

No. 10-396 SEP 20 2010

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In The
Supreme Court of the United States

—◆—
BOARD OF DIRECTORS, THE TRUCKEE-CARSON
IRRIGATION DISTRICT & TRUCKEE-CARSON
IRRIGATION DISTRICT,

Petitioners,

v.

UNITED STATES OF AMERICA & PYRAMID
LAKE PAIUTE TRIBE OF INDIANS,

Respondents.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

—◆—
PETITION FOR WRIT OF CERTIORARI

—◆—
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QUESTIONS PRESENTED

1. Whether the Congress violates the separation of powers doctrine under Article III of the United States Constitution by enacting retroactive legislation that requires a court to accept a past federal regulation as currently valid, enforceable and immune from judicial challenge, the underlying premise of which was previously found by an all-inclusive federal water rights adjudication proceeding as violating vested water rights confirmed under a final federal district court water decree and judgment.

2. Whether a federal court has either the legal or equitable jurisdiction to make an award of pre-judgment or postjudgment in-kind interest, that is, interest that is payable in property, in this case water as interest, and not money.

PARTIES TO THE PROCEEDING

Petitioners are the Board of Directors, Truckee-Carson Irrigation District and the Truckee-Carson Irrigation District. Respondents are the United States of America and the Pyramid Lake Paiute Tribe of Indians.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioners state that they have no parent companies or nonwholly owned subsidiaries.

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OPINIONS BELOW

The memorandum decision dated December 3, 2003 (*infra* App. 30-59.) and Judgment of the United States District Court District of Nevada dated February 16, 2005 (*infra* App. 1-29.) are unreported. The Opinion of the United States Court of Appeals for the Ninth Circuit, dated April 20, 2010 (*infra* App. 1-29.) is reported in 602 F.3d 1074. The Ninth Circuit's order denying TCID's petition for panel hearing and petition for rehearing en banc is dated June 22, 2010 and is unpublished (*infra* App. 72-79.) And, that Court issued its mandate on June 30, 2010 (*infra* App. 61-65.)

**JURISDICTION**

The court of appeals' opinion was issued and entered on April 20, 2010. A timely petition for panel rehearing and rehearing en banc was denied on June 22, 2010 (*infra* App. 72-79.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

U.S. Const., Article III, § 1.

Truckee-Carson Pyramid Lake Water Rights Settlement Act, Pub. L. No. 101-618, 104 Stat. 3294, Nov. 16, 1990.

28 U.S.C. § 1961.

Petitioners, the Board of Directors, Truckee-Carson Irrigation District and the Truckee-Carson Irrigation District, pray that the Supreme Court grant a writ of certiorari to review the judgment of the court below.



STATEMENT OF THE CASE

In 1902, Congress passed the Reclamation Act, 43 U.S.C. §§ 372 *et seq.* and the Secretary of Interior withdrew approximately 200,000 acres from public domain in western Nevada to form the Newlands Reclamation Project (“Project”), the first federal reclamation project authorized by Congress and the first ever built. Since 1926, the Truckee-Carson Irrigation District (“TCID”) has operated and managed the Project for the United States under contract and on a quasi-contractual basis. TCID continues to do so today.

The Truckee River and the Carson River are the primary sources of water for the Project and are the lifeblood of the Project farmers who live and work the land as contemplated by Congress. Their water rights to these sources were litigated in two all inclusive water rights adjudications resulting in the Final *Orr Ditch* Decree in 1944 (“*Orr Ditch*”), which determined vested water rights to the Truckee River and the *Alpine* Decree in 1980, which determined vested

water rights to the Carson River.¹ Both of these federal court decrees are final.

In 1970, the Pyramid Lake Paiute Tribe of Indians (“Tribe”) initiated a lawsuit attacking the 1967 iteration of regulations promulgated by the Secretary of the Interior (“Secretary”) entitled Newlands Project Operating Criteria and Procedures (“OCAP”), which had been issued by the Secretary year to year since 1967, to control water taken into the Project. See 43 C.F.R. § 418 (1972).

