No. 16-15507

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff,

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Intervenor-Plaintif –Appellant,

v.

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

and

DODGE BROTHERS AND DODGE JR. FAMILY TRUST, et al.
Intervenors-Defendants.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF NEVADA

RESPONSE BRIEF OF APPELLEE THE BOARD OF TRUCKEE-CARSON IRRIGATION DISTRICT, and the TRUCKEE-CARSON IRRIGATION DISTRICT

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I. INTRODUCTION

The complaint for recoupment that underlies this appeal was filed in 1995. The trial in the district court occurred in 2002, ending in a Decision issued in 2003. Judgment was entered and amended in 2005 and a notice of appeal to the Ninth Circuit was filed in the same year. In 2010, the Ninth Circuit issued its opinion in *United States v. Bell, et al.*, 602 F.3d 1074 (9th Cir. 2010), and remanded the matter to the district court for further proceedings in conformance with the mandate.

In response to the Ninth Circuit's directions, the district court amended its judgment, but did not include a calculation for recoupment or excess diversions, without any adjustment for gauge error, in the water years of 1973, 1976, 1985 and 1986, which years had been omitted from the mandate. The district court's judgment was once again appealed resulting in the Ninth Circuit's second opinion in *United States v. Bell, et al.*, 734 F.3d 1223 (9th Cir. 2013). The Court, taking the "rare step" of amending the earlier remand, withdrew, clarified and directed the district court to recalculate excess diversions without the benefit of gauge error for these additional years, so long as recoupment was not precluded because of existing decree court orders in 1985 and 1986.

Once again in the district court, the parties were asked to brief the issues raised in the amended remand. After considering the arguments, the district court

issued its second amended judgment in 2016, confirming what that court had earlier decided in 2003, that decree court orders precluded violations of the Newlands Project Operating Criteria and Procedures ("OCAP") in 1985 and for 1986. The trial court concluded that no recoupment was ordered in 1985 because the decree court had allowed diversions from January 1985 until November 1985. The trial court also concluded that no recoupment was ordered in the period of March 13, 1986 to June 30, 1986, because the Bureau of Reclamation's record-keeping made it impossible to factually determine whether there were any excess diversions subject to recoupment. More importantly, the district court denied any recoupment for those years, because the district court concluded that there was insufficient evidence to support any recoupment for 1985 and 1986, finding that the government and the Tribe had failed in their burden of proof.

The government and the Tribe put forth "new" evidence prepared by their expert witness, but the district court found that it was based upon the same rejected data that had been offered at trial in their rebuttal case and only admitted for that limited purpose. The district court again rejected this data on remand, for the same reason it did so at trial, since it was calculated upon an entirely different methodology than the government and the Tribe offered in their case in chief and which the court had adopted at trial. The methodology adopted at trial was never disputed by the government and the Tribe, and it was twice approved by the Ninth

Circuit. Moreover, other than for gauge error and "water" interest, none of those evidentiary rulings made at trial were challenged on appeal.

Both the Tribe and the government appealed from the district court's second judgment; however, the government subsequently dismissed its appeal, leaving the Tribe to again challenge the trial court's recoupment judgment some twenty years after the filing of the recoupment complaint and some fourteen years after the trial. The Tribe asks this Court to require the district court to accept calculations to determine recoupment for excess diversions only for 1985 and 1986, which are at odds with the methodology used to award recoupment in 1973, 1974, 1975, 1976, 1978, 1979, 1980 and for spills in 1981-1984.

The Tribe also asks this Court to reverse the district court and under the guise of its broad equitable powers, for this Court to use equity to suspend the doctrines of *res judicata* and law of the case, so that the Tribe can garner 8,300 acre-feet ("af") more water by accepting the use of a methodology at odds with that previously approved and confirmed by this Court and now embedded in a final judgment.

II. ISSUES ON APPEAL

1. In this equitable proceeding, is the Tribe barred by the doctrines of *res judicata* and law of the case from belatedly challenging district court evidentiary

and legal rulings, and factual findings made at trial in 2002, which the Tribe failed to challenge in the district court and in two subsequent appeals?

2. Did the district court abuse its discretion in refusing to re-consider its prior denial of the Tribe's request to re-open its case in chief at trial to admit rebuttal evidence, having previously found that such evidence did not rebut any new evidence presented by the Tribe that was irrelevant and would have required a change in the methodology relied upon by the government and the Tribe in their case in chief, and which had been subsequently upheld on appeal in *United States v. Bell*?

3. Does a district court abuse its discretion in an equitable proceeding by refusing to permit a party to reopen its case in chief to offer evidence based on a new theory of damages that supports recovery for only a portion of their claim, and which would contradict the evidentiary trial record made by that party in its case in chief?

4. Was the district court correct when it determined that certain Interim OCAPs were not in effect for a vast majority of the year in 1985, and certain diversions should not be counted in 1986 because decree court orders superseded the implementation of the OCAPs in those years?

III. STATEMENT OF THE PROCEEDINGS

A. The Recoupment Trial.

The United States and the Tribe brought suit to recoup 1,057,000 acre-feet ("af") of water under the Truckee-Carson-Pyramid Lake Water Rights Settlement Act, Pub. L. 101-618, 104 Stat. 3287, Title II (1990) ("Settlement Act"). After a five-week bench trial beginning in March 2000, the district court in 2003 rendered its decision, ordering that judgment be entered on a finding that TCID, in administering the Newlands Project, diverted 197,152 af more water than the Newlands Project Operating Criteria and Procedures (OCAP) allowed between 1973 and 1980. ("2003 Decision"). ER 469.

