POSTJUDGMENT “WATER INTEREST”: LIFTING THE HEADGATE TO LET APPROPRIATE COMPENSATION FLOW FOR UNLAWFUL DIVERIONS

Jeffrey T Matson, Lewis & Clark College

Available at: https://works.bepress.com/jeffrey_matson/1/
POSTJUDGMENT “WATER INTEREST”: LIFTING THE HEADGATE TO LET APPROPRIATE COMPENSATION FLOW FOR UNLAWFUL DIVERSIONS

BY
JEFFREY T. MATSON

Irrigators overdraw many Western streams to the detriment of tribal and environmental uses; these conflicting interests regularly battle in state and federal court over water allocation. This article profiles United States v. Bell (Bell)\(^1\)—the latest such skirmish among warring parties in the Truckee and Carson River basins of northern Nevada. In Bell, the United States Court of Appeals for the Ninth Circuit faced persistent excessive irrigation diversions by the Truckee Carson Irrigation District (TCID) in violation of applicable federal court decrees, administrative Operating Criteria and Procedures (OCAPs), and the Congressional Settlement Act of 1990. The Court discussed an unprecedented remedy—“water interest”—in order to fully compensate the Pyramid Lake Paiute Tribe of the Pyramid Lake Indian Reservation for injuries caused by TCID’s unlawful diversions. The United States District Court for the District of Nevada had awarded water interest, and rather than dismiss the novel remedy out of hand, the Ninth Circuit remanded the issue to the District Court to explain the basis in law or equity for awarding water interest. This article provides a synopsis of the decades of litigation giving rise to Bell, an analysis of the decision itself, and an evaluation of the authority supporting the District Court’s unusual award of postjudgment water interest. The article concludes that, taken together, common principles controlling an award of interest, the statutory water recoupment scheme, and United States Supreme Court precedent authorize this novel remedy. Moreover, such relief is necessary to fully compensate for the opportunity cost of lost water and in light of TCID’s dogged opposition to federal law, to dissuade TCID from further procrastinating in its water repayment obligation.

I. INTRODUCTION ........................................................................................................................................... 2
II. TIMELINE: A CHRONOLOGY OF CONFLICT ............................................................................................ 5
III. UNITED STATES V. BELL, 602 F.3d 1074 (9TH CIR. 2010)........................................................................ 13
IV. TIME IS OF THE ESSENCE: UNITED STATES SUPREME COURT PRECEDENT CONTEMPLATES A COMPLEMENTARY AWARD OF WATER INTEREST TO FULLY COMPENSATE THE TRIBE AND HEAD OFF ANY DELAY IN REPAYMENT .................................................................................................................... 19
V. CONCLUSION ............................................................................................................................................... 32

\(^1\) Ninth Circuit Review Editor, Environmental Law, 2011–2012; Member, Environmental Law, 2010–2011; J.D., Certificate in Environmental and Natural Resources Law, Lewis & Clark Law School, expected 2012; B.S. Environmental Engineering, United States Military Academy at West Point. The author would like to thank Professor Janet Neuman for her guidance in advising the writing of this article and Jennifer for her incredible support over the past twelve years.

\(^{1}\) United States v. Bell, 602 F.3d 1074 (9th Cir. 2010).
I. Introduction

“Procrastination is the thief of time;
Year after year it steals, till all are fled...”\(^2\)

Since 1973 federal courts have struggled to rein in the Truckee Carson Irrigation District (TCID) from delivering water to its irrigators in excess of federal law.\(^3\) More than twenty years ago, the United States Department of Justice (DOJ) reported that between 1973 and 1985, TCID unlawfully diverted “many hundreds of thousands of acre feet of water” from the Truckee River in violation of the Secretary of the Interior’s (Secretary) Operating Criteria and Procedures (OCAPs), all the while challenging the Secretary’s authority to promulgate such regulations.\(^4\) Congress ultimately entered the fray, passing the Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act (Settlement Act) in 1990.\(^5\) The Settlement Act validated the OCAPs at issue\(^6\) and incorporated a water recoupment remedy first implemented a year prior by the United States Court of Appeals for the Ninth Circuit in *Pyramid Lake Paiute Tribe of Indians v. Hodel (Stampede Credit Case)*.\(^7\) Specifically, section 209(j)(3) of the Settlement Act authorizes the Secretary to pursue recoupment of water diverted in excess of OCAPs via settlement or judicial proceeding, granted that the agreement or order is consistent with the Endangered Species Act

---

2 *Edward Young, The Complaint: Or, Night Thoughts* 22 (Brookfield, E. Merriman & Co. 1853).
3 *Pyramid Lake Paiute Tribe of Indians v. Morton (Tribe v. Morton)*, 354 F. Supp. 252, 257–58 (D.D.C. 1973) (chronicling the Secretary of the Department of Interior’s (Secretary) acquiescence to TCID’s excessive diversions—“water is taken practically on demand without necessary safeguards to prevent improper and wasteful use”—and flagrant disregard for regulations—TCID formally declared “that it will disregard the new regulation and will divert water as it chooses by giving instructions to its own water masters”); see also Truckee-Carson Irrigation Dist. v. Sec’y of Dep’t of Interior (TCID v. Secretary), 742 F.2d 527, 530 (9th Cir. 1984) (describing how in 1973, the first year in which the Secretary’s new regulations were in effect, “TCID intentionally violated [the OCAPs] by diverting more water than the regulations permitted”).
6 *Id.* § 209(j)(2) (declaring the 1988 OCAPs shall remain in effect at least through 1997).
7 *Pyramid Lake Paiute Tribe of Indians v. Hodel (Stampede Credit Case)*, 882 F.2d 364, 366 (9th Cir. 1989); see also Settlement Act § 209(j)(3) (directing the Secretary to ensure compliance with all OCAPs and authorizing recoupment of water diverted in excess of any OCAP).
(ESA). After December 31, 1997 any party with standing may also pursue recoupment, but “the only relief available from any court of the United States will be the issuance of a declaratory judgment and injunctive relief directing any unlawful user of water to restore the amount of water unlawfully diverted.”

In 1995 the United States brought suit against TCID to recoup over one million acre-feet of diversions in excess of relevant OCAPs. In 2003 the United States District Court for the District of Nevada determined that TCID willfully violated the OCAPs and awarded 200,000 acre-feet of water to the United States. Yet—of central interest to this article—the district court also ordered TCID to “pay” the United States postjudgment “water interest” at the rate of two percent per year on the outstanding balance of water owed to the government. On appeal the Ninth Circuit affirmed a portion of the district court’s order, concluding that the Settlement Act authorized the suit and allowed for a recoupment award. Yet, in light of the district court’s failure to explain the basis for its award of “water interest” in law or equity, the Ninth Circuit remanded the issue to the district court to explain its rationale. Specifically, the Ninth Circuit held that water interest is appropriate only if there is “some factual basis for awarding more water than was originally taken so as to provide complete relief.”

---

8 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2007); Settlement Act § 209(j)(3); see also Carson-Truckee Water Conservancy Dist. v. Clark (Water Conservancy Dist. v. Clark), 741 F.2d 257, 261–62 (9th Cir. 1984) (affirming the district court’s order dedicating the water of the Little Truckee River, from the Stampede Dam and Reservoir, for the conservation of the cui-ui (Chasmistes cujus) and Lahontan cutthroat trout (Oncorhynchus clarki henshawi) under the ESA rather than dedicating the water for municipal and industrial use in Reno and Sparks, Nevada under the Washoe Project Act (Act of Aug. 1, 1956, ch. 809, § 1, 70 Stat. 775, revoked by Pub. L. No. 101-618, § 205(c), 104 Stat. 3308 (1990))).

9 Settlement Act § 209(j)(3) (emphasis added).

10 Bell, 602 F.3d 1074, 1079 (9th Cir. 2010).

10A Id. at 1079.

10B Id. at 1082.

10C Id. at 1080.

