

Native American Rights Fund

The National Indian Law Library

ANNOUNCEMENTS

Volume 1, No. 6

November-December 1972

The War Of Ghosts, 1902-1972

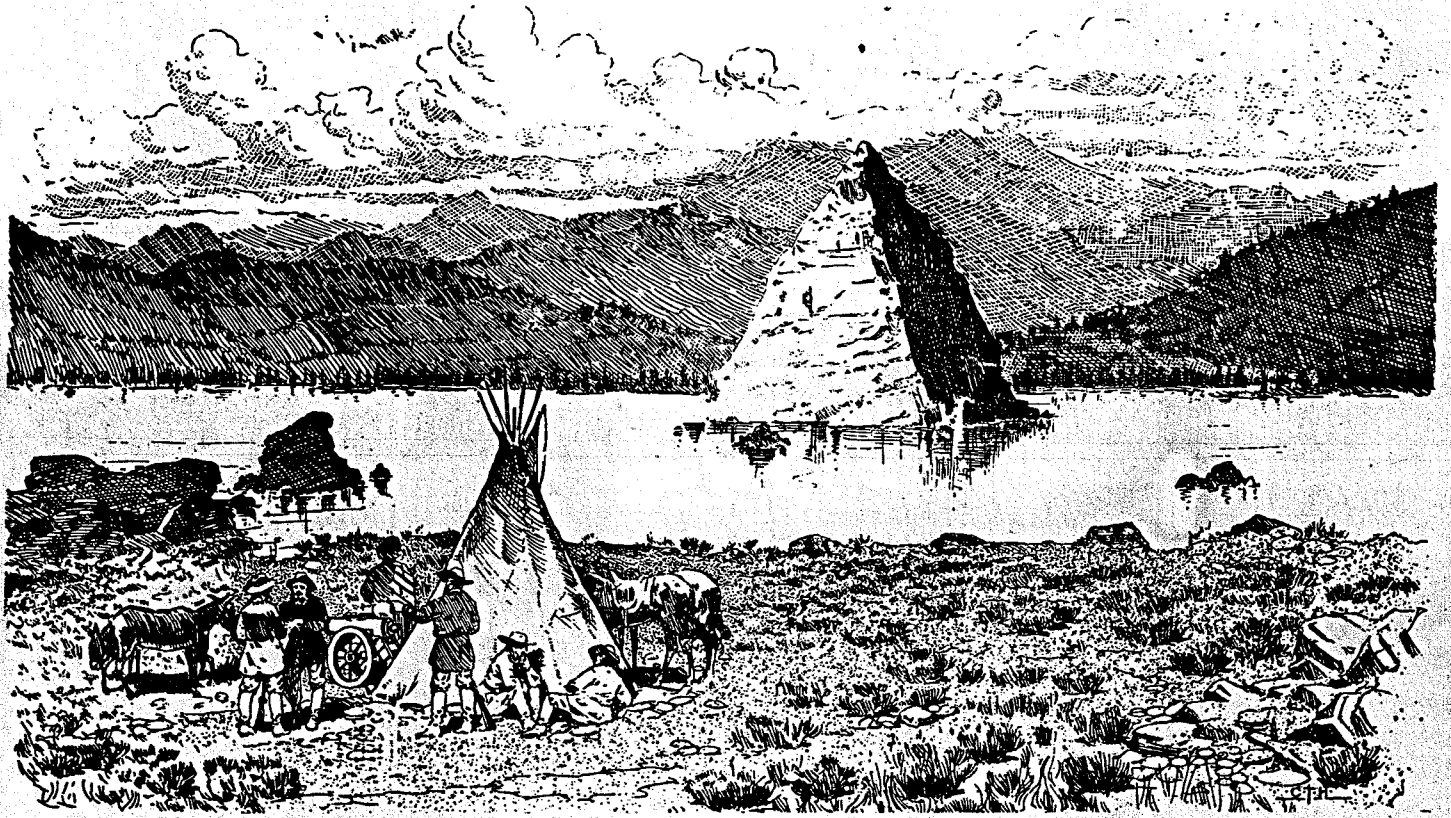
Wovoka was a Nevada Paiute. He was also an Indian messiah whose revelations gave new hope to tens of thousands of Indians from Nevada to South Dakota near the end of the 1800's.

Fearful whites called Wovoka's new religion the "Ghost Dance" because part of his doctrine held that dead Indians were on hand to help living Indians in their hour of extremity. His followers gathered in protective circles and danced the "Ghost Dance", dreaming of Wovoka's promised millenium when, he said, their abundance of land, game, peace of spirit, and dead brothers would be returned to them.

The American military viewed the Ghost Dance as a war dance and used everything they had to suppress it — including the Hotchkiss guns at the massacre of Wounded Knee. The backs and hearts of Wovoka and his followers were broken and the century came to an end without the Indian millenium and without the return of the Indian ghosts.

Wovoka grew up near and had many followers at the Pyramid Lake Paiute Indian Reservation. The Paiutes at Pyramid Lake maintained a rather remarkable survival rating for the 19th century. This is not to say that they were not mistreated, that their women were not outraged, nor that their men were able to escape the experience of massacre. But neither were they systematically exterminated as many of the Eastern tribes had been, nor were they subjected to the total cultural and physical genocide that occurred within Nevada and just across the border in California as the gold rush proceeded.

Although the Paiutes' land base was greatly reduced when they were confined to the Pyramid Lake Reservation in 1859, the fact that they were permitted to remain culturally intact where their ancestors had been for centuries, and to have in addition complete and exclusive access to the



John Fremont's Sketch of Pyramid Lake, 1844

beautiful desert lake (whose fishing, shores, and other wildlife provided such an abundant and complete livelihood) was as close to a non-millennium as any of Wovoka's Ghost Dancers ever got - whether they danced in Nevada, South Dakota or anywhere in between.

The partial millennium did not last a 1000 years; it did not even last a half of a century. It did not end in a biblical explosion and the nature of what began thereafter is even today still not totally comprehensible. To the Paiutes it must have seemed as if the Great White Spirit, in a terrifying and torturous trick, challenged Wovoka's spirits and called for a new dance. This one *was* to be a war dance and this time it was to be danced by white ghosts. In this "War of Ghosts" the enemies of the Pyramid Lake Paiutes have been so illusive, remote and indistinguishable, and finally so powerful, that the survival of the Paiutes during the 20th century is an astounding tribute to Indian courage and tenacity.

It would be difficult to imagine even Wovoka's Indian spirits prevailing through these last 70 years of treachery.

The Cui-ui Eaters

For centuries the Paiutes and other Indians spoke of Pyramid Lake as the "Lake of the Cui-ui Eaters" in reference to a unique species of fish, *Chasmistes cupis*, that isn't found anywhere else in the world. The Lake was not given its second name until January 1844 when Lieutenant John C. Fremont and his party of explorers moving Southward from Oregon came upon it unexpectedly.