At trial, the government and the Tribe based their case in chief on Dr. Gerald Orlob's expert testimony and on calculations which utilized the Maximum Allowable Diversions ("MAD") of water on an annual basis, established after *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 Fed. Supp. 252 (D.D.C. 1973). In 1985, the MAD was 355,000 af. (ER 097.) In 1986, the MAD was 350,000 af. (ER 150.) Because of egregious errors in Dr. Orlob's calculations, the district court instead accepted the opinions and methodology of TCID's expert witness, Charles Binder, to calculate the amount of water ultimately awarded.

In their rebuttal case, the government and Tribe attempted to, as the Tribe does now, to rehabilitate their discredited expert's testimony by introducing the

testimony of Ali Shahroody under the guise of "rebuttal" testimony, offering up Mr. Shahroody's declaration marked as Exhibit 430 (ER 229-244) to prove that the total excess diversions were 1,058,200 af and asking to have that evidence be admitted in their case in chief. These newly concocted calculations were based upon monthly diversion criteria, and not measured against the MAD, whereas Dr. Orlob's testimony and methodology were based upon the yearly allowable diversions under the MAD. ER 023. The district court recognized and rejected Mr. Shahroody's testimony and Exhibit 430 for what it was, improper rebuttal evidence and a transparent attempt to materially revise the failed analysis offered by the government and Tribe. ER 512. The district court found this evidence to be irrelevant to calculating over-diversions, which could only be measured against the MAD on an annual basis. The district court explained the reasons for its ruling:

> The court's position is that the government and the Tribe had their chance to put their case on. You [defendants] had a chance to respond to that case. And they have a chance to rebut what you did. To the extent anything can be read into 430 as rebuttal to the expert that you called, I'm going to consider it. To the extent the government or the Tribe wishes to have me use these figures for purposes of determining over diversions between 1973 and 1987, as an independent basis or formula or methodology for making that determination, the court does not intend to do that. ER 513-514.

The district court admitted Exhibit 430 for limited rebuttal purposes but not as a substitute for the annual diversion methodology proffered by the government and the Tribe in their case in chief. ER 512.

When the district court issued its Decision on December 3, 2003 (2003 Decision), it found TCID liable in Recoupment for 197,152 af. ER 469. In reaching this award, the district court concluded that 1) the evidence established that in 1985 and 1986 the decree court entered orders with regard to diversions by the Federal Water Master for water spreading and diversions in 1985 and 1986 that took precedence over any interim OCAPs for those years, and 2) any diversions or deliveries that occurred under court orders are not properly a part of any recoupment calculation. ER 493.

Upon the motion of the government the district court amended the judgment under Order dated February 4, 2005, to include language that TCID was the representative of the water users during the years of these diversions, and although the individual water users in the Newlands Project were not individually liable, they would be bound by the district court's order. SER 001. Neither the government nor the Tribe challenged any other rulings or findings made by the district court at trial or sought modification of the judgment by the trial court. On February 16, 2005, Judgment was entered against TCID in the amount of 197,152 af, to be repaid in annual amounts of 9,857.6 af over 20 years. SER 001.

In none of the multiple appeals that followed the judgment did either the government or the Tribe appeal the district court's refusal to reopen the evidentiary record to admit Exhibit 430 in their case in chief, or appeal the district court's

findings that decree court orders limited the scope of recoupment in 1985 and 1986, or appeal the district court's denial of additional recoupment for those years based upon that court's determination that the evidence presented at trial was insufficient for that purpose.

B. The First Appeal From the Recoupment Judgment.

The Court of Appeals in *U.S. v. Bell*, 602 F.3d 1074 (9th Cir. 2010), vacated and remanded the recoupment judgment with respect to the calculations of the amounts of recoupment for excess diversions in 1974, 1975, 1978, 1979 and spills for 1979 and 1980 to re-calculate without regard to the effect of gauge error. The *Bell* Court upheld and refused to disturb the district court's adoption of TCID's expert calculations in all other respects and the judgment was "otherwise affirmed." *Id*. at 1086. In that appeal, neither the government nor the Tribe challenged: 1) the district court's refusal to adopt a methodology for calculating recoupment on a monthly basis espoused in rebuttal; 2) the district court's refusal to permit reopening the government and the Tribe's case in chief to change their theory of damages; or 3) the district court's ruling on the effect of decree court orders excusing TCID's obligations under interim OCAP in 1985 and 1986.

The mandate on the remand in this first appeal (as it pertains to the issues on appeal) was specific: it ordered the district court to recalculate the amounts of recoupment for excess diversions in 1974, 1975, 1978, 1979, and spills in 1979 and

1980; and to make a determination of the amount of water spilled in 1981-1984, based upon the previously approved methodology, save and except for adjustments for gauge error. The judgment of the district court was otherwise confirmed with regard to the recoupment amounts awarded and the methodological basis therefore. *Id*. at 1087.

C. The Scope of the First Remand to the District Court.

Once back in the district court, the government and the Tribe also asked that recoupment be calculated without accounting for gauge error, for the additional years of 1973, 1976, 1985 and 1986, pointing out that the first remand had erroneously omitted these years. But, the government and the Tribe did not move the district court to reopen the trial record, presumably recognizing that this Court had otherwise affirmed the district court's findings on the methodology to prove the amount of water subject to recoupment, or challenge the district court's finding in regard to the effect of the decree court orders in 1985 and 1986. The legal effect of decree court orders on TCID's obligation to comply with interim OCAP in 1985 and 1986 had been decided in the 2003 Decision (ER 493) and any challenge should have been raised in the district court in order to give the trial court an opportunity to revisit, possibly reconsider, or pass on its reasoning. Because that ruling was never challenged, this conclusion of the district court remains final.