The Tribe’s challenge resulted in the decision of *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1973) (“*Tribe v. Morton*”). The *Tribe v. Morton* court found that the *Orr Ditch Decree* and the 1950 Temporary Restraining Order (“TRO”) in the *Alpine Decree* court governed the amounts and conditions under which water was available to the Project farmers, setting water duties at 3.5 and 4.5 acre feet per acre (“afa”) for waters diverted from the Truckee River and 2.92 afa for waters diverted from the Carson River. The *Tribe v. Morton* court acknowledged that neither the Secretary of Interior, nor a court could set a regulation that would infringe upon vested water rights confirmed in these decrees.

¹ A concise history of the litigation over water rights on the Truckee and Carson Rivers and the two relevant final water decrees governing these rivers can be found in *Nevada v. United States*, 463 U.S. 110 (1983) and *United States v. Alpine Land & Reservoir Co.*, 503 F.Supp 877 (D.Nev. 1980) (affirmed as modified in *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851 (9th Cir. 1983)).

However, the *Tribe v. Morton* court found that the Secretary's 1967 OCAP ignored the lower water duty of 2.92 afa set in the *Alpine* TRO, and erroneously based the OCAP on the higher *Orr Ditch* Decree water duties of 3.5 and 4.5 afa. The *Alpine* Decree Court and the Ninth Circuit Court of Appeals ultimately found that the 2.92 afa temporary water duty set in the *Alpine* TRO, and which had been adopted by *Tribe v. Morton* and embodied in the 1973 OCAP, violated those vested water rights and the principle of beneficial use under Reclamation law and Nevada law.² *United States v. Alpine Land and Reservoir Co.* 503 F.Supp. at 888; 43 U.S.C. § 372; Nev. Rev. Stat. 533.035 (1913).³

The *Tribe v. Morton* court directed the Secretary to take both decrees into account in formulating a new OCAP for the water year ending October 31, 1973 consistent with that court's findings and order ("1973 OCAP"). In 1976, the United States Bureau of Reclamation ("BOR") calculated that under *Tribe v.*

² Beneficial use is implemented through the water duty. Water duty "is that measure of water, which by careful management and use, without wastage, is reasonably required to be applied to any given tract of land for such period of time as may be adequate to produce therefrom a maximum amount of such crops as ordinarily are grown thereon. *United States v. Alpine Land and Reservoir Co., et al.*, 697 F.2d 851, 854 (9th Cir. 1983).

³ "The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, measure, and limit of the right." 43 U.S.C. § 372.

Morton, the 1973 OCAP maximum allowable diversion of water would only permit the irrigation of approximately 47,000 acres in the Project, when over 73,000 acres were under contract with the BOR and historically up to 65,000 acres were actually irrigated each year. See *Nevada v. United States*, 463 U.S. 110, 117, n. 3 (1983). The 1973 OCAP remained unchanged until 1985, five years after entry of the final *Alpine* Decree in 1980.⁴

In 1980, the *Alpine* court issued a final order settling water rights to the Carson River in *Alpine Land & Reservoir Co.*, 503 F.Supp. 877 (D.Nev. 1980), affirmed as modified in *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851 (9th Cir. 1983). (“*Alpine* Decree”). The *Alpine* Decree conclusively determined that the vested water rights of the Project farmers were historically the same as those guaranteed under *Orr Ditch* Decree, namely 3.5 afa for bottom lands and 4.5 afa for bench lands, based upon evidence presented at trial of historical usage since 1969. The 2.92 afa water duty in the *Alpine* Court’s TRO, that was adopted in the 1973 OCAP under *Tribe v. Morton*, was vacated in the final *Alpine* Decree as not historically reflecting the actual water usage during the ten year period immediately preceding the issuance of the decree. *Alpine Land and Reservoir Co.*, 503 F.Supp. at 888. However, the Secretary did not

⁴ The Secretary of Interior did not promulgate any new OCAPs from 1981 to 1983. A 1984 Interim OCAP was invalidated by the District Court in Washington, D.C.

conform the OCAP to the *Alpine* Decree's water duties until 1985.

Three years after the *Alpine* Decree was issued, this Court unanimously decided its historic decision in *Nevada v. United States*, 463 U.S. 110 (1983). That case determined that the water duties confirmed under *Orr Ditch* for the farmers in the Newlands Project were vested in the Project farmers and that the United States owned only bare legal title to the water rights as the United States' role was that of a mere carrier of the water. *Id.* at 123; see also *Ickes v. Fox*, 300 U.S. 82, 94-96 (1937). Importantly, this Court held that both the government and the Tribe were bound by the doctrine of res judicata to the findings of *Orr Ditch* and the United States could not reallocate water away from the Newlands Project farmers to the Tribe. *Nevada*, 463 U.S. at 129-45.