Fremont named it for as he described it "a very remarkable rock in the lake ... it rose according to our estimate, six hundred feet above the water; and, from the point we viewed it, presented a pretty exact outline of the great pyramid of Cheops."

He described what they saw in his diary as a "sheet of green" breaking "upon our eyes like the ocean. The waves were curling in the breeze and their dark-green color showed it to be a body of deep water. For a long time we sat enjoying the view... It was set like a gem in the mountains."

Fremont did not know how prophetic his "gem-like" description was to become. Part of the reason the

Pyramid Lake Paiutes survived the catastrophes of the 1800's was the fact that the wealth they had was subtle. A desert lake, 30 miles long, surrounded by barren mountains, even with its abundant fishing appeared to be of little value to the new government or advancing white settlers.

The lack of demand for that particular kind of asset made the Pyramid Lake Paiutes the beneficiaries of a generosity by the white government which was unusual for the times. However, in the 1900's when the demand for water (and therefore for the particular kind of asset or "gem" that the Pyramid Lake Paiutes had been promised was to be theirs in perpetuity) increased, the generosity ended and the War of Ghosts began. Since then the lake's waters have been as ruthlessly robbed from the Pyramid Lake Paiutes as gold was from their brothers and neighbors a century before.

Pyramid Lake is a remnant of a vast inland sea which once covered nearly 9,000 square miles of western Nevada. As the climate became slightly warmer and drier, the inland sea slowly receded, leaving smaller lakes behind. Some of the people known as the

Northern Paiute Indians were living at one of these, Pyramid Lake, in 1844 when John Fremont arrived. Dwelling in caves and straw huts, the Indians lived on an abundant supply of Lahontan cutthroat trout and Cui-ui's, and supplemented their diet with piñon nuts and other gathered foods.

The Truckee River, which begins at

Lake Tahoe, (100 miles to the Southwest) is the only significant source of water for Pyramid Lake.

Although the lake has no outlet, it loses about 5 feet of water a year by evaporation, and the Paiutes have depended on the Truckee River for centuries to maintain the lake's level

and to provide a spawning ground for the lake's fishery. When the federal government set aside the lake in 1859 for the Paiutes as the main part of an otherwise barren reservation, it was with the intent that the lake and its fishery should provide them with their major — and traditional — means of existence.

A Declaration of War-The Reclamation Act

For the first several decades of the 1900's the Paiutes did not know that war had been declared against them on June 17, 1902. They had been living relatively securely on the Pyramid Lake Reservation, which surrounds the lake, for almost half a century. The fresh wounds that were being inflicted were at first as unfelt and invisible as the ghostly enemies who dealt them out. A trader, named Fred Crosby, who used to purchase Lahontan trout and Cui-ui fish from the Paiutes recalled that then:

“...the Indians lived in harmony with nature and one another, and all reaped the benefits of ever-present supply of the large, beautiful native fish ... There was never a hungry person on the reservation, they loved that kind of work - that way of making a living, and they had a dignity, which went away after the last run [of Lahontan trout] in 1937....”

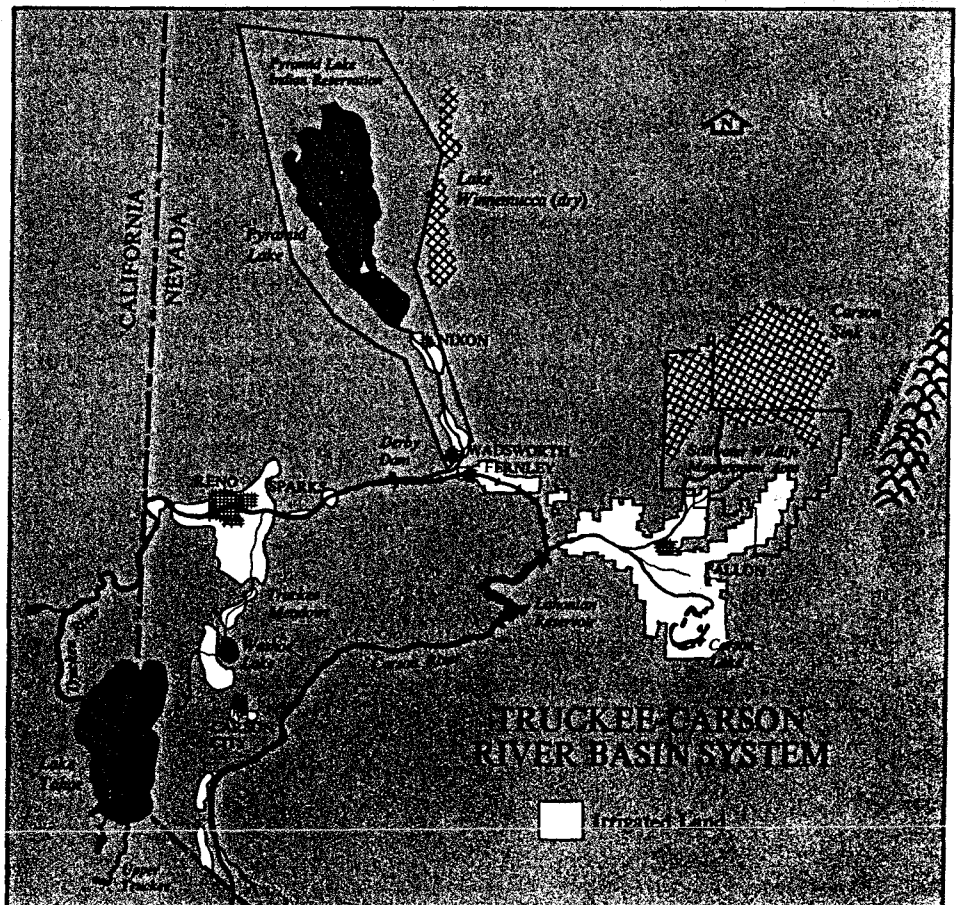
It was on June 17, 1902 that the United States Congress passed the Reclamation Act. No one envisioned it as a weapon or the declaration of war that it was. It seemed to be an innocuous kind of law—sell public lands and use the proceeds to reclaim and improve other, less desirable, lands for the benefit of the nation's small farmers in water-short areas. The law gave the Indians' trustee and guardian, the Secretary of the Interior, authority to initiate projects. Less than one year later the Secretary began the Newlands Irrigation Project which called for the diversion of the bulk of the Truckee River to irrigate arid non-Indian land south-east of the lake near Fallon, Nevada. (See map)

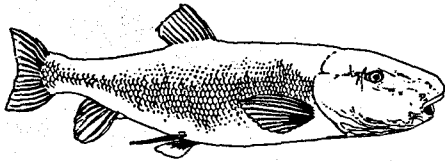
By 1905 the Bureau of Reclamation of the Department of Interior had built Derby Dam across the Truckee River. A large proportion of the waters which had been flowing into Pyramid Lake for centuries suddenly was diverted into a canal (the Truckee

Canal) and sent away to desert lands which were to be turned into farms for non-Indians. The dam site was less than 10 miles from the reservation. A greater irony was that the Department of Interior, which holds the trustee responsibilities in the name of the U. S. Government for all Indians, was the “general” in charge of the battle. A remote guardian—whose face changed and still changes with each new administration, and sometimes more often—implemented a project which spelled disaster for his Paiute wards. The guardian neither sought their approval or consent; he did not even bother to notify them of the event or its

implications on their lives. Thus the Paiutes' water was stolen from them like land, gold, culture and lives had been in another century. The only difference was that the subtlety surrounding the robbery was more in keeping with the current social mores of the “civilization” that surrounded the Paiutes.