The district court properly construed the limits to its jurisdiction under the mandate, which did not include calculating diversions in 1985 and 1986. ER 448. The district court ordered the clerk to file an amended judgment in which the court increased recoupment to 309,480 af, having removed any adjustment for gauge error. ER 450.

D. The Narrow Scope of Remand from the Second Appeal of the Recoupment Judgment.

In *U.S. v Board of Directors of Truckee-Carson Irrigation District,* 723 F. 3d 1029 (9th Cir. 2013), this Court revisited its remand in *U.S. v. Bell*, holding that the scope of the remand did not intend to limit the district court's jurisdiction to a recalculation of the specific years identified and that an error had been made. In granting the extraordinary remedy of recalling its mandate, this Court found that under the circumstances presented the error in the mandate could only be corrected by the appeals court that issued it, not the district court which was blameless. ER 444. The mandate recognized the …"district court's finding that recoupment was unavailable or limited for [1985 and 1986], namely, deviation from the OCAP authorized by court order." The Court left it to the district court to "…determine whether, and to what extent, this consideration [existing decree court orders on OCAP] affects the recoupment available for 1985 and 1986 once the gauge error is taken out of the equation." ER 445.

Importantly this Court made it very clear, that having taken the extraordinary step of recalling its mandate:

> … [t]he parties should not take any signal that decisions involving water diversions from the Truckee and Carson have any less finality than decisions in other cases. The rules of procedure and the purposes of res judicata apply no differently here than in other cases…Nothing would do more harm to the goal of sustaining that balance than systemic uncertainty of the obligations of the parties. Our Court's decision should be read in that light. ER 446.

E. Second Mandate Hearing in the District Court.

The district court recognized the limited scope of its jurisdiction under this second remand was to determine the amount of water subject to recoupment for the years 1985 and 1986, stating that "in all other respects, the earlier orders of the court… are reconfirmed" ER 014. The court reiterated its conclusion from its 2003 Decision that "any OCAP issued by Reclamation [were] subordinate to the Orr Ditch and Alpine Decrees …[and] any orders or judgments issued pursuant to the Nevada District Court's continuing jurisdiction of those cases necessarily would supersede any inconsistent terms of the OCAP." Id. While the court concluded that the interim OCAPs in effect in 1985 and 1986 were valid and binding on TCID, it also concluded that "[t]he evidence established that in 1985 and 1986 the decree court entered orders with regard to diversions or deliveries that occurred under court orders are not properly a part of any recoupment calculation." Id.

The district court considered the briefings of the parties and based upon the evidence and methodology utilized by the government and the Tribe in their case in chief at trial, as approved by the Court of Appeal, calculated the amount of water subject to recoupment. The district court concluded that TCID had no liability for diversions between January 15, 1985 and November 15, 1985, as they were controlled by the 1944 Final Decree and decree court orders and not by OCAP. However, excess diversions between January 15, 1985 and March 13, 1986, would be subject to recoupment. ER 017. The court further determined that in 1986, TCID was permitted by a decree court order to make precautionary drawdowns through June 1986, which order included releases from Lahontan Reservoir whether the water was from the Truckee River or Carson River. Moreover, the court found that the Tribe failed in its burden of proof to establish whether and to what extent there were any excess diversions in the period of March 13, 1986, to the end of June 1986, because it was undisputed by the parties that the records kept by the Bureau of Reclamation did not distinguish between water released to avoid flooding and normal irrigation deliveries during this time frame, making it impossible to factually determine whether there were any excess diversions subject to recoupment. Recoupment was not, however, avoided under any decree court order between January 1, 1986 and March 13, 1986, and between July 1, 1986 and the end of 1986. ER 018-019.

In the district court's final analysis and in its Second Judgment, it found no recoupment for the years 1985 and 1986, because it concluded that the government and the Tribe failed in their burden to prove any amount of water was subject to recoupment, because insufficient evidence had been admitted in their case in chief to support any water subject to recoupment in these two years. ER 006-007.

The Tribe ascribes error to this finding because the district court had previously rejected the data offered by the government and the Tribe through the declaration of Ali Shahroody, which the district court found unpersuasive and was admitted only for limited rebuttal purposes. The proffered evidence was a calculation of the amounts subject to recoupment for 1985 and 1986 and was based on a methodology never accepted by the district court. ER 009.

A Second Amended Judgment was entered on January 25, 2016, awarding the government and the Tribe 335,908 af of excess diversions to be repaid over twenty years. ER 001-003.

The Tribe correctly recognizes, as it must, that these district court determinations are law of the case and now beyond challenge, as they are factual and legal determinations that neither the government nor the Tribe ever raised in prior appeals. AOB 14. Additionally, neither the government nor the Tribe bought a motion to modify the second judgment in the district court, nor previously

challenged these district court evidentiary rulings at trial, or afterwards on appeal (other than for gauge error) until this third appeal.

IV. STANDARD OF REVIEW

The Ninth Circuit reviews findings of fact by the district court under the clearly erroneous standard. Clear error review is deferential to the district court; reversal requires a definite and firm conviction that a mistake has been made. If the district court's findings are plausible in light of the record viewed in its entirety, the appellate court cannot reverse even if it is convinced it would have found differently. *Husian v. Olympic Airways*, 316 F3d 829, 835 (9th Cir. 2002).