In 1990, Congress enacted the Truckee-Carson Pyramid Lake Water Rights Settlement Act of 1990, Pub. L. No. 101-618, 104 Stat. 3294 enacted Nov. 16, 1990 ("Settlement Act").

Pertinent to this Petition are the provisions of the Settlement Act in Section 209(j)(1)-(3) under which:

(1) in Sec. 209(j)(1) Congress directed the Secretary, when carrying out the Settlement Act's provisions, . . . to "act in a manner that is fully consistent" with the decision in *Tribe v. Morton*;

(2) in Sec. 209(j)(2) by fiat, reinstated all prior actions of the Secretary under any OCAP, whether they violated any existing decrees, including the final *Alpine* Decree. They were “declared to be valid and shall not be subject to review in any judicial or administrative proceeding”;⁵ and,

(3) in Sec. 209(j)(3), Congress directed the Secretary to recover in a court action for recoupment, water diverted in violation of such prior OCAP.⁶

⁵ Section 210(b)(13) exempted from the title’s reach, the power of the *Orr Ditch* or *Alpine* courts to ensure that vested water rights holders, including Project farmers, were protected.

⁶ The relevant provisions read in part:

(j) OPERATING CRITERIA AND PROCEDURES.

(1) In carrying out the provision of this title, the Secretary shall act in a manner that is fully consistent with the decision in the case of *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C.1973).

(2) . . . All actions taken heretofore by the Secretary under any operating criteria and procedures are hereby declared to be valid and shall not be subject to review in any judicial or administrative proceeding, except as set forth in paragraph (3) of this subsection.

(3) The Secretary shall henceforth ensure compliance with all of the provisions of the operating criteria and procedures referenced in paragraph (2) of this subsection or any applicable provision of any other operating criteria or procedures for the Newlands Project previously adopted by the Secretary, and shall, pursuant to subsection 709(h) or judicial proceeding, pursue recoupment of any water diverted from the

(Continued on following page)

The United States and the Tribe as Intervenors brought a class action lawsuit for recoupment of water in kind under section 209(j)(3), in the United States District Court, District of Nevada, *United States of America v. Board of Directors, Truckee-Carson Irrigation District, et al.*, CV-N-95-0757-HDM, thus forgoing any claim for monetary damages.⁷ The case was filed against the Board of Directors for TCID, TCID itself as manager of the Project, and the class of some 3000 individual Project farmers, asserting a claim to recoup 1,057,000 acre feet (af) of water alleged to have been diverted from the Truckee River in excess of amounts allowed under the 1973 OCAP between 1973 and 1988.

After a trial without jury, the District Court found that the Settlement Act invoked the court's full equitable powers to fashion a remedy and entered judgment against TCID ordering it to repay 197,152 af of water to the United States and the Tribe for diversions of water over the 2.92 af water duty

Truckee River in excess of the amounts permitted by any such operating criteria and procedures.

⁷ The Settlement Act's authorization to the United States to recoup water did not preclude the United States from instead seeking monetary damages, as opposed to any other party, including the Tribe, who if they brought an action after December 31, 1997, were limited to seeking a declaratory judgment and injunctive relief to recover water. (Section 209(j)(3)).

allowed under the 1973 OCAP and *Tribe v. Morton*, as directed by the Settlement Act.⁸

The judgment was against TCID only and not the individual Project farmers, as the District Court recognized their rights were vested under the *Orr Ditch* and *Alpine* Decrees and protected by the Settlement Act, section 210(b)(13). The District Court's Decision and Judgment did not include an award of postjudgment interest. The District Court then modified its Judgment to require repayment of the judgment awarded to the Government and the Tribe, in equal yearly installments of 9857.6 af, and water interest at two percent per year on the unpaid balance of the judgment. The District Court had denied awarding water as pre-judgment interest, not because a federal court lacked the jurisdiction or federal precedent to make the award, but because of the United States' act of destroying documents during the litigation and for delaying the initiation of the litigation for some 22 years.