Non-Indians had come to the Indians' continent. They had taken almost all of the Indians' lands, and now they had made a law which appeared harmless, but which according to the character of the man implementing it, permitted white men to use the money from the sale of the lands originally taken from Indians and to make what Indian land did remain, useless.





Lahontan Cutthroat Trout

The promises of protection and guardianship disappeared into the complexities of law as if they had been made by an apparition.

Derby Dam, described as a killer by the Paiutes, extinguished Pyramid Lake's sister, Lake Winnemucca, first. Lake Winnemucca had been filled with the overflow from Pyramid Lake, and her flocks of geese, ducks and other waterfowl moved on to other feeding grounds. Then Pyramid Lake began to die.

"Fish prepared and preserved in several different ways provided the main course of most families' daily food. With the normal flow of the river, prior to its diversion upstream, the banks and backwashes provided moisture to thick growths of willows, which gave shade to holes in the river where the trout and cui-ui fish gathered by the hundreds, making them easy to catch, both by the fishermen and wives who would then prepare the day's meal. The backwashes were a haven for ducks and mudhens who became so fat on the rich natural food that they were caught by hand and women would go home with a gunny sack full. 'Buck-berry' bushes abounded and families spent week-ends harvesting the berries that were eaten either fresh or made into jams and jellies that were kept on hand for year-around consumption. As the level of the river gradually lowered, all of the water fowl, berrybushes and easily-caught fish disappeared and only barren, unshaded banks were left exposed."

Jose A. Zuni,
Superintendent
Nevada Indian Agency, 1972

Because of the diversion of the Truckee River, the surface of Pyramid Lake dropped more than 80 feet, exposing a bleached bathtub ring of calcium carbonate deposits and extensive sand flats. The fish and wildlife resources upon which the Indians historically depended for their food disappeared. The Lahontan cutthroat trout fought furiously, but eventually were completely prevented from spawning up the Truckee River by a sand bar which formed at the mouth of the river as the lake level dropped, and they ultimately disappeared from the lake. The mountain sheep which

formerly roamed the mountains surrounding the Lake left, and the white pelicans nesting on Pyramid Lake's Anaho Island lost more than half of their population.

The doubling of the lake's salinity level in a fifty year period due to evaporation and loss of the Truckee waters made the survival of marine life difficult. This, combined with the blockage of upstream spawning of the trout, had a deadly impact on the lake's productivity as a fishery. Even the unique Cui-ui became threatened with extinction.

The First Cease-Fire

Some scientists believe that the Paiute Indians might once have had to contend with the American Mastodon, whose remains have been found in the lake's depression. If so, it may explain how the Paiutes trained and therefore how they have managed to maintain themselves in the War of Ghosts.

In 1859 the Commissioner of the General Land Office, had set aside the Pyramid Lake Reservation for the Paiutes who had always been there and for other Paiutes who came to join them, as white settlers encroached on the river bottoms and gold fields elsewhere in Nevada. The setting aside of the reservation gave the Paiutes priority rights as of 1859 to the waters needed to maintain the lake and its fishery.

As had been the case in almost every area of the country, in the next few years non-Indian settlers ignored the law and squatted on the Paiutes' lands near what is now the town of Wadsworth. The squatters occupied good farming lands alongside the Truckee River. The Paiutes, following the doctrine of their brother Wovoka, did not harm the settlers. Like Wovoka they acted out of the necessity of cheerful acceptance of the intrusion of non-Indians. Further, at the time the squatters arrived, Pyramid Lake was still full of fish and the Paiutes were not yet being forced to turn to ranching to survive.

Then for some reason in 1924, Congress, at the request of the Secretary of the Interior, said the squatters could acquire legal title and buy the Indian lands, and an arbitrary

price was set on them. Many of the squatters paid for the lands they were on, but five families defaulted after the first payment. By 1935 the Lahontan trout were struggling to make their last runs, and the Indians finally were realizing that their fishery was gone. The Paiutes, (who had never been asked about the proposed sale and therefore had never consented to it), asked gently that the Secretary retrieve the farming lands that had not been paid for, and in 1936 the government started eviction proceedings against the remaining squatters.

In 1937 Nevada's Senator Patrick A. McCarran introduced the first of his many bills into Congress relating to the squatters. He asked that the Secretary of Interior be granted permission to give these lands, or, at least to sell them for practically nothing to the squatters, who according to him weren't squatters at all, but authorized successors in interest. He contended that the Pyramid Lake Reservation had not been established until 1874. The Secretary and the BIA said 1859. The squatters had arrived sometime in the interval.

The squatters, buoyed by McCarran's type of reasoning, went to the United States District Court to stop the evictions and won. The Secretary appealed the decision to the Court of Appeals and won a reversal. The Paiutes were relieved when the Supreme Court refused to hear further appeal from the squatters. Although the Courts had taken a position in favor of the Paiutes - the unseen weapon this time was the fact that the government could not enforce its own decisions. It could not get a United States Marshal to serve the eviction papers. The marshals all relied on Senator McCarran for their appointments.

This battle in the War of Ghosts resulted finally in a temporary, unproductive cease fire. The Indians fenced the disputed lands into their reservation, and the ranchers cut off the water from the Truckee irrigation ditches which fed the land. Without water, the land began to dry out, and the Indians' cattle (introduced by the Bureau of Indian Affairs as a part of their subsistence when the fishery disappeared) continued to die on the range in winter for lack of the hay the deadlocked acres might have produced.

The Death Decree — Orr Ditch

By 1939 the Lahontan fishery was destroyed. The Secretary of Interior, through the Bureau of Indian Affairs, submitted a plan to Congress which called for monies to create a channel in the Truckee River which would permit the Lahontan trout to spawn upstream. Whatever hopes this action raised for the Paiutes were soon taken away in an ironic twist of fate. Some work on the channel had been completed when a sudden flood washed it all out. The work was never started again. World War II began and the funds that might have been given to the Indian's fish channel were absorbed by the machinery of yet another war on another continent.