The determination of whether the district court erred in not considering additional evidence is reviewed for abuse of discretion. *Pit River Home and Agricultural Cooperative Association v. United States*, 30 F.3d 1088, 1096 (9th Cir. 1994). Under the abuse of discretion standard, the Ninth Circuit may not substitute its judgment for that of the district court simply because it would have reached a different result. An abuse of discretion will be found only if the appellate court is firmly convinced that the district court's decision lies beyond the pale of reasonable justification under the circumstances. *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985) (where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous).

The district court's decision to deny equitable relief is reviewed for abuse of discretion, which occurs if the district court fails to apply correct law or if it rests on clearly erroneous findings of material fact. *Levi Strauss & Co. v. Shilon*, 121 F.3d 1309, 1313 (9th Cir. 1997).

V. SUMMARY OF ARGUMENT

The Tribe appeals the district court's Second Amended Judgment, challenging that court's factual determination not to order recoupment of more water in 1985 and 1986. The district court followed the second remand to the letter. This Court gave the district court full discretion to determine factually the effect of several decree court orders on the amounts of water that may otherwise be subject to recoupment under interim OCAP. On remand, the district court concluded that existing decree court orders exempted TCID from complying with interim OCAP in some of those years, but denied awarding any amount of water in recoupment because of the lack of adequate Bureau record-keeping and the lack of sufficient evidence presented by the government and the Tribe in their case in chief at trial. Stated simply, the Tribe failed to carry its burden of proof as to how much recoupment should be awarded.

The Tribe's argument that the district court erred in denying the Tribe's request to reopen its case in chief to offer evidence that contradicted its theory of the case at trial, attacks an evidentiary ruling made at trial, which was never

challenged in the district court or in two subsequent appeals to this Court until now. Moreover, the Tribe never challenged the district court's finding in its 2003 Decision, which determined recoupment in 1985 and 1986 was not available because of existing decree court orders.

Moreover, these arguments are barred from further consideration in this third appeal, if not absolutely by the doctrine of *res judicata*, then under the doctrine of law of the case. The district court was well within the scope of the second mandate and properly exercised its discretion in refusing to permit the Tribe to reopen the trial record to submit evidence of an entirely different and contradictory methodology than admitted at trial, and which has been twice affirmed on appeal.

Notwithstanding the effects of *res judicata* on the Tribe's late challenge to the trial court's rulings in 2003, the Tribe also contends that certain Interim OCAPs issued in 1985 superseded orders from the decree court that allowed TCID to divert water from the Truckee River. However, the Tribe ignores the fact that the United States and the Tribe attempted on two occasions in February1985 and in October 1985 to have Judge Craig's order of January 15, 1985 (ER 260) set aside. (ER 262-63 and ER 267-68.) In both cases, the decree court judge refused to set aside the order allowing diversions and affirmatively continued the judicial authorization to divert. Since these diversions are completely outside the purview of the OCAP, they cannot be used under the methodology used by the trial court to

calculate over-diversions, using the annual maximum allowable diversions ("MAD") under OCAP. There were no over-diversions in 1985.

Again, disregarding the *res judicata* effect of the original judgment on the Tribe's attempt to appeal issues that it failed to raise in its first appeal, the Tribe also makes the argument that the March 13, 1986 order from Judge Thompson (ER 269), allowing spreading of water on Newlands Project lands without regard to any entitlements under the decrees or restrictions under OCAP, did not authorize diversions from the Truckee River, and thus could not excuse TCID from liability for over-diversions. AOB 36-38. In making this argument the Tribe ignores how over-diversions are calculated in the OCAPs and how the Tribe and the United States calculated over-diversions at trial. The trial court and the Ninth Circuit previously approved the methodology for calculating over-diversions based on the OCAP's annual maximum allowable diversions ("MAD"). The MAD is not based exclusively on diversions from the Truckee River, but rather on releases from Lahontan Reservoir to the Carson Division of the Newlands Project combined with the diversions from the Truckee Canal to the Truckee Division on an annual basis. ER 064. Because Judge Thompson's water spreading order allowed releases from Lahontan Reservoir, those releases could not be counted against the MAD. The releases following June 1986 from Lahontan Reservoir that are counted as

irrigation releases do not exceed the annual MAD for the Carson Division. Thus, there were no over-diversions in 1986.

VI. ARGUMENT

A. THE DISTRICT COURT'S 2003 DECISION AFFIRMED IN PRIOR APPEALS PRECLUDES FURTHER CONSIDERATION OF ISSUES EXPLICITLY OR IMPLICITLY DECIDED OR WHICH WERE NOT RAISED AT ALL.

1. Review of Unchallenged Factual Findings and Legal Rulings of the District Court Is Now Barred by *Res Judicata.*

When a final judgment on the merits of a claim has been entered, the finality that attaches goes to all claims or demands in controversy and "every matter which was offered and received to sustain or defeat the claim or demand, [and] as to any other admissible matter which might have been offered for that purpose.". *Nevada v. United States*, 463 U.S. 110 (1983). There, the Supreme Court pointed out that "the policies advanced by the doctrine of *res judicata* are at their zenith in cases concerning real property, land and water." 463 U.S. at 122, n. 10.

The doctrine of *res judicata* reflecting the policy of the law to provide all parties to the dispute with finality was reaffirmed in this Court's observation that:

> … [t]he parties should not take away from this opinion any signal that decisions involving water diversions from the Truckee and Carson have any less finality than decisions in other cases. The rules of procedure and the purposes of *res judicata* apply no differently here than in other cases….

United States v. Board of Directors, 723 F.3d at 1035 (9th Cir. 2013). ER 446.