The Ninth Circuit Court of Appeals panel's opinion recognized that the Settlement Act could not be interpreted or enforced in any manner that would conflict with the vested water rights granted under the Final *Orr Ditch* and *Alpine* Decrees. Settlement

⁸ The District Court denied recovery for diversions between 1981 and 1984, as the Secretary did not promulgate any effective OCAPs and did not properly reflect the water duties in the final *Alpine* Decree.

Act § 210(b)(13). The Ninth Circuit upheld, without analysis however, the provisions of the Settlement Act's Section 209(j)(1)-(3) that retroactively required courts to adhere to *Tribe v. Morton* and the 1973 OCAP, despite the *Alpine* Decree which superseded the findings in *Tribe v. Morton* and the 1973 OCAP, and forbade judicial scrutiny of any prior actions of the Secretary under the prior 1973 OCAP.

The Ninth Circuit remanded with instructions that the District Court reconsider its decisions concerning pre-judgment and postjudgment water interest in the following respects. The District Court was directed to yet again reconsider whether a post-judgment water interest award could be factually supported and made in equity, in light of this Court's original jurisdiction decision in *Texas v. New Mexico*, 482 U.S. 124, 132, n.8 (1987). The opinion acknowledged that the award was unprecedented in federal jurisprudence, but believed that an award of water interest could be made by a federal court sitting in equity. Further, the District Court was directed to explain how it determined the two percent interest rate applied to the unpaid portions of the judgment.⁹

The Ninth Circuit also remanded the question of an award of pre-judgment interest for further

⁹ Under 28 U.S.C. § 1961(a) interest on a money judgment is calculated at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System for the calendar week preceding the date of the judgment.

consideration, overturning the district court's refusal to make an award of water interest because of a discovery dispute and the Government's delay in bringing suit. Recognizing that pre-judgment interest awards are not controlled by statute but rest in the discretion of the trial judge, the Ninth Circuit concluded that if postjudgment water interest could be awarded so could an award of pre-judgment interest, based upon common law equitable concepts of the need to fully compensate a party.

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**REASONS WHY THIS PETITION
SHOULD BE GRANTED**

1. The Ninth Circuit Failed to Redress the Settlement Act's Blatant Violation of the Separation of Powers Doctrine.

This case raises two important concerns about the limits of Congressional power under Article III. First, Congress offended the separation of powers doctrine when it enacted legislation in 1990 that retroactively reinstated the 1973 OCAP, regulations the Secretary had in effect in the years 1973 to 1980, after those regulations had been judicially determined to have violated the applicable water duties adjudicated in the final *Alpine* Decree. The Congressional direction to the Secretary and to the federal courts was an act of Congress specifically overruling a final decision of the federal judiciary and Congressional nullification of a final federal judicial decree. This Congressional act violates U.S. Supreme Court

precedent on this issue as pronounced in *Plaut v. Spendthrift Farm, Inc., et al.*, 514 U.S. 211 (1995).

Second, Congress invaded the province constitutionally reserved for the Judiciary since *Marbury v. Madison* when it sought under the Settlement Act, to prohibit a court from interpreting or hearing any challenges to the Secretary's regulations in any court action. This extends to the recoupment action where the Congress directed the Secretary to bring redress to violations of the prior OCAPs, now undermined by a federal court decree and judgment.

In the Settlement Act, the Congress violated the separation of powers between the legislative and judicial branches. In the Settlement Act, Congress both overrides a final judicial decision and suspends the normal judicial power to interpret and rule on issues under the law. The Ninth Circuit's deference to the Congress' transgression of the Judiciary is an abdication of its Article III duty to interpret the Settlement Act. Nothing in the opinion reveals that court's own independent efforts to determine the limits of Congressional authority to trammel on judicial authority when Congress statutorily determined in advance the outcome of litigation authorized in the Settlement Act.

The Settlement Act is an unconstitutional attempt by special legislation to undo what federal courts accomplished in two all-inclusive final water rights adjudications, the results of which were unpalatable to special interests, the United States and the Tribe.

2. The Decision of the Ninth Circuit Unless Reversed May Serve as Precedent for Federal Courts to Fashion Awards of Non-monetary Interest In Excess of Their Jurisdiction.