Near Fallon, the Newlands Irrigation Project was also in trouble. The project as originally planned was intended to irrigate more than a million acres of desert with water from the Truckee and the Carson Rivers. (See map p. 3)

However the Bureau of Reclamation sponsors had grossly overestimated the amount of water available, and, further, they had failed to analyze chemically the soils intended to be irrigated. Only after the killer Derby Dam had been built did the Bureau of Reclamation find that the land was too salt-laden for profitable production. Instead of a million acres of farmland, less than 60,000 acres were put under cultivation.

In 1944, as claims to the use of Truckee River water increased (not only from the farmers in the Newlands Project, but also from growing towns like Reno and Sparks), a water rights decree was issued by the Federal District Court which is now known as the *Orr Ditch Decree*. This decree provided a legal cover to the destruction of Pyramid Lake. The United States represented the Newlands Project and the Paiutes in the litigation. The government asked for no water rights at all for Pyramid Lake and got none. Since the Bureau of Indian Affairs had decided to turn the Paiutes into farmers, the United States did ask for irrigation water for the Indians, and the court recognized their right to a meager amount under the provision that it could only be used for irrigation, stock or domestic purposes.

The weapons of the non-Indians in the War of Ghosts were becoming even more inanimate than the killer Derby Dam. A court decree, in an adjudication sought by their guardian, was telling them they could not have water for their lake, but they could have water for their farm lands. To make matters worse, the amount of water they could have was based on the amount of land they had under cultivation; and since they had only been able to irrigate a strip along the bottomlands, they could therefore only draw one-fifth of what the court had set aside for them. The Paiutes might have wished for the return of the Mastodon, or for something more comprehensible like the guns and bombs being used in the war on the next continent.

"A more pernicious system of religion [the Ghost Dance] could not have been offered to a people who stood on the threshold of civilization."

James McLaughlin
Indian Agent, 1890

In 1955 the Lake, like the Paiutes, was still struggling for its life. It was sustaining itself on water from springs and underground sources below Derby Dam and from leaks in the killer itself. The Lake was also benefiting from large amounts of flood water which the Newlands project could not use and which were allowed to flow into the lake. However, in the *Orr Ditch Decree* the courts had said the Paiutes were not entitled to the floodwater. In 1955 the Bureau of Reclamation and the Secretary of Interior introduced the Washoe Project. The Washoe Project included plans to build flood-control dams on the headwaters of the Truckee and Carson Rivers, and the proposed legislation for it specifically stated that none of the floodwaters would be made available to the Paiutes.

"You must not hurt anybody or do harm to anyone, you must not fight. Do right always..."

Wovoka, 1889

Wovoka had died in 1932. His grave stone in Schurz, Nevada listed him only as Jack Wilson, which was the Anglo name given to him by the non-

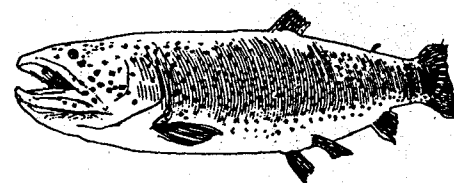
Indian farmers he went to work for after his father died. So in 1955 as the War of Ghosts proceeded, the results were finally too alarming and visible for the Pyramid Lake Paiutes not to lay aside a portion of Wovoka's doctrine. They moved cautiously, uncertain of where the resistance to their destruction should be applied. It turned out to be the Interior and Insular Affairs Committees of both the House and Senate, which were then considering the Washoe Project.

"It is hence not an exaggeration to state that there has been placed before you a plan by which the solemn protocol of our highest lawmakers is directed toward the deprivation of the property rights of an inconsequential few... The tribe doesn't wish anybody ill. The tribe wants water."

Testimony of Mr. James MacInnis, counsel to the Paiute Tribe of Pyramid Lake before the Committee of Interior and Insular Affairs, H.R.

6028, Reno, Nevada
November 12, 1955

One of the arguments the tribe used was to tell the government's representatives that a lot of white persons would benefit if just a little more water were allowed to flow into Pyramid Lake. They did so by reminding the lawmakers that more than 1000 persons per month used to go to the lake for the pleasure of fishing and that they might once again be able to do so if sufficient water were available to restore the fishery. It is doubtful that Wovoka's peaceful slumber in Schurz was disturbed by the "aggressive" stance of the Paiutes.



Pyramid Lake's Unique Cut-throat

Following the Paiutes' testimony, both committees responded with reports that noted officially for the first time that the crisis at Pyramid Lake was due largely to acts of the federal government. When the Washoe Project bill was finally passed in 1956, it directed that facilities be provided to increase water releases to Pyramid Lake and to restore its fishery.

The Allies and The Second Cease-fire.

In the War of Ghosts, as in all wars, each side had its allies. The federal government's allies were the Nevada and California state governments. While the Paiutes were moving up their first lines of defense against the Washoe Project, the states of Nevada and California had begun working on an Interstate Compact to divide between them all the water of the Truckee and Carson Rivers. Since the Truckee River flows through California before entering Nevada, the Paiutes were at odds with California whose legislature had advocated less than a 100 years earlier that all of the Indians in their gold-rich state be transported out.

The Paiutes, thinking that they had won a partial victory because their appeals had changed the final legislative version of the Washoe Project, soon found that whatever encouragement and strength they gained from the success, was sucked away in the years it took to obtain appropriations and to move the other complex mechanisms of the federal government toward implementation of the project. It still has not been implemented. As if the frustration resulting from the time lag, between hearing that the little they had asked

for had been given and seeing it become a reality, was not enough; the victory turned out to have been just one more apparition. In 1963 when the Bureau of Reclamation finally unveiled the working design of the Washoe Project, the Paiutes' water was not there.

The angry Paiutes advanced quickly and the then Secretary of the Interior, Stewart Udall, responded with yet another undistinguishable weapon, the "task force". Secretary Udall appointed its members and instructed them to examine the claims of everyone. The product of a "task force battle" was a "report". This task force report, released in 1964 in spite of protests by the Paiutes and an increasing number of outside supporters, only produced some rather confusing modifications in the Washoe plan and suggestions that the Newlands Project could use water more economically. In particular the report failed to recommend that a specific grant of water be made to the lake. Instead it said only that the government should use "every effort to maintain the greatest practicable flow of water into Pyramid Lake" — the kind of recommendation the Paiutes should have recognized could and would become instantly in-

visible. The report also did not recommend that the Secretary go to court to seek an adjudication of the Indians' rights.

The Paiutes logically might have been apprehensive had the report made such a recommendation, especially if they recalled the government's performance in court on their behalf in the past. In the end the Paiutes accepted Udall's promise that the Interior Department could and would salvage the excess water, eliminate the waste of water and improve regulations and controls at the Newlands Project. Believing that the "saved" water would be allowed to flow into their Lake, the Paiutes retreated from the Washoe Project battle under the conditions of a cease-fire.