The doctrine of *res judicata* is an absolute prohibition to the Tribe's belated challenge to the district court's factual and legal determination made in its 2003 Decision. That evidence at trial established that:

> [I]n 1985 and 1986 the decree court entered orders with regard to diversions in 1985 and 1986 that [took] precedence over any interim OCAPs for those years and any diversion or deliveries that occurred under court orders [were] not properly a part of any recoupment calculation. ER 493.

The doctrine also bars the further appellate review, directly or indirectly, of any evidentiary rulings made at trial, including the district court's refusal to admit Exhibit 430, other than as rebuttal evidence, and denial to permit reopening the government's and the Tribe's case in chief. The district court explained the reasons for its denial when the evidence was first offered by the government and the Tribe at trial, and that ruling was never raised again in the trial court or on appeal.

In *United States v. Bell*, 602 F.3d at 1087 (9th Cir. 2010), this Court reversed the district court's acceptance of reductions of the amounts subject to recoupment for gauge error, but otherwise affirmed the findings, calculations, methodology and conclusions of TCID's expert witness Charles Binder. None of the issues the Tribe now raises were challenged in the district court or raised by either the government or the Tribe in the two subsequent appeals to this Court; and they are now immune to review in this third appeal.

The Tribe argues that it should get the benefit of broad equitable powers, which it adjures this Court to invoke to instruct the district court to reconsider rulings and decisions previously confirmed or omitted in prior appeals. (AOB p. 17). There is no equitable exception to the application of *res judicata*; it is an absolute bar. *Owens v. Kaiser Found. Health Plan, Inc*. 244 F3d708, 714 (9th Cir. 2001) (There is "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata.") (citing *Federated Dep't Stores, Inc. v. Moitie,* 452 U.S. 394, 401 (1981)).

2. The Doctrine of Law of the Case Forecloses Further Appellate Challenges to the District Court's 2003 Decision Not Previously Raised on Appeal.

The 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 in *United States v. Bell*, and should not now be re-visited by this Court. *Merritt v. Mackey*, 932 F.3d 1317, 1320 (9th Cir. 1991) (under the law of the case doctrine, one panel of an appellate court will not as a general rule reconsider questions decided on a prior appeal).

The exercise of review by this Court of matters considered final or to which the opportunity to have been raised for appellate review has come and gone, and which have become law of the case "…should be exercised exceedingly sparingly

so as not to undermine the salutary policy of finality that underlies the rule." *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 834 (9th Cir. 1982).

The Tribe's present appeal of the district court's rulings below is an untimely collateral attack on the trial court's evidentiary rulings and those conclusions in the 2003 Decision, which neither the government nor the Tribe ever previously raised on appeal, and which are now law of the case. *See Little Earth of the United Tribes, Inc., v. United States Dept. of Housing & Urban Dev.*, 807 F.2d 1433, 1438 (8th Cir. 1986) (law of the case doctrine applies to trial court's prior orders and rulings). The fact that the Tribe is the affected party here provides no justification for departing from this Court's usual practice of adhering to the law of the case. In virtually every appeal involving allocation of Truckee River water, the Tribe has or will be a party, and if TCID is involved, finality may be denied if the doctrines precluding re-decision of resolved issues are suspended in the face of equity or not evenly applied.

3. This Court Should Decline to Consider Arguments Not Presented to the District Court or in Prior Appeals.

The Court should adhere to the general appellate reluctance to pass on arguments not presented or developed in the district court, and decline to hear an issue not raised nor factually developed below. *Conservation Northwest v. Sherman*, 715 F.3d 1181,1188 (9th Cir. 2013) (this principle accords to the district court the opportunity to reconsider its rulings and correct its errors).

The effect of decree court orders on TCID's obligation to comply with interim OCAP in 1985 and 1986 was never challenged in the district court, nor in the prior two appeals to this Court. This is so even after the government and the Tribe jointly made a Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. P 59(e), in which the only relief sought was to correct which Amended Judgment was affected, not to reverse a prior ruling of the district court. SER 001. The opportunity for the Tribe to re-litigate these district court rulings in this third appeal has been foreclosed; that ship has sailed.

B. The Narrow Scope of the Mandate on the Second Remand Did Not Require the Reopening of the Tribe's Case in Chief on Remand or to Reconsider Evidence Previously Rejected as Improper.

The scope of review before this Court is now narrowed to issues that the district court was directed to consider based upon the scope of the second remand. This scope does not permit a *de novo* review of what has already been affirmed in prior appeals or in the district court as reflected in its 2003 Decision. *Adamian v. Lombardi*, 608 F.2d 1224, 1228 (9th Cir. 1979) (district court's review on remand was narrowed to the limitations of the remand; prior appellate holdings became law of the case and binding on the district court and subsequent appellate panels).

This Court's second mandate specifically directed the district court to recalculate the effect of gauge error on the amounts of recoupment for excess diversions for the additional years of 1973, 1976, 1975, 1985 and 1986, based upon

the existing trial record. Moreover, the scope of the mandate left full discretion to the district court "to determine whether, and to what extent, this consideration [district court orders precluding OCAP] affects the recoupment available for 1985 and 1986 once the gauge error is taken out of the equation."

It was not a violation of the mandate or an abuse of discretion to deny the Tribe's request to re-open the trial record to consider new and different evidence in the district court's recalculation of the quantity of water subject to recoupment, once gauge error was taken out of the equation, based upon the affirmed evidence and methodology in the trial record. The Tribe's argument that the district court abused its discretion in not reconsidering the rebuttal evidence previously rejected at trial comes two appeals too late. The law of mandate embodies the principle that on remand litigants should not be permitted to re-litigate issues that they have already had a fair opportunity to contest. *Vizcano v. United States*, 173 F.3d 713, 719-20 (9th Cir. 1999).