11 Id. at 1083.
Regarding potential sources of authority for an award of postjudgment water interest, in the absence of common law precedent, applicable statutory provisions may authorize such an award. Yet, the applicable provision in Bell, 28 U.S.C. § 1961(a), only speaks to "money judgment[s]." Thus, the district court likely relied on the United States’ and Tribe’s briefs that directed the court’s attention to the United States Supreme Court’s specific reference to postjudgment water interest in footnote eight of Texas v. New Mexico (Texas v. New Mexico III). Yet, the Supreme Court concluded it was “unpersuaded, however, that ‘water interest,’ rather than money, should be awarded unless and until it proves to be necessary.” In Bell, such an award of postjudgment water interest may indeed be necessary to stave off any procrastination on the part of TCID in repaying its 200,000 plus acre-feet water debt. It was this risk of procrastination—and attendant opportunity cost of lost water—that spurred Special Master Meyers to suggest such a remedy in his 1986 Report to the Court in Texas v. New Mexico III.

This article chronicles litigation leading up to Bell, analyzes the decision itself, and evaluates authority supporting the district court’s award of postjudgment water interest. The article concludes that the background principles controlling an award of interest, the statutory recoupment scheme itself, and Supreme Court precedent in the interstate compact context authorize the novel remedy. Further, such relief is necessary to compensate for the deprivation

---

12 28 U.S.C. § 1961(a) (2006) (“Interest shall be allowed on any money judgment in a civil case recovered in a district court . . . . Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield . . . .”).
13 See Bell, 602 F.3d at 1083.
14 Texas v. New Mexico (Texas v. New Mexico III), 482 U.S. 124, 132 n.8 (1987) (explaining that failure on the part of New Mexico to deliver water pursuant to the court’s order “would entitle Texas to apply to this Court for enforcement . . . and to some form of postjudgment interest for the period during which that judgment is not satisfied”).
of the opportunity to put water to beneficial use and, in light of certain time-sensitive Tribal interests, to dissuade TCID from procrastinating in its water repayment obligation.

II. TIMELINE: A CHRONOLOGY OF CONFLICT

In 1844 Captain John Fremont made the first reported, non-Indian, sighting of Pyramid Lake.\(^\text{16}\) Fifteen years later the United States Department of the Interior (DOI) established a reservation, encompassing the lake, the lower Truckee River, and surrounding lands, for the Pyramid Lake Paiute tribe (Tribe).\(^\text{17}\) President Ulysses S. Grant confirmed the reservation’s establishment in an 1874 executive order.\(^\text{18}\)

At the turn of the century Congress passed the National Reclamation Act of 1902,\(^\text{19}\) which authorized the Secretary to withdraw approximately 200,000 acres of land in western Nevada for the Newlands Reclamation Project (Project).\(^\text{20}\) The Project incorporates water from both the Truckee and Carson Rivers to irrigate the project area near Fallon, Nevada.\(^\text{21}\) Unintentionally, the Newlands Project authorization set the irrigators and the Tribe on a collision course because the Truckee River is the primary source of Pyramid Lake water and habitat for


\(^{17}\) Id. at 115.

\(^{18}\) Id.


\(^{20}\) Nevada v. United States, 463 U.S. at 115.

\(^{21}\) Id. Fallon is located approximately sixty miles east of Reno, NV.
the cui-ui and Lahontan cutthroat trout. Any diversion of Truckee River water into the Truckee Canal at Derby Dam (see Figure 1, below) reduces that amount available for Pyramid Lake, its fishery, and the Reservation.

Figure 1. Map of Irrigation District

Eleven years later the United States filed a complaint in the United States District Court for the District of Nevada asserting a claim to the Truckee River for ten thousand cubic feet of water per second (cfs) for the Project and 500 cfs for the Reservation. This claim on the

---

22 See id. at 119.
23 See id. at 115–16, 119.
Truckee River water initiated the *Orr Ditch* litigation. The United States grounded its claim to water for the Reservation on the “implied-reservation-of-water” doctrine established in *Winters v. United States*. At the conclusion of hearings in 1924 a Special Master issued a report and proposed decree awarding the Reservation a right to 58.7 cfs from the Truckee River to irrigate 3,130 acres, with a priority date of 1859, the year the Reservation was established. The proposed decree also awarded the Project a right to 1,500 cfs to irrigate 232,800 acres within the Project area, with a priority date of 1902, the year the Reclamation Act was enacted. The district court subsequently confirmed the water rights as proposed and entered a temporary restraining order (TRO) which allowed for an experimental period in which the parties to the *Orr Ditch* litigation might modify the proposed decreed diversion amounts by agreement, if necessary.

In 1926 the Truckee-Carson Irrigation District (TCID) began operating the Newlands Project pursuant to a contract with the DOI. The contract authorized DOI to terminate TCID’s operation of the Newlands Project in the event of a breach or a violation of the regulations adopted to implement the contract. It did not take long for conflicts to develop over the use of Truckee River water. By the mid-1930s, a severe drought spurred the parties to settle the *Orr*

---

26 *Id.*
27 *Id.; see* *Winters v. United States*, 207 U.S. 564, 577–78 (1908) (holding that when the United States withdraws land from the public domain to establish an Indian reservation, it also reserves an amount of water sufficient to meet the present and future irrigation needs of the Indians; the implied federal reserved water right vests on and carries a priority date as of the date the reservation was established).
28 *Nevada v. United States*, 463 U.S. at 117.
29 *Id.*
30 *Id.* The proposed amounts were not modified.
31 *Nevada v. United States*, 463 U.S. at 118; *see also Our History*, TRUCKEE-CARSON IRRIGATION DISTRICT, http://www.tcid.org/history1.htm (last visited Oct. 1, 2011) (“[TCID] is a political subdivision of the State of Nevada, organized and chartered in 1918 for the purpose of representing the water right holders within the boundaries of the Newlands Project in connection with the operation of the Project.”).
32 *TCID v. Secretary*, 742 F.2d 527, 529 (9th Cir. 1984).
Ditch litigation and dissolve the 1926 TRO. In these negotiations TCID, rather than the federal government, represented the interests of the Newlands Project.

The United States, now only representing the interests of the Reservation, sought additional water rights for irrigating 2,745 more acres of Reservation land. The parties ultimately accepted DOI’s demand for increased water and signed what later became known as the Truckee River Agreement on July 1, 1935. The Nevada district court then ended the Orr Ditch litigation in 1944 when it issued a final decree that specifically incorporated the Truckee River Agreement in its holding. This “Orr Ditch Decree” affirmed the Tribe’s two senior water rights—Claim Numbers 1 and 2—with a priority date of 1859 to irrigate 5,875 acres, and TCID’s junior right—Claim Number 3—with a priority date of 1902 to irrigate 232,800 acres.

The final Orr Ditch Decree, however, did not put an end to allocation problems. In the mid-to-late 1960s, diversions from the Truckee River led to the listing of fish native to Pyramid Lake as endangered under the ESA due to reduced water depth, greater erosion, and increased

---

33 Id. at 529.
34 See Nevada v. United States, 463 U.S. at 118.
35 Id.
36 TCID v. Secretary, 742 F.2d at 529.
37 Id. (referencing United States v. Orr Water Ditch Co. (Orr Ditch Decree), In Equity No. A3, Case No. 73-cv-00003 (D. Nev. 1944) and United States v. Truckee River Gen. Elec. Co., No. 14861 (N.D. Cal. 1915) now designated Case No. 68-cv-643 (E.D. Cal.)).
38 Nevada v. United States, 463 U.S. at 121 n.8.
39 United States v. Orr Water Ditch Co., 600 F.3d 1152, 1158 (9th Cir. 2010).
41 Nevada v. United States, 463 U.S. at 117 n.3 (noting that no more than approximately 65,000 acres of Newlands Project land was actually irrigated); Truckee River Chronology: A Chronological History of Lake Tahoe and the Truckee River and Related Water Issues, DIV. OF WATER RES., DEP’T OF CONSERVATION & NATURAL RES., STATE OF NEV., http://water.nv.gov/mapping/chronologies/truckee/part3.cfm (last visited Oct. 4, 2011) [hereinafter Chronology] (explaining that the Orr Ditch Decree entitles TCID to divert 1,500 cfs at Derby Dam).
salinity levels.\textsuperscript{43} Between 1910 and 1966, irrigation diversions from the Truckee River at Derby Dam in to the Truckee Canal averaged 331 cfs (240,000 acre-feet per year).\textsuperscript{44} After the United States Bureau of Reclamation (Reclamation) eliminated diversions solely for hydroelectric power generation, average diversions at Derby Dam from 1967 to 1994 dropped to 253 cfs (183,160 acre-feet per year).\textsuperscript{45}