They soon realized that the Secretary's promise was just another ghost. Some water was "saved", but the Interior Department refused to assert that it had the right to deliver it to Pyramid Lake and the Paiutes saw it disappear into the lands of non-Indians.

By 1968 the Paiutes' defenses were spread thin. They had been on guard for so long that their resources were badly depleted. It is hard to imagine how they must have felt when the proposed Inter-State Compact, which California, Nevada and the omnipresent representatives of federal government had been working on for thirteen years, was revealed. It limited the Paiutes to the water allotted under the *Orr Ditch Decree* in 1944 and, if that was not enough, it precluded the government and the Paiutes from ever going to court to obtain any additional water.

The Inter-State Compact weapon was even too offensive for the Interior Department. The Department objected, in part, because it was not willing to turn over the fate of the water rights it had in Nevada (and which previously it had used so freely) to the states. Since the Compact had to be ratified by Congress to be effective, the Interior Department threatened that Congress would never approve it as it had been proposed. The Nevada Legislature, ignoring the threat, gave its approval to the Compact.

The Ghost Dance-Rigid



A Proposal For Overkill

War makes strange bed fellows. The Paiutes suddenly found an unexpected ally in the form of the California State Assembly Committee on Natural Resources and Conservation. After reviewing the Compact, this committee refused to approve it unless it was rewritten to provide for the preservation of Pyramid Lake. Because Nevada remained obstinate and refused to compromise on this portion of the Compact, one of the most improbable sequences of the War of Ghosts took place. In the summer of 1969, in the middle of Lake Tahoe still another Secretary of the Interior, Walter J. Hickel, met with the Governors of California and Nevada in the cabin cruiser of Reno gambler William Harrah.

"It was the same logic used by the Army to destroy a Vietnamese village- 'we had to destroy the village to save it.' It naturally followed that the only way to save Pyramid Lake was to drain it."

Vine Deloria, Jr.
Standing Rock Sioux, 1970

After 90 minutes the three gentlemen agreed that engineers should assist the killer Derby Dam by draining Pyramid Lake down another 152 feet, which, they said, would put it at a level at which it would be "stable." What remained would have been a stable salt

The Ghost Dance - Inspiration



bed. Why didn't they meet on a cruiser in the middle of Pyramid Lake? Had they done so, perhaps Secretary Hickel and Governors Reagan and Laxalt might have been more rational. Although in a War of Ghosts it may be deemed logical simply to make the object of the conflict disappear! This battle plan was so outrageous that the three generals were forced to bring out a weapon more familiar to the Paiutes -

The Logistics Of War

To fight a war one must have many kinds of resources. It is evident the Paiutes had very impressive human resources. Their perseverance and endurance speak for themselves. Economically, it was a different story. The War of Ghosts had taken its toll. In 1970 almost 70 per cent of the Pyramid Lake Paiutes were unemployed and more than 50 per cent of their families had incomes under \$2,000 per year. The tribe had been attempting to use legal representation as a weapon since the beginning of the Washoe Project battle, but funds to pay attorney fees were scarce.

In 1970 the Paiutes had given up hope that the Secretary of Interior would ever go to court to seek the return of the water which he had taken away from their lake.

another task force. The Indians chose not to send a representative to the "negotiating table", especially since Nevada's Governor claimed he had the right to tell them whom they should send. They felt the task force was a trap and that the inevitable result, a "report", was destined to be written against them since the task force was dominated by their now recognizable enemy, the Bureau of Reclamation.

Which Secretary? What Legislation? What Survey? Which Year? What Senator? Which Patent? How many acre feet per year? What Promise? Who Comprehends? Which enemy? What battle? Where is the War?

The tribe had struggled with its meager resources to keep itself in lawyers. It hadn't been easy. The problems were so complex and diverse that many attorneys were not capable of representing them, or were not interested, or found that they would have a conflict of interest if they attempted the representation. In addition the enemy had the psychological advantage of being the Paiutes' guardian at times and their Judas at others.

Once again, however, the Paiutes found some unexpected allies in California. California Indians had their own OEO legal services program. It had a reputation for being one of the best in the country, so when the Paiutes' dedicated local Nevada counsel heard that California Indian Legal Services attorneys were involved in extensive water rights litigation on behalf of some of Southern California Indian bands, he sought information and advice for the Paiutes. The contact was made, and a new battle in the War of Ghosts began. This time the Paiutes were on the offensive - they drew up the battle plan.

The Pyramid Lake Paiutes had learned the hard way that when Indians litigate, a great deal is at stake because of the *Orr Ditch* adjudication, which had amounted to the legalized destruction of their lake. In addition it was difficult for them to not recall that even

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Pyramid Lake Paiute Tribe of Indians,
Plaintiff,

v.

Rogers C. B. Morton, Secretary of the Interior,
Defendant.

Civil Action No. 2506-70

MEMORANDUM OPINION

This is an action by a recognized Indian tribe challenging a regulation issued by the Secretary of the Interior. The matter came before the Court for trial without a jury following an extended period of pretrial activity during which issues were narrowed and efforts to resolve the controversy by negotiation failed. Claiming that the regulation should be set aside as arbitrary, capricious, and an abuse of the Secretary's authority, the Tribe invokes applicable provisions of the Administrative Procedure Act 5 U.S.C. S 706. A declaration of rights and affirmative injunctive relief is also sought on the ground the Secretary has unlawfully withheld and unreasonably delayed required actions, 5 U.S.C. S 706 (1).

The Court's jurisdiction to review the challenged regulation under the Administrative Procedure Act is not contested. The Tribe is an aggrieved party directly affected by the regulation and is proceeding in good faith. The controversy is ripe and immediate. All administrative remedies have been exhausted and the Secretary's action is final.

The regulation was signed by the Secretary on September 14, 1972, appears in the *Federal Register*, 37 Fed. Reg. 19848, and became effective November 1, 1972. It is designed to implement pre-existing general regulations¹ by establishing the basis on which water will be provided during the succeeding twelve months to the Truckee-Carson Irrigation District, which is located in Churchill County, Nevada, some 50 miles east of Reno. The Tribe contends that the regulation delivers more water to the District than required by applicable court decrees and statutes, and improperly diverts water that otherwise would flow into nearby Pyramid Lake, located on the Tribe's reservation.

This 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. Following directives of the Department of Interior in 1859, which were confirmed by Executive Order signed by President Grant in 1874, the Lake, together with land surrounding the Lake and the immediate valley of the Truckee River which feeds into the Lake, have been reserved for the Tribe and set aside from the public domain. The area has been consistently recognized as the Tribe's aboriginal home. See *United States v. Sturgeon* 27 F. Cas. 1357 (No. 16,413) (D. Nev. 1879), *aff'd*, 27 F. Cas. 1358; *United States v. Walker River Irr. Dist.*, 104 F.2d 334 (9th Cir. 1939).