The mandate to the district court was to make a factual determination of the amount of water subject to recoupment and not an open check book to revisit the validity of factual findings and legal conclusions made and established at trial and in two subsequent appeals. *Leslie Salt Co., v. United States*, 55 F.3d 1388, 1392 (9th Cir. 1995) (appellate review was limited by findings in the prior appeal and excluded factual findings of the district court that had not been appealed).

Having determined that there was no substantial evidence presented at trial from which to calculate any quantity of water subject to recoupment, and after finding that the evidence offered in Exhibit 430 was not persuasive and would diametrically alter the approved methodology used to prove the amount of water subject to recoupment in the vast majority of the water years at issue, the district court's refusal to reopen the evidentiary record was not an abuse of discretion. *Ryan v. Editions Ltd. West, Inc*., 786 F.3d 754, 766 (9th Cir. 2013) (district court did not abuse its discretion in ordering that the trial would be "limited to the specific issues set forth by the Ninth Circuit for remand," which did not include reopening the issue of damages)**.**

C. District Court's Evidentiary Rulings Are Reviewed for Abuse of Discretion.

The district court's evidentiary rulings are reviewed under the abuse of discretion standard. *Pit River Home and Agricultural Cooperative Association v. United States,* 30 F.3d 1088, 1096 (9th Cir. 1994) (appellate court may not substitute its judgment for that of the district court simply because it would have reached a different result).

To find an abuse of discretion, the appellate court must be firmly convinced that the district court's decision lies beyond the pale of reasonable justification under the circumstances. If the district court's findings are plausible in light of the record viewed in its entirety, the appellate court cannot reverse even if it is

convinced it would have found differently. *Husian v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002).

1. The district court was well within the bounds of discretion in admitting Exhibit 430 as rebuttal evidence only.

Rebuttal evidence is evidence introduced by a plaintiff to meet new facts brought out in a defendant's case-in-chief. The determination of what constitutes proper rebuttal evidence is well within the sound discretion of the district court. *Morgan v. Commercial Union Assurance Cos.,* 606 F.2d 554, 555 (5th Cir. 1979); *Toth v. Grand Trunk R.R.,* 306 F.3d 335, 345 (6th Cir.2002) (trial court has the discretion to "limit the scope of rebuttal to that which is directed to rebut new evidence or new theories proffered in defendant's case in chief.")

The government and the Tribe offered Exhibit 430 as an alternate basis to calculate excess diversions for the years 1973 through 1987, and to prove that 1,058,200 af of water was recoverable under the Settlement Act. The district court rejected this offer of evidence to the extent it was intended to replace the calculations prepared by Dr. Orlob and corrected by TCID's expert, and determined to treat the evidence as rebuttal—that "… which would relate to the expert called by the defendant in terms of the validity of the figures that the defendant's expert came up with"—and not as a new computation for the court to use as a basis to compute the water being sought in recoupment. ER 512. The district court then explained:

> The court's position is that the government and the Tribe had their chance to put their case on. You [defendants] had a chance to respond to that case. And they have a chance to rebut what you did. To the extent anything can be read into 430 as rebuttal to the expert that you called, I'm going to consider it. To the extent the government or the Tribe wishes to have me use these figures for purposes of determining over diversions between 1973 and 1987, as an independent basis or formula or methodology for making that determination, the court does not intend to do that. ER 513-514.

The district court accepted Exhibit 430 to the extent that there "may or may not be something that's valuable… with respect to rebuttal testimony" and admitted it for that purpose. ER 514. This was an appropriate exercise of the trial court's discretion to manage the trial. *See Geders v. United States*, 425 U.S. 80, 86 (1976) (discussing broad powers the trial judge has to manage trial, including rebuttal testimony). This evidentiary ruling was never challenged in the trial court nor on any prior appeal to this Court. Setting aside the fact that the district court's ruling is *res judicata*, the refusal to admit Exhibit 430 other than as rebuttal evidence was not an abuse of discretion.

2. The Shahroody Declaration was properly struck by the district court.

In the motion on the second remand, the government and the Tribe submitted the Supplemental Declaration of Ali Shahroody, who calculated that the government and the Tribe were entitled to recoup 8,300 af of water for excess diversions over the OCAP allowable amounts (4,800 af in 1985 and 3,500 af in 1986). ER 08-09. The district court granted TCID's motion to strike this

declaration and the proffered evidence, finding that: 1) this was not evidence at trial; 2) it was admitted for limited rebuttal purposes; and 3) it was improperly based on a methodology that had never been accepted by the court. The calculation of the amounts subject to recoupment, if any, in 1985 and 1986, "should be made on the basis of evidence presented during the government's case-in-chief." ER 032.

The weight that the district court gives to expert testimony will not be disturbed on appeal unless found to be clearly erroneous. *U.S. v. Skokomish Indian Tribe*, 764 F.2d 670, 673 (9th Cir. 1985) (citing *United States v. Alpine Land and Reservoir Co.,* 697 F.2d 851, 857 (9th Cir. 1983)). The district court's multiple rejections of the testimony of rebuttal expert Ali Shahroody and Exhibit 430 must be upheld.

The evidence offered in Exhibit 430 was properly rejected based upon the district court finding it to be unpersuasive and lacking credibility, and that it contradicted the government's and the Tribe's theory of damages presented in their case in chief at trial. ER 006-007.