Based on the recommendations of a 1964 taskforce, the Secretary promulgated regulations in 1967 that established OCAPs limiting the amount of water available, within decreed rights, to TCID to divert from the Truckee River in order to increase that amount available to Pyramid Lake.\textsuperscript{46} In 1970 the Tribe brought suit against the Secretary for failing to meet his trust responsibilities by illegally and unnecessarily authorizing TCID to divert Truckee water in exceedance of the 1967 OCAPs.\textsuperscript{47} The District Court for the District of Columbia held that the 1967 OCAPs were arbitrary considering that the Secretary disregarded the \textit{Orr Ditch} and \textit{Alpine Decrees}, and the Secretary failed to prevent unnecessary waste within the irrigation district.\textsuperscript{48}

In 1973 the court approved revised OCAPs\textsuperscript{49} designed to effectively measure water use, minimize waste, restrict application of water to land pursuant to the \textit{Orr Ditch} and \textit{Alpine Decrees}, and ensure TCID’s compliance with the revised orders.\textsuperscript{50} To meet the court’s directives, the amended regulations maximized storage of upper Truckee River water in

\textsuperscript{44} \textit{Chronology, supra} note 34.
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} 43 C.F.R. § 418.16–.27 (2011); \textit{Stampede Credit Case}, 882 F.2d at 366.
\textsuperscript{47} \textit{Tribe v. Morton}, 354 F. Supp. at 255.
\textsuperscript{48} \textit{Id.} at 256–57 (holding also that the Secretary was obliged to promulgate even more restrictive OCAPs to insure “that all water not obligated by court decree or contract with the District goes to Pyramid Lake”).
\textsuperscript{49} \textit{Id.} at 260–65 (amending judgment and order including Section A, Truckee Diversion Criteria and Section B, Storage Credit at Stampede).
\textsuperscript{50} \textit{Id.} at 258.
Stampede Reservoir for the benefit of the Tribe, required that TCID deliver at least 385,000 acre-feet of water to Pyramid Lake to preserve its current depth, and capped the amount of Truckee River water that TCID could divert into the Truckee Canal.\(^{51}\) Additionally, the court affirmed the paramount nature of the Secretary’s trust responsibility to the Tribe, holding that existing contracts between DOI and the United States Department of Agriculture (USDA), and Reclamation and the United States Forest Service, “[could not] be interposed as . . . obstacle[s] to the Lake receiving the maximum benefit from the upper Truckee flow into Stampede.”\(^{52}\) In practice, the amended regulatory scheme requires that the Secretary direct any water not obligated by decree or contract to flow to Pyramid Lake.\(^{53}\)

Similar to the 1926 contract, the amended regulations also authorized the Secretary to terminate TCID’s contract if the irrigation district engaged in a substantial violation of the regulations.\(^{54}\) Later in 1973 TCID intentionally violated the permitted diversion amounts, thus forcing the Secretary to terminate the 1926 contract.\(^{55}\) On behalf of the Reservation, the United States quickly brought suit to secure additional instream (nonconsumptive use) water rights to the Truckee River, beyond those consumptive use rights previously litigated in *Orr Ditch*.\(^{56}\) The United States asserted, again relying on the *Winters* doctrine, that the executive order

\(^{51}\) *Stampede Credit Case*, 882 F.2d at 366; *TCID v. Secretary*, 742 F.2d 527, 530 (9th Cir. 1984) (capping the amount to 350,000 acre-feet in 1973 and to 288,129 acre-feet each year thereafter); *Tribe v. Morton*, 354 F. Supp. at 255. Truckee River water may be stored either upstream in Stampede Reservoir or diverted at the Derby Dam, through the Truckee Canal, to Lahontan Reservoir. Whereas water stored in Stampede Reservoir may be released to Pyramid Lake for the benefit of the Tribe, water, once diverted to Lahontan Reservoir, cannot be returned upstream to the Tribe. *Stampede Credit Case*, 882 F.2d at 366.

\(^{52}\) *Tribe v. Morton*, 354 F. Supp. at 258, 260–61; see also supra Figure 1 (illustrating how Stampede Reservoir holds upper Truckee River water that may later be released back into the river for eventual delivery to Pyramid Lake).


\(^{54}\) *TCID v. Secretary*, 742 F.2d at 530.

\(^{55}\) *Id.* (describing TCID’s subsequent suit to prevent the Secretary from terminating the contract and the district’s attack on the validity of the 1973 OCAP; in 1973 the court upheld the Secretary’s decision to terminate the contract).

establishing the Reservation had also reserved the amount necessary to maintain the Pyramid Lake fishery, including the lower Truckee River spawning grounds.57

The Nevada district court dismissed the government’s claim, holding that it was “the same quiet title cause of action asserted by the plaintiff in Orr Ditch . . . . The plaintiff and the Tribe may not litigate several different types of water use claims, all arising under the Winters doctrine and all derived from the same water source in a piece-meal fashion.”58 In United States v. TCID, the United States Court of Appeals for the Ninth Circuit affirmed that part of the decision concluding that res judicata prevents re-litigating the claim at issue in Orr Ditch but held that Orr Ditch did not conclude the dispute between the Tribe and the owners of Newlands Project lands.59 The United States Supreme Court granted certiorari and ultimately affirmed that part of the Ninth Circuit’s decision concerning res judicata of the Orr Ditch cause of action but also reversed that portion regarding the viability of the claim between TCID and the United States and Tribe.60 The Supreme Court held that the United States was barred from “asserting the same reserved right for purposes of ‘fishing’ and maintenance of ‘lands and waters’ that was asserted in Orr Ditch.”61

While parties litigated rights to Truckee River water, litigation over Carson River water similarly raged. An interim restraining order signed in 1952 triaged contested claims to the Carson River until the Nevada district court decided United States v. Alpine Land & Reservoir Co. (Alpine Land & Reservoir I)62 in 1980.63 The Nevada district court’s final order, the “Alpine

57 Id. at 119.
58 Id. at 120.
59 Id. at 120–21.
60 Id. at 121.
61 Id. at 134.
63 TCID v. Secretary, 742 F.2d 527, 531 n.2 (9th Cir. 1984); see supra Figure 1 (depicting how the Lahontan Reservoir stores both Carson River water and that Truckee River water diverted at Derby Dam (routed through the
“Decrease,” settled water rights to the Carson River and was subsequently modified and affirmed by the Ninth Circuit. In 1988 the Secretary established the current OCAP “based on actual project water-righted and irrigated acreage,” and in 1992 assigned a water duty of 3.5 acre-feet per year for Newlands Project bottomlands and 4.5 acre-feet per year for bench lands. The regulation had the effect of limiting water delivered by restricting application of water to only that land classified as “eligible” by Reclamation, in accord with the annual water duty.

By 1990 Congress noticed TCID’s deliberate diversion of water in excess of the 1973 OCAPs (and the Secretary’s subsequent termination of TCID’s contract), waste of Newlands Project water, delivery of Project water to lands without valid water rights, and wrongful diversions potentially exceeding 800,000 acre-feet of water. Partly in response to these transgressions, Congress enacted the Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990 (Settlement Act) authorizing the Secretary to enforce compliance with all OCAPs and “pursue recoupment of any water diverted from the Truckee River in excess of the amounts permitted by any such [OCAP].” Congress also specified that the Settlement Act not be interpreted in such a way as to conflict with the Orr Ditch and Alpine Decrees.

TCID’s absence from the Settlement Act negotiations was cause for concern and noted by several parties. Former Nevada Representative Vucanovich expressed, “[w]hether [TCID]
walked away from the negotiations or was barred from real participation . . . matters very little at this point. We simply cannot expect to legislatively end the years of litigation . . . without involving such a major player in the deal.”\textsuperscript{72} In contrast, Nevada Senator Reid explained that the Tribe’s and TCID’s declaration to continue litigating relevant OCAPs, rather than settle their differences within the Act, did not indicate the legislation was fatally flawed.\textsuperscript{73} When questioned by Senator Bradley, Chairman of the Subcommittee on Water and Power, Senator Reid stated “it wouldn’t be right to have one party be able to veto the agreement” after the thousands of hours the cities, states, and tribes have put into it.\textsuperscript{74}

Perhaps not surprisingly, TCID continued to violate the applicable agreements and regulations, even though they were ratified in the 1990 Settlement Act. As a result, the United States began the litigation that produced the Ninth Circuit decision that is the subject of this article.