Recently, the United States, by original peti-

tion in the Supreme Court of the United States, filed September, 1972, claims the right to use of sufficient water of the Truckee River for the benefit of the Tribe to fulfill the purposes for which the Indian Reservation was created, "including the maintenance and preservation of Pyramid Lake and the maintenance of the lower reaches of the Truckee as a natural spawning ground for fish and other purposes beneficial to and satisfying the needs" of the Tribe. *United States v. States of Nevada and California*, (No. 59 Original, October Term 1972) complaint at 14.

Appended to this Memorandum Opinion is a map which shows the available sources of water supply in relationship to Pyramid Lake and the District. The area involved is a water shortage area, characterized by seasonal and yearly variations in available supply. Beneficial irrigation for farming and other uses within the District are accommodated through some 600 miles of main water ditches and drains and the water is ultimately parcelled out through 1,500 delivery points. The water fed into this system comes from the Carson River following storage in Lahontan Reservoir and by diversion of water from the Truckee River at Derby Dam where it passes through the Truckee Canal to be stored in the Lahontan Reservoir for subsequent or simultaneous release. The Secretary entered into a contract with the District in 1926 and this contract is still in effect (Def. Ex. 2).

As the map so clearly shows, any water diverted from the Truckee at Derby Dam for the District is thereby prevented an substantial measure from flowing further north into Pyramid Lake. The Lake is a unique natural resource of almost incomparable beauty. It has no outflow, and as a desert lake depends largely on Truckee River inflow to make up for evaporation and other losses. It is approximately five miles wide and twenty-five miles long and now has a maximum depth of 335 feet. Although the Lake has risen a few feet in recent years, it has dropped more than 70 feet since 1906. A flow of 185,000 acre feet of water per year from the Truckee River into the Lake is required merely to maintain its present level. The decreased level and inflow have had the effect of making fish native to the Lake endangered protected species, and have unsettled the erosion and salinity balance of the Lake to a point where the continued utility of the Lake as a useful body of water is at hazard.²

The regulation under attack is the most recent of a series of regulations issued from year to year

² Native fish which naturally spawn in the Truckee can no longer do this and the Lake must be stocked at least until 1974 when construction to permit the fish again to pass into the river for spawning is to be completed.

since 1967 pursuant to general policies established by the Secretary (see 43 C.F.R. Part 418 (1972) and Def. Ex. 3). The Tribe contends that the Secretary's action is an arbitrary abuse of discretion in that the Secretary has ignored his own guidelines and failed to fulfill his trust responsibilities to the Tribe by illegally and unnecessarily diverting water from Pyramid Lake.

The focus of the inquiry has been to determine whether the 378,000 acre feet of water which the regulation contemplates will be diverted from the Truckee River at Derby Dam may be justified on a national basis. This determination must be made in the light of three major factors which necessarily control the Secretary's action: namely, the Secretary's contract with the District, certain applicable court decrees, and his trust responsibilities to the Tribe. The Secretary and the Tribe are in substantial agreement that these are the factors to be weighed. The issue, therefore, comes down to whether or not the Secretary's resolution of conflicting demands created by these factors was effectuated arbitrarily rather than in the sound exercise of discretion.

The Court has carefully reviewed the processes by which the Secretary arrived at the disputed regulation. The Secretary had before him various written recommendations from interested agencies and experts, including responsible expert studies presented by the Tribe. There was a wide variation in these recommendations suggesting diversion of water in varying amounts ranging from 287,000 acre feet to 396,000 acre feet. All purported to be made on the basis of guidelines and policies previously set by the Secretary. After reviewing these written submissions, the Secretary conferred with the Assistant Secretary for Reclamation and the Assistant Secretary for Indian Affairs and made what one of these Assistants characterized as a "judgment call." It is affirmatively stated that the Secretary did not accept the recommendation of any particular person or group. The record, therefore, is completely devoid of any explanation or indication of the factors or computations which he took into account in arriving at the diversion figure of 378,000 acre feet. The grounds of his action are not disclosed and there is no way of knowing the basis on which his conclusions rested. Since the record is as complete on this score as it ever can be, the Government has failed to meet its burden of establishing that this decision was anything but arbitrary. See *Citizens*

² Commissioner of Indian Affairs, Bureau of Reclamation, Geological Survey, the Fish and Wildlife Bureau, Clyde-Criddle-Woodward, Inc., and Woodward-Clevenger & Associates, Inc., among others.

¹ 43 C.F.R. S 418 (1972).

to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); *Environmental Defense Fund, Inc. v. Ruckelshaus*, 142 U.S. App. D.C. 74, 439 F.2d 584 (1971); *DeVito v. Shultz* 300 F. Supp. 381 (D.D.C. 1969).

Furthermore, while the Secretary's good faith is not in question, his approach to the difficult problem confronting him misconceived the legal requirements that should have governed his action. A "judgment call" was simply not legally permissible. The Secretary's duty was not to determine a basis for allocating water between the District and the Tribe in a manner that hopefully everyone could live with for the year ahead. This suit is pending and the Tribe has asserted well-founded rights. The burden rested on the Secretary to justify any diversion of water from the Tribe with precision. It was not his function to attempt an accommodation.

In order to fulfill his fiduciary duty, the Secretary must insure, to the extent of his power, that all water not obligated by court decree or contract with the District goes to Pyramid Lake.⁴ The United States, acting through the Secretary of Interior, "has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); *Navajo Tribe of Indians v. United States*, 364 F.2d 320 (Ct. Cl. 1966).

The vast body of case law which recognizes this trustee obligation is amply complemented by the detailed statutory scheme for Indian affairs set forth in Title 25 of the United States Code. Undertakings with the Indians are to be liberally construed to the benefit of the Indians, and the duty of the Secretary to do so is particularly apparent. It is not enough to assert the water and fishing rights of the Tribe by filing a suit in the United States Supreme Court.

The Secretary was obliged to formulate a closely developed regulation that would preserve water for the Tribe. He was further obliged to assert his statutory and contractual authority to the fullest extent possible to accomplish this result. Difficult as this process might be, and troublesome as the repercussions of his actions might be, the Secretary was required to resolve the conflicting claims in a precise manner that would indicate the weight given each interest before him. Possible difficulties ahead could not simply be blunted by a "judgment call" calculated to placate temporarily conflicting claims to precious water. The Secretary's action is therefore doubly defective and irrational because it fails to demonstrate an adequate recognition of his fiduciary duty to the Tribe. This also is an abuse of discretion and not in accordance with law.

The record before the Court clearly establishes the underlying defects and arbitrary nature of the challenged regulation. The Secretary erred in two significant respects. First, he disregarded interrelated court decrees, and, second, he failed to exercise his authority to prevent unnecessary waste within the District. The effect of this is to deprive the Tribe of water without legal justification.