The Court of Appeals committed reversible error by not determining as a matter of law, that a federal court has no jurisdiction to award property, here water, as postjudgment interest on a judgment. The Ninth Circuit failed to recognize that this Court's decisions in *Pierce v. United States*, 255 U.S. 398, 406 (1921) and *Willy v. Coastal Corp.*, 503 U.S. 131, 134 (1992) obligates a federal court to apply 28 U.S.C. § 1961, requiring an award of postjudgment monetary interest on a monetary judgment, even in equity.

The Ninth Circuit erroneously relied on this Court's original jurisdiction decision in *Texas v. New Mexico*, 482 U.S. 124, 132, n.8 (1987), as precedent for a federal court to make an award of non-monetary postjudgment water interest in equity. The Ninth Circuit's remand with instructions to the District Court would cause that court to exceed its jurisdiction under the Federal Rules, in order to consider whether there was any factual basis to make an award of postjudgment water interest, even as part of a federal court's equitable powers.

The Ninth Circuit also erred when it directed the District Court, despite the lack of federal common law precedent, to consider an award of water as pre-judgment interest by using the analogue of

compensation for the lost value of money, to base such an award. The Court of Appeals wrongly assumed that an interest rate applicable to a money interest award could also be used to measure a non-monetary interest award.

The Ninth Circuit's opinion below is unprecedented and presents issues of first impression. If allowed to stand, it would invite mischief of the first order. The concept of an in-kind or property interest award by a federal court in equity, as compensation for injury without proof of financial loss, cannot be extrapolated from the concept of the time value of money. Interest by its very nature is money.

Unless reversed by this Court, the Ninth Circuit's opinion creates a new paradigm where non-monetary interest in some form of property, not just water, can be awarded as additional compensation on a judgment under the guise of an interest, that is not measurable by the traditional metrics of a monetary interest award.

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ARGUMENT

I. RETROACTIVE APPLICATION OF THE SETTLEMENT ACT VIOLATES THE DOCTRINE OF SEPARATION OF POWERS AND IS UNCONSTITUTIONAL.

A. Introduction.

Acts of Congress that seek to resolve particular disputes or provide relief to special interests or

parties are not uncommon and may be a proper use of legislative powers. But what Congress sought to accomplish under Sec. 209(j)(1)-(3) of the Settlement Act is not. Congress, prompted by individual favoritism, brazenly attempted to retroactively create a claim for relief in favor of the United States and the Tribe, long barred by a final federal judicial water decree and by removing jurisdiction of a court to hear and determine the validity of the Secretary's prior regulations in any action brought under the Settlement Act. In doing so, Congress violated the doctrine of separation of powers in Article III of the United States Constitution.

Under the separation of powers doctrine, a court will construe as unconstitutional legislation enacted by Congress which prescribes a rule of decision in a case pending before the court in a manner that requires the court to decide the controversy in the Government's favor. *United States v. Klein*, 80 U.S. 128 (1872). Congress has the law-making power, but the power to construe laws in the course of their administration between citizens is vested in the courts. It is a fundamental principle of constitutional protection that the legislative power shall be separate from the judicial. To declare what the law is, or has been, is a judicial power. *Stockdale v. The Insurance Companies*, 87 U.S. 323, 333 (1874). In *Stockdale*, this Court held that legislation construing the intent of 1864 tax statutes was upheld because construction "was not in . . . essence an attempt to construe a statute differently from what the courts had construed it." *Id.*

B. Congress May Not Retroactively Dictate to the Judiciary What the Law Was at a Time Past That Must Be Applied by Courts to a Particular Case.

In Sec. 209(j)(3) Congress dictated the substantive legal standards for the Judiciary to apply in an action that the Settlement Act directed that the Secretary pursue to enforce the 1973 OCAP. The Settlement Act stacked the deck in favor of the Government in advance of an action being brought in recoupment.