### III. \textit{United States v. Bell}, 602 F.3d 1074 (9th Cir. 2010)

In 1995 the United States brought suit against TCID to recoup over one million acre-feet of diversions in excess of OCAPs in force from 1973 to 1988.\textsuperscript{75} Fifteen years later the United States Court of Appeals for the Ninth Circuit affirmed the validity of the 1973 OCAPs and upheld the district court’s conclusion that the Fallon Paiute Shoshone Indian Tribes Water Rights


\textsuperscript{73} Id. at 45 (statement of Sen. Harry M. Reid).

\textsuperscript{74} Id. at 105.

\textsuperscript{75} \textit{Bell}, 602 F.3d 1074, 1079 (9th Cir. 2010). In total, six cases were brought by the United States in the District Court for the District of Nevada, Judge Howard D. McKibben, Presiding; the Ninth Circuit designated the appeals Nos. 05-16154, 05-16157, 05-16158, 05-16187, 05-16189 and 05-16909, and issued one opinion as to all the appeals. The United States brought the suit against TCID and all agricultural users of water supplied by TCID, including Arthur W. Bell, IV, the lead defendant in all six cases; the State of Nevada was also a named defendant as a water user. \textit{Id.} at 1074–75, 1079 (noting lengthy evidentiary proceedings postponed the district court’s decision until 2003).
Settlement Act of 1990 (Settlement Act)\textsuperscript{76} authorized the suit.\textsuperscript{77} The court further determined that the Settlement Act allowed for water recoupment awards, upheld much of the district court’s recoupment order, and held that the order was compatible with the Orr Ditch\textsuperscript{78} and Alpine\textsuperscript{79} Decrees.\textsuperscript{80} However, the Ninth Circuit vacated the award concerning pre and postjudgment interest and remanded with instructions for the district court to explain its basis.\textsuperscript{81} The Ninth Circuit also vacated and remanded the issues of the methodology for calculating excess diversion amounts, and the calculation of the amount spilled from Lahontan Reservoir in light of gauge error.\textsuperscript{82}

In 1926 TCID had entered into a contract with the Secretary to assume operational control of the Newlands Project.\textsuperscript{83} Court orders in 1944 and 1980 established the maximum diversion amounts for the Truckee and Carson Rivers, respectively.\textsuperscript{84} However, by the mid-1960s irrigation diversions from the Truckee had adversely affected the river’s ability to

\footnotesize{
\textsuperscript{77} Bell, 602 F.3d at 1081.
\textsuperscript{78} United States v. Orr Water Ditch Co. (Orr Ditch), In Equity No. A3, Case No. 73-cv-00003 (D. Nev. 1944); United States v. Truckee River Gen. Elec. Co., No. 14861 (N.D. Cal. 1915) now designated Case No. 68-cv-643 (E.D. Cal.).
\textsuperscript{80} Bell, 602 F.3d at 1082, 1085
\textsuperscript{81} Id. at 1083–84.
\textsuperscript{82} Id. at 1085 (referencing spills of Truckee River water in the amount of 11,938 af and 12,193 af in 1979 and 1980, respectively, and the district court’s erroneous accounting of the statistical uncertainty associated with the government’s published flow data). TCID regulates its diversions of Truckee River water at Derby Dam based on end-of-month storage targets at Lahontan Reservoir, but the mathematical uncertainty in such forecasts will at times contribute to an excess of water at the reservoir, thus leading to spills or precautionary drawdowns. JEREMY PRATT, TRUCKEE-CARBON RIVER BASIN STUDY: FINAL REPORT TO THE WESTERN WATER POLICY REVIEW ADVISORY COMMISSION 96 (Clear Water Consulting Corp. ed., 1997). Though a system of drains collects some of the water spilled at Lahontan Reservoir and transports it to Stillwater Marsh and Carson Lake and Pasture wetlands, a significant portion escapes to the Carson Sink, “failing to serve any of the priority uses in the lower Carson Basin.” Id. at 22, 96; see also supra Figure 1 (delineating the Carson Division from the Truckee Division).
\textsuperscript{83} Nevada v. United States, 463 U.S. 110, 118 (1983).
\textsuperscript{84} Bell, 602 F.3d at 1078.
}
recharge Pyramid Lake, thereby jeopardizing the Pyramid Lake fishery.\textsuperscript{85} In response, the Secretary established OCAPs in 1967, later challenged in \textit{Tribe v. Morton}.\textsuperscript{86} The 1967 OCAPs were succeeded by more restrictive court-ordered OCAPs in 1973.\textsuperscript{87} In 1995 the United States brought suit against TCID under the Settlement Act seeking recoupment of over one million acre-feet of water diverted in excess of OCAPs from 1973 to 1988.\textsuperscript{88} Although the Nevada district court determined that TCID willfully violated the OCAPs, it awarded just 200,000 acre-feet of water to the United States, holding TCID liable for excesses in 1974, 1975, 1978, and 1979 and for spills in 1979 and 1980.\textsuperscript{89} The district court ordered TCID to “pay” the United States with water, including postjudgment “water interest.”\textsuperscript{90} However, the court denied the government’s request for prejudgment interest.\textsuperscript{91}

On appeal TCID challenged the validity of the 1973 OCAP but the Ninth Circuit affirmed the district court on this point, concluding that the Settlement Act expressly validated the OCAPs.\textsuperscript{92} TCID also challenged whether the Settlement Act authorizes the United States to litigate for past diversions in excess of OCAPs.\textsuperscript{93} Again, the Ninth Circuit affirmed the lower court and held that the Act unambiguously provides for litigation if settlement fails and authorizes the Secretary to enforce compliance with all OCAPs, past, present, and future.\textsuperscript{94} The court also held that awarding recoupment water under the Act did not constitute contempt\textsuperscript{95} and

\begin{flushleft}
\textsuperscript{85} Id.
\textsuperscript{86} 354 F. Supp. at 255–56.
\textsuperscript{87} Bell, 602 F.3d at 1078.
\textsuperscript{88} Id. at 1079.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id. at 1081.
\textsuperscript{93} Id. at 1079.
\textsuperscript{94} See id. at 1080.
\textsuperscript{95} Fed. Trade Comm’n v. Affordable Media, 179 F.3d 1228, 1239 (9th Cir.1999) (noting that a party is in contempt only when it first violates a judicial order).
\end{flushleft}
that previous government assurances that the 1973 OCAP would not be enforced did not constitute “affirmative misconduct” causing “serious injustice” such that estoppel barred the government’s suit.  

TCID and Nevada next claimed that simultaneous compliance with the decrees and the Settlement Act (intended to restore Pyramid Lake) was impossible given the limited water supply. The Ninth Circuit rejected that argument, reasoning that although a specific amount is decreed, TCID is not always entitled to divert the full amount since the district’s right is dependent on the application of beneficial use without waste or uneconomic application. Moreover, “TCID’s past record of noncompliance” put the burden on TCID to satisfy both the decrees and recoupment order, possibly through implementation of conservation measures resulting in “credit water” available to satisfy the order.

After upholding the district court’s determination that TCID was liable under the Settlement Act for violating applicable OCAPs, the Ninth Circuit next considered the propriety of awarding pre and postjudgment water interest. Reasoning by analogy to the law on awarding money interest, the court stated that in the absence of common law precedent an award of postjudgment “water interest” must be authorized by statute. Since the statute at issue only allows for interest “on any money judgment in a civil case,” it did not provide the necessary authority. After dismissing the government’s argument that prior United States Supreme

---

96 Bell, 602 F.3d at 1082 (citing Watkins v. U.S. Army, 875 F.2d 699, 707 (9th Cir. 1989)).
97 Bell, 602 F.3d at 1080.
98 Alpine Land & Reservoir II, 697 F.2d 851, 854 (9th Cir. 1983). See also Bell, 602 F.3d at 1081 (relying on the Ninth Circuit’s definition of beneficial use which is premised on application of that amount of water necessary to irrigate the maximum amount of crops suitable for a given tract of land).
99 Bell, 602 F.3d at 1081.
100 Id. at 1083. See also Pierce v. United States, 255 U.S. 398, 406 (1921) (holding that “[a]t common law[,] judgments do not bear interest; interest rests solely upon statutory provision”).
Court precedent\textsuperscript{102} allows for “water interest,” the court determined that any authority for such interest was likely based in equity. The Ninth Circuit then remanded the case for the district court to determine if the award was necessary to compensate the plaintiffs and to explain why the lower court had chosen a postjudgment interest rate of two percent per year on the outstanding balance of water owed to the government. The court also criticized the district court’s denial of prejudgment interest. In contrast to postjudgment interest, in the absence of statutory authorization, common law provides for prejudgment interest.\textsuperscript{103} The Ninth Circuit also disagreed with the lower court that the government’s delay in bringing its suit warranted a denial of prejudgment interest since the government’s cause of action did not become available until 1990, upon enactment of the Settlement Act.