The Tribe's argument that equity favored it and not TCID, as a basis for the Recoupment Judgment under the Settlement Act in the first instance, was undoubtedly understood by the district court. AOB 44. However, the broad

equitable powers did not cancel out the district court's inherent discretion to consider and reject a suspect expert opinion.

D. The Interim OCAPs Did not Supersede the Decree Court Orders Issued in 1985 and 1986.

The Tribe takes the position that Judge Craig's order of January 15, 1985, allowing TCID to divert water from the Truckee River to the Newlands Project was superseded by Interim OCAPs that were issued by the Bureau of Reclamation during 1985. AOB 25-28. The Tribe also takes the position that the 1986 water spreading order by Judge Thompson on March 13, 1986, did not supersede the OCAP and did not allow TCID to divert water from the Truckee River to Lahontan Reservoir. AOB 36-38. Both of the Tribe's positions are without merit, and the trial court correctly determined that the two Decree Court orders in 1985 and 1986 negated any findings of over-diversions in those years.

1. The trial court correctly determined that Judge Craig's January 1985 order allowed diversions to the Newlands Project until November 15, 1985.

The trial court concluded that the January 15, 1985 order from Judge Craig allowed TCID to divert water from the Truckee River and to deliver such water to the Newlands Project from the date of the order until November 15, 1986. ER 006. The Tribe's position is that several Interim OCAPs issued by the Bureau of Reclamation, even one objected to by the Tribe, have the effect of vacating Judge Craig's order. AOB 25-28. However, the Tribe provides a copy of Judge Craig's

order in its Excerpts of Record without quoting or analyzing the actual language. The limitations the Tribe reads into Judge Craig's order are not contained in the order. ER 260. Nor does the Tribe quote the language in the additional order in February 1985 that denied a motion to set aside the January 15, 1985 order. ER 262-63. Nor does the Tribe quote from or analyze the subsequent October 28, 1985 order from Judge Thompson (ER 267-68) that confirms the January 1985 order from Judge Craig.

Judge Craig's January 15, 1985 order states the following:

> GOOD CAUSE APPEARING THEREFOR, 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.

The order makes no mention of any OCAPs or authorization to the Bureau of Reclamation to unilaterally cease diversions without a further court order vacating Judge Craig's January 15, 1985 order. Recognizing the need to return to the court, in fact, the United States and the Tribe brought a motion in February 1985 to set aside the Water Master's Order that allowed diversions in 1985. ER 262-63. The Tribe completely ignores this February order in its analysis. AOB 25-27. Judge Craig denied that motion on February 12, 1985, and ordered the Secretary of the Interior to cooperate with the Water Master regarding the Newlands Project. The court entered its order as follows:

> IT IS ORDERED that plaintiff's Motion to Set Aside Water Master's order, filed January 16, 1985, is hereby denied.
>
> IT IS FURTHER ORDERED that the Secretary of the Interior is to cooperate with the Water Master regarding the Newlands Project. In this respect, the Secretary and the Water Master are to cooperate concerning workable and reasonable rules and regulations regarding the Newlands Project. ER 262-63.

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.

The next court order in the sequence ignored by the Tribe (AOB 25-27) was one signed by Judge Bruce R. Thompson on October 28, 1985. ER 267-68. That order addressed a Motion for Approval of Interim Operating Criteria and Procedures For the Newlands Reclamation Project and that certain orders are necessary to maintain the status quo as shown by Truckee-Carson Irrigation District's *Ex Parte* Motion For Protective Order. Judge Thompson ruled as follows:

> IT IS HEREBY ORDERED:
>
> 1. Pending this court's ruling on the above-referenced motion of the Justice Department filed on behalf of the Secretary of the Interior, diversions of Truckee River water to Lahontan Reservoir as authorized by the Watermaster pursuant to the January 15, 1985 Order of Judge Walter E. Craig entered in the case of *United States v. Orr Water Ditch Co.*, Equity No. A-3, shall be permitted.

> 2. Truckee-Carson Irrigation District shall be permitted to deliver water during the period of November 1, through November 15, of this year to project farmers who have planted winter grain and/or new fall seedlings of alfalfa on their project water right lands. ER 267-68.

Thus from January 15, 1985, until at least November 15, 1985, diversions to the Newlands Project were permitted to continue. And such diversions were reaffirmed twice in the interim by Judge Craig in February 1985 and by Judge Thompson in October 1985. The mere fact that the United States went to the decree court to have the Interim OCAP approved is undeniable evidence that the United States and the Tribe recognized they could not unilaterally impose an OCAP that was inconsistent with Judge Craig's January 1985 order. The United States and the Tribe conceded by their actions in October 1985 that they must seek permission from the decree court to have the Interim OCAP approved and the January 1985 diversion order vacated.

Judge Thompson's words are telling in his October 1985 order, where he states that the diversions allowed by the January 1985 order "shall be permitted." Critical to understanding the import of Judge Thompson's order is that the order was made in the context of an *Ex Parte* Motion for Protective Order to maintain status quo. ER 267-68. The import of that order by Judge Thompson is that the diversions since January 1985 have continued and that the court is allowing "status

quo" for them to continue until such time as the decree court approves an Interim OCAP.

The Tribe's attempt to omit from its analysis of the record these two critical orders from Judge Craig (ER 260 and 262-63) and then to completely misinterpret the import of Judge Thompson's October 28, 1985 order (ER 267-68) is both misleading and false. The Tribe's position regarding the effect of these three critical orders in 1985 affecting diversions is without merit. There were no over-diversions in 1985.