In *Plaut v. Spendthrift Farm, Inc., et al.*, 514 U.S. 211 (1995) this Court addressed the constitutional vice in legislation that sought to retroactively command federal courts to reopen final judgments as being a violation of Article III.¹⁰ *Id.* at 219-225. The same holds true here. The violation of the separation of powers doctrine in Sec. 209(j)(1)-(3) exists because Congress by legislative action deprived federal courts

¹⁰ Article III establishes a “judicial department” with the “province and duty . . . to say what the law is” in particular cases and controversies. *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy – with an understanding, in short, that a judgment conclusively resolves the case because “a ‘judicial Power’ is one to render dispositive judgments.” Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905, 926 (1990). See *Plaut*, 514 U.S. at 218-219.

of the jurisdiction to apply final federal judgments and decrees, precluding their conclusive effect when they were announced.¹¹

The retroactive application of the Settlement Act violates the separation of powers doctrine precisely because it prescribes what the law was at an earlier time when the regulations had been enacted with no regard to subsequent judicial action. “When retroactive legislation requires its own application in a case already finally adjudicated, it does no more and no less than “reverse a determination once made, in a particular case . . . such an act exceeds the powers of Congress.” *Id.* 226-227.

The stated purposes of the Settlement Act in Section 202 may be laudatory, given the near century of litigation over water rights on the Truckee and Carson Rivers. The Settlement Act, however, went beyond purchasing peace in the valley when it retroactively reinstated the 1973 OCAP, directing the Secretary to adhere to *Tribe v. Morton*, which had been effectively overruled by the final *Alpine* Decree, and when it forbade courts from hearing any challenge to any prior actions of the Secretary under prior OCAPs.

¹¹ “[P]ower is the object of the separation-of-powers prohibition. The prohibition is violated when an individual final judgment is legislatively rescinded for even the very best of reasons, such as the legislature’s genuine conviction . . . that the judgment was wrong;” *Plaut* 524 U.S. at 228-229.

The purpose for imposing this legal straightjacket on courts was that no action for recoupment of water allegedly over diverted under the 1973 OCAP, could have been otherwise brought. The record in the District Court is clear that the amount diverted was less than permitted under the final *Alpine* Decree. Thus, no recoupment would have been permissible.

C. Congress' Mandate in Section 209(j)(2) of the Settlement Act Violated the Separation of Powers Doctrine When Congress Dictated the Law to be Applied in the Recoupment Action.

When the Settlement Act was enacted in 1990, the *Alpine* Decree had become final. It established that the appropriate amount of water that could be diverted into the Project to achieve beneficial use, was the same as under *Orr Ditch*, 3.5/4.5 afa and historically was never the 2.92 afa adopted in *Tribe v. Morton* and the 1973 OCAP.¹² The underlying premise in *Tribe v. Morton* had effectively been overruled by the final *Alpine* Decree. Any attempt by Congress to reestablish the 2.92 afa limitation is in direct violation of the final *Alpine* Decree. The Settlement Act was a thinly disguised attempt by Congress to nullify and allow a collateral attack on the *Alpine* Decree

¹² The United States by the time the *Alpine* case was being tried was advocating 3.0 afa and not the 2.92 afa. *Alpine Land and Reservoir Co.*, 503 F. Supp. at 885-887.

that had become final. That Congress could not constitutionally do.

The only purpose served by enacting special legislation requiring adherence to *Tribe v. Morton* was to avoid the federal court decisions that came seven years later, which rendered the 1973 OCAP unenforceable. These provisions of the Settlement Act are unconstitutional as a violation of Article III of the United States Constitution.

D. The Court of Appeals Erred In Concluding the Settlement Act Was Valid and Enforceable.

The Ninth Circuit upheld the District Court's enforcement of the 1973 OCAP under the Sec. 209(j)(3) direction to pursue an action in recoupment based upon the water duty of 2.92 afa set in *Tribe v. Morton*. It ignored the fact that this water duty was determined not to achieve beneficial use and was supplanted by the 3.5/4.5 afa of the final *Alpine Decree*.

These provisions of the Settlement Act are unconstitutional to the extent that Congress has retroactively reinstated regulations of the Secretary that had been voided by subsequent judicial judgments and decrees, and Congress' attempt to preclude a court from hearing challenges to the enforcement of these provisions and to disregard final judgments entered before enactment of the Settlement Act are likewise unconstitutional.