The Ninth Circuit next assessed the district court’s calculation of the recoupment award. Declining to second-guess the lower court, the Ninth Circuit observed that estimates of excess diversions of Carson River water and spills of Truckee River water matched those of TCID’s own expert. However, the Ninth Circuit concluded that the district court erred in subtracting the level of statistical uncertainty from the published flow data, which limited the amount of water available for recoupment.\textsuperscript{104} The court remanded the issue for the district court to recalculate the amount diverted based on the government’s published flow data.

Regarding contested diversions from 1981 to 1984, the Ninth Circuit upheld the district court’s denial of recoupment and concluded that the Secretary’s failure to amend the 1973 OCAPs, in light of increased diversions made available by the 1980 Alpine Decree, prevented

\textsuperscript{102} Texas v. New Mexico III, 482 U.S. 124, 133 n.8 (1987) (explaining that “water interest” should not “be awarded unless and until it proves to be necessary”).

\textsuperscript{103} City of Milwaukee v. Cement Div., Nat’l Gypsum Co., 515 U.S. 189, 194 (1995) (reasoning that in the absence of a legislative determination regarding prejudgment interest, “the absence of a statute merely indicates that the question is governed by traditional judge-made principles”).

\textsuperscript{104} Bell, 602 F.3d at 1085 (“[T]he district court accounted for statistical uncertainty in the flow data by subtracting the confidence interval from the published quantities, effectively assigning all of the uncertainty against the Tribe.”).
the government from showing that TCID diverted in excess of a relevant standard during those years. However, the court agreed with the government that failure to amend the 1973 OCAP did not excuse TCID’s spills at Lahontan Reservoir, in contravention of the principle of beneficial use, between 1981 and 1984.

Finally, the Ninth Circuit upheld the district court’s decision not to dismiss the farmers, even though they bore no individual liability for TCID’s diversions, because the long history of litigation in the basin suggested it prudent to bar subsequent collateral attack. The Ninth Circuit also denied the farmers’ attorney fees as prevailing parties under the Equal Access to Justice Act (EAJA). The court concluded that the farmers were not prevailing parties because the district court’s decision was wholly in favor of the United States and the Tribe. Although the district court did not impose individual liability on the farmers, it found that TCID unlawfully diverted nearly 200,000 acre-feet for the farmers’ benefit.

On November 29, 2010, the Supreme Court denied TCID’s petition for writ of certiorari after the United States Solicitor General refrained from replying to TCID’s petition. On remand to the district court, approximately 150,000 acre-feet of water is in play through recalculation due to gauge error, measurement of that amount spilled, and determination of the validity of awarding postjudgment water interest. Part IV next explores sources of authority

105 See Equal Emp’l Opportunity Comm’n v. Peabody W. Coal Co., 400 F.3d 774, 780 (9th Cir. 2005) (“[W]e have elsewhere found that tribes are necessary parties to actions that might have the result of directly undermining authority they would otherwise exercise.”).
107 Bell, 602 F.3d at 1087 (reasoning that a plaintiff must be “awarded some relief by the court” on the merits of his claim before he can be said to prevail) (citing Poland v. Chertoff, 494 F.3d 1174, 1186–87 (9th Cir. 2007)).
108 Bell, 602 F.3d at 1087.
110 Bell, 602 F.3d at 1085, 1087 (vacating those amounts the district court found TCID improperly diverted from 1974 to 1979 (173, 021 acre-feet) and spilled from 1979 to 1980 (24,131 acre-feet), and remanding to recalculate
for postjudgment water interest. It concludes that in an action to recoup water under federal law, Supreme Court precedent authorizes a federal court to borrow postjudgment interest concepts from the monetary damages context to fully compensate the claimant—especially when the interest might dissuade the respondent from procrastinating in the repayment of water.

IV. Time is of the Essence: United States Supreme Court Precedent Contemplates a Complementary Award of Water Interest To Fully Compensate the Tribe and Head Off Any Delay in Repayment

A federal court sitting in equity must make the injured party whole and, in light of United States Supreme Court precedent in the interstate compact context, may borrow the practice of awarding interest on damages to fully compensate a claimant for injury due to unlawful diversions.\footnote{See Kansas v. Colorado (Kansas v. Colorado I), No. 105, Orig., 2000 WL 34508307, at *40–41 (Aug. 31, 2000); see also Texas v. New Mexico III, 482 U.S. 124, 131–32 (1987).} In evaluating authority for equitable remedies available to a federal court in an action to recoup water under the Settlement Act, similar actions under common law principles, statutory recoupment schemes, and interstate compacts demonstrate the viability of water interest relief. In light of the scope of injury to the Tribe’s agricultural, ecological, and cultural interests, background principles giving rise to an award of interest on monetary damages to fully compensate a claimant are particularly relevant. Additionally, water interest complements relief provided by the water recoupment scheme codified in the Settlement Act. Finally, the Supreme Court’s discussion of interest on outstanding water balances in the interstate compact context provides the strongest authority for a water interest award.\footnote{See discussion infra Part IV.C.} Specifically, Special Master Meyers’s practical postjudgment water interest remedy, as announced in Texas v. New Mexico
III, is necessary to fully compensate the Tribe and stave off any procrastination on the part of TCID in meeting its repayment obligation. 113

A. Common Law Principles Giving Rise to an Award of Interest in the Monetary Damages Context Are Particularly Instructive in the Water Recoupment Setting.


Prior to the enactment of state and federal statutory schemes controlling the acquisition and adjudication of water rights, courts insisted that a claimant satisfy certain predicate elements in actions for damages due to interference with a vested water right. Unlike property rights in real property, rights in water “are usufructuary; ownership of the resource itself remains in the public.”114 Thus, interference with an appropriator’s right to the continuous flow of water for beneficial use under state law premised a cause of action. 115 Specifically, the measure of actionable interference corresponded to the repercussions attributable to the inability to apply water to a particular beneficial use.116 Further, since “missing” water is not yet reduced to possession, a cause of action for the value of such previously diverted water is not available: water “does not become his property until it reaches his ditches.”117 Thus, state and federal legislatures enacted remedial statutes allowing for the recoupment of water unlawfully

113 See Report of the Special Master, supra note 15, at 32.
116 Id. at 2124 n.2 (presenting the subsequent destruction of a field and the crops grown thereon as an example of actionable interference). For example, though a Colorado statute requires that any substituted water be of a “quality and continuity” to meet an appropriator’s normal demands, the substitution of clear water for silty water—a highly desirable trait as silt seals cracks in the beds and banks of irrigation ditches—does not constitute an unreasonable deterioration in quality giving rise to actionable interference. COLO. REV. STAT. § 37-80-120(3) (2011); A-B Cattle Co. v. United States, 589 P.2d 57, 59–60 (Colo. 1978) (holding that under a maximum utilization doctrine an appropriator has no legal right to the continued delivery of silt-laden water after the construction of a federal dam resulted in delivery of clear water from the impoundment area).
117 FARNHAM, supra note 121, at 2123–24.
diverted. However, despite a legislative predilection for recoupment schemes, no express statutory allowance for pre or postjudgment water interest on recoupment awards yet exists in the federal arena.

2. Common Law Principles Controlling Awards of Pre and Postjudgment Interest are Particularly Instructive to Water Recoupment and Necessary to Fully Compensate for Deprivation of the Opportunity to Put Water to Beneficial Use.