2. The trial court correctly determined that Judge Thompson's order of March 13, 1986, allowed the release of water from Lahontan Reservoir without regard to any restrictions in OCAP.

On March 13, 1986, TCID filed in the decree court a Memorandum Re: Spreading of Waters On Project Lands. ER 270-71. The memorandum describes that on that day Lahontan Reservoir is full and spilling, and there is a real chance for damages resulting from major flooding downstream of Lahontan Reservoir. The solution proposed was to allow TCID to release water from Lahontan Reservoir and to spread that water on project lands. Such releases 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. TCID asked the court to allow spreading of the water without considering them as irrigation

releases and part of the acre-foot entitlement of the farmers under the decrees. ER 270-71. Judge Thompson's order of March 13, 1986, agreed and allowed water to be released and not to count against any farmer's entitlement to irrigation deliveries under the decree. ER 269.

The Tribe argues that releases from Lahontan have nothing to do with diversions from the Truckee River or the OCAP. AOB 36-38. However, the Tribe is completely mistaken. Releases from Lahontan have everything to do with the OCAP, because such releases are the critical component in determining if the annual MAD set forth in the OCAP have been exceeded. In making this argument, the Tribe ignores how over-diversions are calculated in the OCAPs, and how the Tribe and the United States calculated over-diversions at trial. The trial court and the Ninth Circuit previously approved the methodology for calculating over-diversions based on the OCAP's annual MAD. *United States v. Bell, et al., supra*, 602 F.3d at 1086.

The MAD is calculated by determining the number of acres to be irrigated in the Carson and Truckee Divisions, multiplied by the water duty, and multiplied by an efficiency factor to account for transportation losses. ER 064. The MAD is not based exclusively on diversions from the Truckee River, but rather on releases from Lahontan Reservoir to the Carson Division of the Newlands Project, combined with the diversions from the Truckee Canal to the Truckee Division on

an annual basis. ER 064. If releases to the Truckee Division and the Carson Division exceed the MAD, and there have been diversions from the Truckee River that contributed to the exceedance, then those excess diversions were determined to be over-diversions. However, if the MAD was not exceeded during the year then there can be no over-diversions. There is no monthly MAD. Because Judge Thompson's water spreading order allowed releases from Lahontan Reservoir, those releases could not be counted against the MAD. The releases following June 1986 from Lahontan Reservoir that are counted as irrigation releases do not exceed the MAD for the Carson Division. Thus, there were no over-diversions in 1986.

3. The district court's conclusion that decree court orders superseded OCAP was correct under *Tribe v. Morton*.

OCAPs are subordinate to the Orr Ditch and Alpine Decrees and to any decree court orders administering these decrees. The district court's conclusion in this regard is not fanciful, but a determination that is the predicate to the district court's order in *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp 252, 257 (D.D.C 1973) ("*Tribe v. Morton*") (The parties and this Court of course recognize that neither the Secretary nor this court can adopt or require a regulation that would infringe upon [the Orr and Alpine] decrees.). That court, in adopting the OCAP formulas now in dispute, recognized that no regulation adopted by the Secretary nor the court could require a regulation that would infringe upon the decrees. *Id*. at 257. Any OCAP implemented by the Secretary must give proper

weight to the water rights outlined in the Orr Ditch and Alpine decrees. 354 F.Supp at 260. This Court has long recognized and respected this doctrine. *TCID v. Secretary of the Interior*, 742 F.2d 527, 531 n. 2 (9th Cir. 1984).

The *Tribe v. Morton* court order adopting the Tribe's version of the interim OCAP also provided that "(5) Nothing in the Judgment and Order shall be deemed to prevent any change in the Operating Criteria …ordered by the Court after notice." *Tribe v. Morton*, 354 F.Supp. at 262. Thus, when the district court below in its 2003 Decision concluded "…that in 1985 and 1986 the decree court entered orders … that took precedence over any interim OCAPs for those years," that was an accurate and straightforward statement that is the law in the Ninth Circuit. ER 493.

The Tribe, however, attempts to entice this Court to see a newly created issue, by making the sophistic distinction that the district court order below added "new" language that went further than the 2003 Decision because of the added phrase: "the rule holds true whether the OCAPs existed at the time of the court order *or whether they were subsequently adopted*." (emphasis by the Tribe) ER 016 (AOB 14). This is a distinction without a difference. The district court in its 2003 Decision clearly stated that district court orders trumped OCAP whenever they were promulgated in 1985 and 1986. No further analysis need be made because of

a slightly different way of saying the same thing; in either wording version, the district court's conclusion was correct under *Tribe v. Morton*.

VII. CONCLUSION

For the foregoing reasons, the district court's second amended judgment did full justice to this Court's directions in the second mandate. The district court conclusions and rulings below are now *res judicata* and law of the case and should not be disturbed on appeal. The second amended judgment must be affirmed.

DATED: November 7, 2016

Respectfully submitted,

HANSON BRIDGETT LLP

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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 8,720 words, excluding the portions exempted by FRAP 32(a)(7)(B)(iii), if applicable.

DATED: November 7, 2016

Respectfully submitted,

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Attorneys for Defendants-Appellees

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, I certify that there are no related cases pending in this Court. This is the third appeal in the same cases; this case decided the prior appeals in Case No. 05-16154 (*United States v. Bell*, 602 F. 3d 1074 (9th Cir. 2010)) and Case No. 12-15476.

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 November 7, 2016.

I Further certify that I electronically filed the One (1) volume of Defendants-Appellees Excerpts of Record with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using CM/ECF system on November 7, 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.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 7, 2016, at San Francisco, California.

/S/ Keith Kiley

Keith Kiley