For all intents and purposes, the 1973 OCAP was no longer enforceable by 1990 when Congress enacted the Settlement Act, and Congress could not resurrect the 1973 OCAP as a basis for liability in a recoupment action for its violation after the Final *Alpine* Decree vacated the *Alpine* TRO. *United States v. United Mine Workers*, 330 U.S. 258, 295 (1947) (“(t)he right to remedial relief falls with an injunction which events prove was erroneously issued.”)

E. Congress’ Attempt to Proscribe the Judiciary’s Review of Secretary’s Actions Pursuant to the Settlement Act is Unconstitutional.

Section 209(j)(2) provides that “All actions taken heretofore by the Secretary under any operating criteria and procedures are hereby declared to be valid and shall not be subject to review in any judicial or administrative proceeding, . . . ”

The jurisdiction and powers of the judicial department pursuant to Article III were defined by this Court in *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177 (1803). The blatant attempt by Congress to prohibit access to the courts to seek review of the executive’s action pursuant to this Act, as demonstrated above, is unconstitutional. The Ninth Circuit’s failure to recognize this defect in the Settlement Act requires reversal of their decision.

II. THE NINTH CIRCUIT OPINION IF NOT REVERSED WILL SERVE AS A PRECEDENTIAL Foothold FOR FEDERAL COURTS TO FASHION AWARDS OF NON-MONETARY INTEREST IN EXCESS OF THEIR JURISDICTION.

A. A Federal Court is Without Jurisdiction to Make an Award of Post-judgment Non-monetary Interest in the Absence of Statutory Authority.

The Ninth Circuit should have reversed outright the District Court's award of two percent post-judgment interest on the recoupment judgment. Although the opinion acknowledged that no legal precedent supported an award of water interest, it would not foreclose the possibility of an equitable basis and remand was made to the District C

ourt with directions to determine if there is a factual basis for awarding more water than was originally taken so as to provide complete relief to the United States and the Tribe. On its face, this remand exceeded the jurisdiction of the District Court as no factual basis could justify a postjudgment interest award if not made pursuant to 28 U.S.C. § 1961(a).

All of the legal reasons to reverse the District Court's award of water interest were recognized by the Court of Appeal. There was a recognition that this Court's decision in *Pierce v. United States*, 255 U.S. 398, 406 (1921) requires that postjudgment awards in federal courts be based on statute and not common

law. There was a recognition that no legal precedent supported such an award. And, there was a recognition that the only applicable federal statute is 28 U.S.C. § 1961(a), which permits only interest on monetary judgments. There was not, however, any acknowledgement that a postjudgment interest award under § 1961(a) must be in money.

The Ninth Circuit has previously recognized that the “federal [r]ules govern the procedure in the United States district courts in all suits of a civil nature.” Fed. R. Civ. P. 1. *United States v. Orr Water Ditch Company, et al.*, 391 F.3d 1077, 1082 (9th Cir. 2004)¹³ This Court has held that in all civil cases, both law and equity, federal courts must apply the Federal Rules of Civil Procedure. *Willy v. Coastal Corp.*, 503 U.S. 131, 134 (1992). There could be no equitable basis for an award of non-monetary water interest as awarded by the District Court in the recoupment claim brought under the Settlement Act.

The Ninth Circuit relied upon dicta in this Court’s original jurisdiction decision of *Texas v. New Mexico*, 482 U.S. 124, 132, n.8 (1987), as precedent that there may be an equitable basis to uphold the District Court’s award of postjudgment interest in water depending on the factual record to be developed

¹³ “[W]hen a situation is covered by one of the Federal Rules, . . . the [district court must] apply the Federal Rule, and can refuse to do so only if . . . the Rule in question transgresses[] the terms of the [Rules] Enabling Act [or the Constitution].” *Hanna v. Plumer*, 380 U.S. 460, 471 (1965).

on remand. However, there is nothing in this footnote discussion that suggests this Court intended that this dicta was to be used as precedent for federal courts to depart from the Federal Rules or create a new form of non-monetary water interest.¹⁴ In *Texas v. New Mexico*, the Supreme Court sat in original jurisdiction in an action arising between states over violations of a state water compact and was not bound to follow the Federal Rules regarding awards of postjudgment interest, as must a federal court. No award of water interest was directed to be made, and the discussion of a possible award of “water interest” remained dictum.