Though express provisions for interest on nonmonetary awards in water recoupment actions are lacking, background principles controlling interest on monetary awards are analogous and persuasive in the recoupment context because any procrastination in the repayment of water compounds injury to those beneficial uses deprived of the application of water. In the monetary damages context, the legal principle that guides the assessment of interest is *qui tardius solvit, minus solvit*—whoever pays tardily, pays less. Considering that a delay in reparations prevents the claimant from making timely use of compensation, thereby compounding injury, the respondent is expected to compensate for such delay. Grotius expressed the concept of compensation for the lost time value of an injured asset as early as 1625. In essence, the claimant is entitled to those damages associated with the potential income or products derived from the injured asset. Though in light of the uncertainty in calculating hypothetical lost profits,

---

118 See Nev. Rev. Stat. § 533.481(1)(b) (2010). For instance, in addition to administrative fines upwards of $10,000, the Nevada State Engineer may require a person who effects an unlawful diversion of water to “replace not more than 200 percent of the water [unlawfully] used, wasted or diverted.” Id. § 533.481(1)(a), (b) (emphasis added); Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990 (Settlement Act), Pub. L. No. 101-618, § 209(j)(3), 104 Stat. 3289 (1990).

119 Bell, 602 F.3d 1074, 1083 (9th Cir. 2010).


121 *Id.*

122 *Hugo Grotius, De Jure Belli Ac Pacis Libri Tres [On the Law of War and Peace Three Books]* 431 (Francis W. Kelsey trans., Clarendon Press 1925) (1625) (“Moreover, a person will be understood to have less, and therefore to have suffered loss, not only in the property itself, but also in the products which strictly belong to it, whether these have actually been gathered or not, if he might have gathered them . . . .”).
interest is usually awarded on injuries to non-income producing assets.\textsuperscript{123} While pre and postjudgment interest operate similarly to lost profits, in accounting for the time value of money that should have been paid earlier to compensate for injury, only prejudgment interest is “governed by traditional judge-made principles.”\textsuperscript{124} In contrast, since the common law does not authorize postjudgment interest, “the propriety of an award of postjudgment interest ‘rests solely upon the statutory provision.’”\textsuperscript{125}

In addition, Ninth Circuit precedent demonstrates that a monetary judgment is not a precondition to an award of pre or postjudgment interest.\textsuperscript{126} In its brief, counsel for the Tribe cited the Ninth Circuit’s decision in \textit{United States v. Gordon}\textsuperscript{127} that affirmed an award of monetary prejudgment interest on a nonmonetary judgment involving embezzled securities (a nonmonetary instrument).\textsuperscript{128} Therefore, although \textit{Gordon} does not speak to an award of nonmonetary interest on a nonmonetary judgment, it does suggest that monetary judgments are not a precondition to postjudgment interest.

Perhaps even more so than in the monetary damages context—where monetary interest \textit{indirectly} compensates through the purchase of goods or services to ameliorate injury—nonmonetary water interest \textit{directly} compensates, as it is precisely the medium through which deprivation of application of water to beneficial use is ameliorated. At present, the Tribe is doubly worse off for TCID’s unlawful diversions of water in 1974, 1975, 1978, and 1979:

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{123} Fellmeth, \textit{supra} note 120, at 427.
\item \textsuperscript{124} \textit{Bell}, 602 F.3d at 1083–84 (citing Dishman v. UNUM Life Ins. Co. of Am., 269 F.3d 974, 989 (9th Cir. 2001)).
\item \textsuperscript{125} \textit{Bell}, 602 F.3d at 1083. Some commentators are careful to distinguish ‘interest on damages’ from ‘interest as damages’; when interest constitutes damages itself, it usually refers to actual costs incurred such as monies borrowed to mitigate damage from a wrongful act. Fellmeth, \textit{supra} note 126, at 436. As implemented by the Nevada district court, ‘water interest’ would constitute ‘interest on damages’ since it is based on that recoupment amount which TCID must repay, rather than a standalone damages award. \textit{Bell}, 602 F.3d at 1082–83.
\item \textsuperscript{126} See \textit{United States v. Gordon}, 393 F.3d 1044, 1057–59 (9th Cir. 2004).
\item \textsuperscript{127} See \textit{Opening/Answering Brief for Appellee/Cross-Appellant Pyramid Lake Paiute Tribe of Indians at 31, Bell}, 602 F.3d 1074 (9th Cir. 2010) (Nos. 05-16154, 05-16157, 05-16158, 05-16187, 05-16189 and 05-16909).
\item \textsuperscript{128} \textit{Gordon}, 393 F.3d at 1059–60.
\end{enumerate}
\end{footnotesize}
beyond the time it will take to compensate the Tribe for damage to agricultural, ecological, and cultural resources, it is uncertain whether the Tribe might ever recover the attendant opportunity cost (e.g., crop production, fish spawning, and cultural preservation) associated with being deprived of the ability to apply water to beneficial use during the late 1970s.

What is certain though, is that an award of water interest stands a better chance of redressing injuries to the Pyramid Lake fishery than a monetary award. For example, the 1992 Cui-ui Recovery Plan called for supplemental inflow of 110,000 acre-feet of Truckee River water to the Lake, partly through reduction of TCID’s diversions to Newlands Project irrigators. It is questionable whether a monetary award would allow the Tribe to procure water rights to 110,000 acre-feet of Truckee River water in light of the newly acquired rights’ junior priority dates. Moreover, without a water interest component, any further delay by TCID in honoring its recoupment obligation will compound injury to certain time-sensitive interests,
like recovery of the endangered cui-ui and threatened Lahontan cutthroat trout. Therefore, background principles giving rise to an award of interest on monetary damages are particularly instructive to the water recoupment setting since pre and postjudgment interest insure a greater probability that injury to Tribal interests will indeed be fully compensated in a timely manner.

B. An Award of Water Interest Would Complement the Firmly Established Water Recoupment Scheme First Implemented in the Stampede Credit Case and Later Codified in the Settlement Act.

Prior to implementing an explicit water recoupment strategy to enforce relevant OCAPs promulgated by the Secretary, federal courts in this ongoing dispute authorized water masters to condition delivery of water pursuant to federal court decrees. In practice, depriving misbehaving owners of decreed water rights constitutes an approved means of enforcing regulatory rules and measures. In 1984 the Ninth Circuit in TCID v. Secretary held that the Secretary is authorized to reduce the quantity of water diverted to Newlands Project users below

---

134 Pyramid Lake is the sole remaining habitat for the cui-ui, a large sucker that grows to a length of two feet and lives up to thirty years, and was listed as endangered under the ESA in 1967; the cui-ui also serves as a seasonal food source for the tribe. Id. at 24–25. Pyramid Lake is also home to the Lahontan cutthroat trout, whose original Pyramid Lake strain grew to sixty pounds and lived upwards of ten years, and was listed as threatened under the ESA in 1975. Id. at 27. Though the original strain went extinct by 1944, the species was restocked via hatchery operations, but restocked species seldom grow more than fifteen pounds. Id. Unlike the cui-ui, the Lahontan cutthroat have suffered permanent loss of genetic diversity and require significantly greater flows throughout the year to reach their natural spawning grounds on the lower Truckee River. Id.

135 The Orr Ditch Decree limits that amount of Truckee River water available to Newlands Project users:

Except as herein specially provided no diversion of water into any ditch or canal, in this decree mentioned shall be permitted except in such amount as shall actually, reasonably necessary for the economical and beneficial use for which the right of diversion is determined and established by this decree.

Tribe Opening Brief, supra note 133, at 4. The Alpine Decree similarly limits that amount of Carson River water available:

The quantities of water to be diverted by the owners of the several ditches, through those ditches, on account of the several priorities herein allowed, are allowed subject to the obligations of said owners to divert and use water only at such times as needed and only in such amounts as may be required for actual, reasonable beneficial use.


See Bell, 602 F.3d 1074, 1083–84 (9th Cir. 2010).
the maximum amounts permitted by the relevant decree since the “the Secretary explicitly reserved the right to issue regulations governing the operation of the Newlands Project.” In 1989 the Ninth Circuit in the Stampede Credit Case approved of a restitutio

ary remedy to recoup illegally diverted Truckee River water for the benefit of the Pyramid Lake fishery. Although TCID released 21,500 acre-feet of water for irrigation from Stampede Reservoir pursuant to the district court’s erroneous interpretation of applicable OCAPs, the Ninth Circuit held that the resultant injury to the Pyramid Lake fishery could be remedied by storing an equivalent amount of water from TCID’s future allotment, for later release to the Lake. In essence, TCID and Newlands Project water users were required to repay the previously released water to the Tribe pursuant to the Secretary’s plan.