⁴ The Secretary's own regulations recognize his trustee obligations. 43 C.F.R. SS 418.1(b) and 418.3(a) (1972).

⁵ *E.g.*, 25 U.S.C. SS 174 and 476; see 43 U.S.C. S 614c.

Two decrees of the United States District Court for the District of Nevada, known as the Orr Water Ditch and Alpine Decrees, govern the amounts and conditions under which water shall be available for beneficial uses in the District. Maximums of roughly 4.5 acre feet and 2.92 acre feet measured at farm headgates are provided in the Orr and Alpine decrees, respectively. Approximately 60-75 percent of the water needed to serve the District's 60,000 acres of land is covered by the Alpine Decree, and the remaining needed water is covered by the Orr decree. The parties and this Court of course recognize that neither the Secretary nor this Court can adopt or require a regulation that would infringe upon these decrees, and their interpretation and application is, in a number of respects, uncertain. Nonetheless, regardless of ambiguities and inconsistencies, as the Secretary himself recognized in his own guidelines and regulations, 43 C.F.R. S 418.3 (1972), he was required to take both decrees into account. The evidence demonstrates conclusively that the Secretary formulated the regulation by totally ignoring the Alpine Decree and must have reached his calculations by relying solely on larger quantities provided by the Orr Water Ditch Decree.

In addition, the evidence conclusively showed that the regulation is wholly inadequate to prevent waste within the District, causing substantial and wholly unnecessary diversion of water from the Truckee River to the obvious detriment of the Tribe. It was amply demonstrated that water could be conserved for Pyramid Lake without offending existing decrees or contractual rights of the District through better management which would prevent unnecessary waste. The amount of exposed water can be reduced to limit evaporation. Better management will lessen seepage and overflow. Users can be assessed for water taken. Techniques exist for measuring water more effectively at headgates. Land not entitled to water under the decrees and contract with the District can be prevented from taking the water, and by the mere employment of a few individuals the system can be so policed that it will function on a basis consistent with modern water control practices. All of this can be accomplished in spite of the fact that the District has an antiquated system. Failure to take appropriate steps under the circumstances by the regulation constitutes agency action unlawfully withheld and unreasonably delayed when viewed in the light of the Secretary's trust responsibilities to the Tribe, 5 U.S.C. S 706(1).

Under the contract between the Secretary and the District the Secretary has the right to require the District to conduct its affairs in a non-wasteful manner but no such action was taken or is contemplated in the regulation. The operations of the District are not tightly controlled and water is taken practically on demand without necessary safeguards to prevent improper and wasteful use. This failure to act must be given particular emphasis since the proof showed that the Secretary has not in the past enforced his prior yearly regulations affecting the

⁶ The regulation, even within its four corners, showed a disregard for close, careful management and control. The month-to-month operating criteria set out in the regulation were prepared to accommodate a diversion of 406,000 acre feet and were not modified or adjusted when the lesser diversion of 378,000 acre feet were provided. This alone could save some 30,000 acre feet for the Tribe.

District and has acquiesced in excessive water deliveries to the farms. Moreover, the absence of effective enforcement provisions in the challenged regulation must be considered in the light of a formal statement by the District that will disregard the new regulation and will divert water as it chooses by giving instructions to own water masters (Def. Ex. 9).

The regulation is arbitrary, capricious, abuse of discretion and not in accordance with law. A different basis for determining the amount of water to be diverted at Derby Dam is required. There is need to consider appropriate relief. Obviously some standard for regulating water flow to the District must be in effect. In approaching winter months there will be a strain than will arise commencing in early spring. It therefore appears appropriate to permit regulation to remain in effect until February 1973, and to direct appropriate action in interim which will place the management and distribution of the water under more appropriate control before serious seasonal demands become apparent.

Accordingly, the Court directs that on or before January 1, 1973, the Secretary shall submit to this Court a proposed amended regulation which is in conformity with the findings of fact and conclusions of law set forth in the Memorandum Opinion. The amendment shall provide among other things, an effective means to measure water use, to minimize unnecessary waste, to end delivery of water within the District to land not entitled under the decrees, and to assure compliance by the District. Proper water shall be given to both the Orr Water Ditch and Alpine Decrees and the amount of water diverted shall be wholly consistent with the Secretary's fiduciary duty to the Tribe.

In this connection, the Court has noted the manner in which the Secretary chooses to manage and commit water stored in Stampede Reservoir will have an effect on the situation. Inasmuch as the contract between the Secretary and the Department of Agriculture relating to Stampede bears on this aspect of the problem, the Court notes that the contract is ambiguous in its terms and was made without consultation with the Tribe. This contract cannot be imposed as an obstacle to the Lake receiving maximum benefit from the upper Truckee into Stampede which may be available under reasonable and proper interpretation of the decrees. The Secretary's trust obligations to the Tribe are paramount in this respect.

In the event the amended regulation fails to assure at least the delivery of 385,000 acre feet of water to Pyramid Lake, the Secretary accompany the regulation with a full, detailed statement of the reasons why this has not been achieved, together with a specific plan indicating what further action will be taken consistent with the Orr Water Ditch and Alpine Decrees to accomplish this result in the immediate future. New construction programs to be financed with Government funds not appropriated, effective four or five years from now will not suffice.

Counsel shall submit an appropriate regulation consistent with these declarations, findings of fact and conclusions of law within ten days.

Gerhard A.
UNITED STATES DISTRICT JUDGE

November 8, 1972.



Ghost Dance Protective Circle

Continued from page 7

a favorable court order might be circumvented, as had been the case with the decision against the evicted squatters.

The tribe had spent thousands of dollars on legal assistance, but their attorneys had always become trapped in the quagmire of trying to figure out how to obtain more water for the tribe within an economically feasible adjudication. It had been concluded that the tribe probably could not go to court to sue for their first priority rights without suing every water user along the Truckee River. This type of suit would have involved thousands of water users and it was estimated that it would cost more than \$50,000 just to find out who was using what amount of water. In the *Orr Ditch* adjudication the Secretary had done just this. However, he had sued for the primary purpose of obtaining water for the Newlands Project and had rather incidentally put in a request for a small amount of irrigation water for the

Paiutes. The suit was originally filed in 1913; its complexity was so great that the final decree did not come until 1944, some 31 years later. A similar case, *U.S. v. Alpine Land and Reservoir Co.*, brought by the Secretary in 1925 (in which, by adjudicating the water rights on the Carson River, he was also attempting to obtain water for the Newlands Project) had only resulted in a temporary restraining order by 1950, twenty-five years later. That case is still pending.

The possibilities must have seemed so bleak to the Paiutes that it is to their great credit that they continued to work through the legal process. Their contact in January, 1970 with California Indian Legal Services (CILS) offered a hope more consistent with the realities facing the tribe. In addition to knowledge of Indian and water law, California Indian Legal Services was being asked by the Ford Foundation to develop a proposal for a planning grant to ascertain whether or not there was a

need for a broad national attack on Indian legal problems. This effort ultimately became Native American Rights Fund.