Neither the Court of Appeals nor the District Court had jurisdiction to base a non-monetary postjudgment water interest award on *Texas v. New Mexico*, in disregard of existing Supreme Court authority requiring federal courts to derive jurisdiction for an award of postjudgment interest from the Federal Rules.

¹⁴ Footnote 8 reads in pertinent part: “If the Special Master recommends and we approve a judgment for money damages, Texas will be entitled to postjudgment interest until the judgment is paid. If damages are not awarded or a damages judgment is not paid, it would appear it would be necessary to make up the shortfall by delivering more water . . . and Texas would have a judgment against New Mexico for 340,100 acre-feet of water which, if not delivered . . . would entitle Texas . . . to some form of post-judgment interest for the period during which that judgment is not satisfied. We are unpersuaded however, that “water interest” rather than money, should be awarded unless and until it proves to be necessary.” (citation omitted).

The Ninth Circuit also directed the District Court to explain how it arrived at an interest rate of two percent, but did not provide the District Court with direction on how a monetary interest rate could apply to an in-kind award or point to a benchmark from which the award could be calculated. Interest rates are tied to the concept of the time value of money as means of quantifying lost use of money. Under 28 U.S.C. § 1961, the District Court must use a rate equal to the weekly average 1-year constant maturity Treasury yield on money judgments. It would be convenient but unsupportable to borrow that interest rate for a financial loss to calculate an in-kind award, and it would be based on conjecture, not precedent or statute.

B. Awards of Non-monetary Pre-judgment Interest Do Not Exist in the Federal Courts.

Pre-judgment interest is money awarded as compensation for the loss of its use. The Ninth Circuit in its desire to find a means to award the Tribe more water than the evidence established, created the concept of pre-judgment interest in water to compensate the Tribe for a loss that neither the United States nor the Tribe pled nor proved in the District Court.

There is no comparable analogue for in-kind pre-judgment interest, whether in water or otherwise, in any decision of this Court or in any federal court

precedent, even in equity. The general federal interest statute, 28 U.S.C. § 1961 is silent as to pre-judgment interest, which has led this Court to conclude that such awards rely on judge-made principles. *Milwaukee v. Cement Div., National Gypsum Co.*, 515 U.S. 189, 194 (1995).

The decision below disregarded long standing authority in the Ninth Circuit directing district courts to apply 28 U.S.C. § 1961 for fixing the rate for pre-judgment interest in cases where pre-judgment interest may be awarded, unless the trial judge finds, on substantial evidence, that the equities of the particular case require a different rate, but the award is always monetary. *Western Pac. Fisheries, Inc. v. SS President Grant*, 730 F.2d 1280, 1289 (9th Cir. 1984).

This Court has consistently recognized that a monetary award does not fully compensate for an injury unless it includes pre-judgment interest on the loss. See e.g. *Kansas v. Colorado*, 523 U.S. 1, 10 (2001) (money damages award in an interstate river compact); *Milwaukee*, 515 U.S. at 195 (1995) (pre-judgment interest award on monetary damages award in admiralty damages action); *West Virginia v. United States*, 479 U.S. 305, 310-311 (1987) (pre-judgment interest awarded in money damages award under contractual obligation owed to the United States); *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 655, n.10 (1983) (pre-judgment interest required on money damages award in patent infringement suits). In each of these decisions, this Court supported awards of pre-judgment interest to

fully compensate an injured party “for the loss of use of money due as damages from the time the claim accrues until judgment is entered.” *West Virginia*, 479 U.S. at 310-311 n.2.

The United States elected to recover water in a recoupment action brought under the Settlement Act. Section 209(j)(3) did not preclude a monetary damage claim but none was brought. A claim for monetary damage could have supported recovery of pre-judgment interest as did the damages claim in *Kansas v. Colorado*; a judgment to recoup water cannot.



CONCLUSION

The Ninth Circuit’s decision upholding the Settlement Act is flawed under separation of powers doctrine, an important constitutional ground, by directing a collateral attack on a final court decree and further, by precluding any Judicial review. The Ninth Circuit also exceeded its authority by endorsing a federal court in awarding non-monetary interest in the form of water. For the reasons discussed about, the petition for writ of certiorari should be granted

and the Ninth Circuit's opinion and judgment thereon reversed.

September 20, 2010

Respectfully submitted,

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