In 1990 Congress formally adopted such a recoupment scheme when it enacted the Settlement Act. To ensure compliance with all OCAPs, the Settlement Act authorized the Secretary to “pursue recoupment of any water diverted from the Truckee River in excess of the amounts permitted by any such [OCAP].” Specifically, section 209(j)(3) provides that in a recoupment suit brought by any party other than the Secretary, the only relief available is an order directing recovery of the unlawfully diverted water. Additionally, because the

137 TCID v. Secretary, 742 F.2d 527, 529–30, 532 (9th Cir. 1984).
138 Stampede Credit Case, 882 F.2d 364, 365-67, 370–71 (9th Cir. 1989).
139 Id. at 368.
140 Id.; Tribe Opening Brief, supra note 133, at 12.
142 Id. § 209(j)(3). Sen. Reid, key sponsor of the legislation, spoke to a “credit waters” concept in hearings leading up to the Act’s passage. Truckee-Carson-Pyramid Lake Water Rights Settlement Act: Hearing Before the Subcomm. on Water and Power, 101st Cong. 44 (1990) (testimony of Sen. Reid) (exclaiming that “if we put some efficiency back into the river’s operation we could improve conditions for the cui-ui” and “this would be accomplished by making better use of the river’s available storage facilities through the exchange of credit waters . . . .”). Granted, parties to the legislation realized that the Stampede Credit Case litigation would remain outstanding after passage of the Settlement Act. Id. at 531 (“List of Cases involving Truckee and Carson Rivers remaining if S. 1554 is passed as introduced on August 4, 1989.”).
143 Settlement Act § 209(j)(3).
Settlement Act is federal law, “no court may order relief inconsistent with its express terms.”

Therefore, considering that recovery under the Settlement Act is constrained to water recoupment, and that interest is a necessary component of relief to fully compensate the Tribe, water interest is an appropriate means of relief.

In addition, an award of water interest does not run counter to the Supreme Court’s guidance in City of Milwaukie v. Cement Division, National Gypsum Co., that in the absence of an applicable statutory provision prejudgment interest is governed by common law, since the Settlement Act expressly directs the Secretary to recoup water, not money. Moreover, the Supreme Court spoke to the flexible nature of interest, declaring “[it] is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness[.]” Thus, a federal court sitting in equity likely has sufficient discretion to endorse a means of relief that is congruent with the express water recoupment scheme provided by the Settlement Act.

Finally, by delivering sorely needed water to the Pyramid Lake fishery, water interest furthers both the remedial purpose of the Settlement Act and Congress’s desire that any recoupment order be consistent with the ESA. Two of the Settlement Act’s remedial purposes are to fulfill the federal government’s trust obligations to the Tribes and to further the goals of

144 Texas v. New Mexico (Texas v. New Mexico I), 462 U.S. 554, 564 (1983); see also Texas v. New Mexico II, 482 U.S. 124, 128 (1986) (clarifying that when an interstate compact is approved by Congress it becomes a law of the United States and, similar to a contract, “must be construed and applied in accordance with its terms”) (citing West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 28 (1951)).

145 515 U.S. 189, 194 (1995) (“Far from indicating a legislative determination that prejudgment interest should not be awarded, however, the absence of a statute merely indicates that the question is governed by traditional judge-made principles.”).

146 Id. at 195 n.7 (quoting Bd. of Comm'r of Jackson Cnty. v. United States, 308 U.S. 343, 352 (1939)).

147 Settlement Act § 209(j) (providing that any order for recoupment of unlawfully diverted Truckee River water must be consistent with the ESA).
the ESA. Further, in *Polar Bear Productions Inc. v. Timex Corp.* the Ninth Circuit declared that the availability of prejudgment interest “hinges on whether such an award would further the statute's purpose.” In other words, interest can be awarded based on a determination of congressional intent even if interest is not expressly provided for in the statute. Moreover, the Court in *Rodgers v. United States* held that “in the absence of an unequivocal prohibition of interest” on statutory obligations, it could grant interest based on an appraisal of Congress’ purpose in establishing such obligations. Therefore, the Nevada district court is likely authorized to award water interest because such relief complements the statutory water recoupment scheme and furthers the remedial purposes of the Settlement Act by directly addressing injury to the Pyramid Lake fishery.

**C. The Duty to Fully Compensate the Tribe and Deliver Relief Pursuant to the Settlement Act**  
**Fulfill the Conditions Precedent to an Award of Water Interest, as Expressed by the Supreme Court.**

The Supreme Court expressly acknowledged the viability of an award of water interest on the outstanding balance of water due, in its exercise of original jurisdiction in the interstate compact context. Although the interstate compact model is not a perfect analogue to federal law expressed in a congressional act, compact cases highlight the Court’s view of whether a particular remedy is sufficient to compensate for injury due to diversions in excess of federal law. Although the Court usually analyzes unlawful diversions under a compact in terms of breach of contract, rather than as a violation of federal law (the compact being ratified by

---

148 Id. § 202(e), (f); see id. § 209(j)(1) (directing the Secretary to implement the Settlement Act “in a manner that is fully consistent with the decision in the case of [Tribe v. Morton]” which ordered that all water not obligated by decree or contract flows to Pyramid Lake); see also Tribe Opening Brief, supra note 133, at 20.
149 384 F.3d 700, 718 (9th Cir. 2004) (concluding “even in absence of legislative direction, a court may, in its discretion, award interest if necessary to effectuate legislative intent”).
In interstate compact adjudication, water recoupment functions as a restitutionary remedy in the equitable apportionment of water. Though the Court’s discussion of water interest in *Kansas v. Colorado II* is less instructive than its decision in *Texas v. New Mexico III*, both decisions acknowledge the viability of water interest in the water recoupment context.

1. Pursuant to *Texas v. New Mexico III*, it is Necessary to Award Water Interest to Head Off Procrastination on the Part of TCID in its Repayment of Water to the Tribe.

   In *Texas v. New Mexico III*, the Supreme Court determined that New Mexico failed to honor the terms of the Pecos River Compact such that Texas was deprived of 340,100 acre-feet of water from 1950 to 1983. Although questions regarding New Mexico’s actual, quantifiable obligations were not resolved until 1984, the Court held that “good-faith differences about the scope of contractual undertakings do not relieve either party from performance . . . . New Mexico cannot escape liability for what has been adjudicated to be past failures to perform

---

151 Though ambiguity exists as to whether water recoupment in the interstate compact context is best viewed through a breach of contract, violation of federal law, or order of mandamus lens, water interest simply addresses the common root injury caused by diversions in excess of federal law. For example, the Supreme Court in *Texas v. New Mexico II* characterized the interstate compact as a contract, ratified by Congress. 482 U.S. 124, 128 (1986) (“[B]ut a compact is, after all, a contract.”) (citing Petty v. Tenn.-Mo. Bridge Comm'n, 359 U.S. 275, 285 (1959) (Frankfurter, J., dissenting)). One scholar hypothesized that the compact’s nature as a positive enactment of law, like the Settlement Agreement, explains any contract versus statutory enactment ambiguity. Joseph W. Girardot, *Toward a Rational Scheme of Interstate Water Compact Adjudication*, 23 U. MICH. J.L. REFORM 151 nn.57, 58 (1989) (explaining that although the court hesitates to invoke equity, specific performance is itself an equitable remedy). Rather than embrace any ambiguity, the Supreme Court in *Kansas v. Colorado* simply characterized the diversions in excess of compact terms as a breach of contract. *Kansas v. Colorado* (*Kansas v. Colorado II*), 533 U.S. 1, 20 (2001) (O’Connor, J., dissenting) (“We are dealing with an interstate compact apportioning the flow of a river between two States. A compact is a contract. It represents a bargained-for exchange between its signatories . . . .”). Finally, the character of “payment in water” might more closely resemble an order of mandamus, than specific performance of a contract. Girardot, *supra* note 155, at nn.57, 58.

152 533 U.S. at 9.

153 482 U.S. at 124.

154 Pecos River Compact, H.R. 3334, 81st Cong. § Art. III(a) (1949).

its duties under the Compact.”156 The Court agreed with Special Master Myers’s recommendation that New Mexico “repay” Texas approximately 34,010 acre-feet of water each year for ten years157 since the compact contemplated delivery of water and the court should not order relief inconsistent with its terms.158 Also, in footnote eight the court acknowledged the viability of water interest in instances when nonmonetary relief is granted.159

Yet, even prior to footnote eight, the Court acknowledged its authority to craft a remedy along the lines of the Special Master’s recommendation of water interest. Responding to Texas’s concern that awarding only money damages would allow New Mexico to ignore its water debt, the court announced that its authority to order that water be repaid in-kind, along with “whatever additional sanction might be thought necessary for deliberate failure to perform,” would provide sufficient deterrence.160 Thus, the court embraced the Special Master’s conclusion: “the relief to be recommended, at least by a Special Master, ought to be specified in quantities of water.”161 In light of TCID’s dogged opposition to federal regulation, such in-kind relief addresses the potential for TCID to default on its water repayment obligation.

At its heart, the concept of “water interest” is simply a pragmatic method to dissuade TCID from procrastinating in the repayment of its water debt to the Tribe. In Texas v. New

156 Id. at 129.
157 Id. at 127–28. Responding to New Mexico’s argument that it simply did not have recoupment water available, the Special Master stated that New Mexico state law authorized the state to purchase or condemn water rights and then pump that amount directly into the Pecos River. Report of the Special Master, supra note 15, at 34–35. The Special Master explained, “only by invoking the power of eminent domain can the state distribute its own waters as its public policy requires.” Id. at 35, n.15 (citing Kaiser Steel Corp. v. W.S. Ranch Co., 467 P.2d 986, 990 (N.M. 1970)). Because New Mexico law authorized transfers of water right ownership and permitted changes to the original purpose for appropriation, New Mexico was precluded from arguing that the doctrine of prior appropriation prevents it from providing the decreed amount to Texas. Report of the Special Master, supra note 15, at 35.
158 Texas v. New Mexico III, 482 U.S. at 130 (endorsing Special Master Meyers’s “cautious” approach, the court concluded that although the compact does not mandate repayment in water in the event of a breach, “[W]e are quite sure that the Compact itself does not prevent our ordering a suitable remedy, whether in water or money”).
159 Id. at 132.
160 Id. (emphasis added).
Mexico III, Special Master Meyers expressly designed postjudgment water interest to “prevent procrastination” on the part of New Mexico: “water interest should be charged on the undelivered balance of water due in any year in which New Mexico does not meet its annual minimum delivery obligation (‘deficit amount’).” Without an “interest penalty,” the Special Master concluded that New Mexico would have no incentive to fulfill its decree aside from avoidance of further litigation. In essence, water interest would curb any potential “bad faith” on the part of New Mexico. By applying the rate (i.e., the yield on the one-year Treasury bills on the date the deficit was determined) in that case, the Special Master intended to “approximate the opportunity cost to Texas of late delivery of water by New Mexico.” Given that it will take time—precipitation and overeager appropriators permitting—to repay the water debt owed to the Tribe, postjudgment water interest is necessary to fully compensate for injury due to diversions in excess of federal law.

2. The Supreme Court’s Decision in Kansas v. Colorado I Also Acknowledges the Viability of Water Interest.

Unlike in Texas v. New Mexico III, the Supreme Court in Kansas v. Colorado I concluded that damages due to Colorado’s violation of the interstate compact should be paid in money, not water, considering that the unlawful diversion period spanned fifty years and any interest rate would unreasonably compound the total award. The Court cited the difficulty in implementing a water repayment program—including water interest—over fifteen years, in light

---

162 Id.
163 Id. at 38.
164 Id. at 36–37.
165 Id. at 32 n.13 (emphasis added). Moreover, Special Master Meyers was aware of an inflationary effect on the water damages award that would work to Texas’s detriment, and thus restricted New Mexico’s repayment schedule to no more than ten years. Id. at 41–42.
of uncertainty related to the availability of Colorado water in dry years and whether Kansas farmers could make use of repaid water in wet years.\textsuperscript{167} Interestingly, over sixty-six percent of the total amount Kansas claimed in damages was attributable to prejudgment interest—that amount necessary to compensate for investment opportunities lost due to the unavailability of water.\textsuperscript{168} Also, the Court alluded to something akin to water interest when it concluded that it was authorized to award interest or “its equivalent” as an element of damages.\textsuperscript{169} The court also described the importance of awarding prejudgment interest to compensate for the fact that during such protracted litigation, the upstream state retains access to the water and will continue to divert to the detriment of the downstream state, especially since a preliminary injunction is not available.\textsuperscript{170}

As noted in Part IV(A)(2), this same unfortunate dynamic—by which claimant’s injury is compounded by successive delay in compensation—is also experienced by the Tribe. A federal court, sitting in equity, likely has discretion to address this dynamic considering that the water recoupment remedy itself is grounded in equity. In \textit{Kansas v. Colorado I}, the Supreme Court spoke directly to such equitable principles: “making up past shortages by delivering more water has ‘all the earmarks of specific performance, an \textit{equitable remedy} that requires some attention

\textsuperscript{167} \textit{Id.} at *48–50.

\textsuperscript{168} \textit{Kansas v. Colorado II}, 533 U.S. 1, 9, n.2 (2001) (noting that although final damages were not yet calculated, Kansas had claimed $62,369,173 in total damages). Of note, the court also affirmed the concept that a remedy for excess diversions need only address the \textit{flow} available, rather than the \textit{source} of water. \textit{Kansas v. Colorado I}, 2000 WL 34508307, at *22 (explaining that the determining factor for compensation is the \textit{flow} measured at the state line, not the \textit{source} of the water).

\textsuperscript{169} \textit{Kansas v. Colorado II}, 533 U.S. at 14 (citing Miller v. Robertson, 266 U.S. 243, 258 (1924), “When necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or \textit{its equivalent} as an element of damages on unliquidated claims.”) (emphasis added, internal quotations removed).

Regarding whether Colorado was on notice that it would be subject to automatic prejudgment interest, the court opined that before 1949 it was reasonable to expect a court to balance the equities when evaluating an award of prejudgment interest. \textit{Id.} (“Given the state of the law at that time, Colorado may well have believed that we would balance the equities in order to achieve a just and equitable remedy, rather than automatically imposing prejudgment interest in order to achieve full compensation.”).

\textsuperscript{170} \textit{Kansas v. Colorado I}, 2000 WL 34508307 at *43.
to the relative benefits and burdens that the parties may enjoy or suffer.”

Moreover, the Court analogized water repayment to a money debt and noted, “[i]f this were a money debt, the full amount would be due upon judgment and would bear interest if not paid” and “[a]llowing another fifteen years to settle the account in water, by paying simply the amount of the judgment, does not make Kansas whole.”

Therefore, considering that the Settlement Agreement specifically requires repayment in water, and the Supreme Court recognizes that a concomitant award of interest on such obligation is necessary to make the claimant whole, the Nevada district court should award water interest on TCID’s outstanding debt.

V. CONCLUSION

In sum, the United States District Court for the District of Nevada’s practical remedy is justified on several grounds, including: 1) common law principles controlling an award of pre and postjudgment interest on damages; 2) the recoupment scheme as codified in the Settlement Act; and 3) United States Supreme Court precedent in the water recoupment context. Moreover, water interest directly redresses injuries sustained by the Pyramid Lake fishery—a fishery upon which the Tribe depends for its livelihood.

Given TCID’s recalcitrance, the Ninth Circuit's approval of this novel remedy might usher in a more pragmatic compensation scheme to address time-sensitive interests in similar long-standing water rights contests in other basins.

---

171 Id. at *50 (quoting Texas v. New Mexico II, 482 U.S. 124, 128 (1986)) (emphasis added).
173 Tribe v. Morton, 354 F. Supp. 252, 254 (D.D.C. 1973) (“[Pyramid] Lake has been the Tribe's principal source of livelihood. Members of the Tribe have always lived on its shores and have fished its waters for food. * * * The area has been consistently recognized as the Tribe's aboriginal home.”).
174 Id. at 257–58 (chronicling TCID’s declaration “that it will disregard the new regulation and will divert water as it chooses by giving instructions to its own water masters”); see also TCID v. Secretary, 742 F.2d 527, 530 (9th Cir. 1984) (describing how in 1973, the first year in which the Secretary’s new regulations were in effect, “TCID intentionally violated [the OCAPs] by diverting more water than the regulations permitted”).