As the tribe worked with CILS attorney, Robert S. Pelcyger and their local counsel to develop a new litigation strategy, they also joined efforts to look for the monies necessary to cover the cost of the expert hydrologists and other witnesses they would need.

Ford Foundation Matériel

In June, 1970, the Ford Foundation announced a \$155,000 planning grant to California Indian Legal Services. The grant was for the development of a new nationwide program to be known as the Native American Rights Fund. The funding proposal had outlined the overwhelming needs of the Pyramid Lake Paiutes and for the first time the monies for their defense would be made available to them.

The Pyramid Lake Tribe Of Paiute Indians

V.

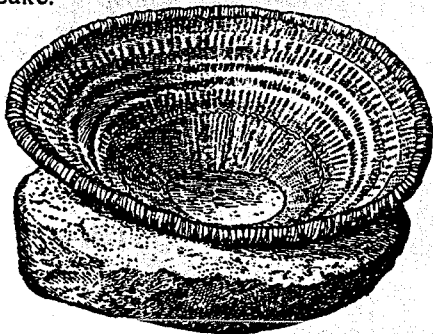
The Secretary Of Interior, Rogers C. B. Morton, et al.

The tribe's attorney and Pelcyger, who became a part of the staff of the Native American Rights Fund, recognized how critical time was to the tribe's and the lake's chances for survival, and took action that they felt would gain the most water in the shortest period of time by filing a suit in August, 1970 in the U.S. District Court for the District of Columbia. The suit was to be against the Secretary of the Interior invoking provisions of the Administrative Procedure Act, as well as the Secretary's trust obligations to the tribe.

For the most part, whatever amount of water made its way down the river past Derby Dam, the tribe could count upon to reach their reservation. Like the Newlands Project, the other primary water users were above Derby Dam.

In reviewing carefully the *Alpine* and *Orr Ditch* cases brought by the government, the tribe's attorneys noted that there was a discrepancy between what the courts had determined was the amount of water needed per acre to irrigate lands in the Newlands Project and the amount that was actually being delivered. There had been so much excess water delivered over the years that a marshland had built up adjacent to the Newlands Project, out of which had been created the Stillwater Wildlife Refuge.

Water that belonged to Pyramid Lake had been used to create an accidental refuge for the waterfowl that had had to flee the dead Lake Winnemucca and the dying Pyramid Lake.



The Reclamation Act of 1902 had given the Secretary the responsibility

for managing effectively the resources, (including water) of any project he undertook under the act. Between the time the Newlands Project began in 1903 and 1967, there were no controls whatsoever placed on the amount of water going to the Newlands Project. While measuring how much water is needed for an acre of farmland is a complicated process which has to take into account the fact that large amounts of water are lost in delivery and transmission, the Secretary's actions (or lack of action) were not those of a trustee for Indian water. Indeed in 1967, when the Department of Interior finally announced that it was going to promulgate regulations governing the amount of water to be diverted to the Newlands Project, it was motivated to do so because the Bureau of Reclamation was clamoring for more water in conjunction with the Washoe Project, rather than for restoring to the Paiutes what was rightfully theirs.

Although the portion of the Washoe Project, which was to have benefited from the "saved" water resulting from the controls asked for by the Secretary, was never built, the "saved" water also never appeared. It was yet another apparition in the War of Ghosts. It was soon discovered that the amount of water the Newlands Project had been "limited" to under the new regulations was essentially what it had been getting all along. Between 1967 and 1970, despite the fact that there were no new needs within the Washoe Project, the Secretary continued to allocate the same amount of water to Newlands.

As the litigation between the tribe and the Secretary proceeded, U. S. District Judge Gerhard A. Gesell tried without success to assist the two parties in bringing about a negotiated settlement. Judge Gesell urged the Secretary to review carefully all of the demands on the Truckee's waters and, before promulgating regulations for 1972, to consult with both the tribe and the court. In accordance with this, the government attorney wrote to the tribe's attorney and assured him that the Paiutes would be consulted before the new regulations were promulgated.

In April, 1972, the Secretary without notice, published new regulations making the situation worse than before. Instead of limiting the Newland Project as he had since 1967 to a firm figure (however excessive might have been), he said only the measures would be taken to insure that the water would be put to better use and listed no firm diversion ceiling. In effect, the Secretary was fighting with yet another unknown and invisible weapon. A few days later Native American Rights Fund attorneys went to court and obtained an order from Judge Gesell which discarded the new "non" regulations and re-imposed the previous ceiling. At the same time Judge Gesell decided that the case would have to go to trial.

I find it unfortunate that we have to proceed this way, but I don't know any other way to proceed, and I feel that I have been bamboozled. I suppose that is the politest word.

U.S. District Judge Gerhard A. Gesell, Addressing the Secretary of Interior's attorney, April 14, 1972

"Bamboozled" — even the Court appeared to be experiencing the peculiarities of the War of Ghosts. Judge Gesell had heard just before expressed this sentiment one of the Secretary's last attempts to avoid the litigation brought against him by the tribe. As the hearing opened the Secretary's attorney announced that had just been handed a copy of a letter from the Solicitor for the Department of Interior advising him that the Secretary of the Interior had decided that a law suit should be filed on behalf of the tribe, and that the Justice Department was "accordingly requested to bring appropriate action soon as [they could] get the papers ready for the recognition and protection of a water right for the maintenance of Pyramid Lake." It had taken the Department of the Interior 70 years to decide this, but Judge Gesell seemed determined not to let the matter off any longer. Under questioning the Secretary's attorney admitted that if new litigation was

filed by the Secretary to obtain water specifically for the maintenance of the lake it might take 10 to 15 years before a final decree were issued. The question raised by the Paiutes before Judge Gesell related only to the water the Secretary already controlled, and specifically that water which was being wasted by excessive irrigation and poor management in the Newlands Project. It was the tribe's assertion, in fact, that by instituting only the most basic kinds of water management and control systems on the Newlands Project that the resulting water savings would be almost enough to maintain the lake at its current level.

"I have before me a trustee, who has a constitutional and statutory duty to do something about [the maintenance of the lake], regardless of the wishes of the people that get irrigation water. So, why can I not direct the trustee to meet his trustee obligations?"

"I do believe from what I know about the case now that there may be some authority in this Court to take steps to preserve this lake without awaiting the ten-year proceedings that [the Secretary is] contemplating to resolve what seems to me to be a matter that requires more immediate attention."

U.S. District Judge
Gerhard A. Gesell,
Addressing the Secretary
of Interior's Attorney
April 14, 1972

In June, a month before the scheduled trial, the Secretary set out a new plan for deciding what criteria would be used to decide how much water would go to the Newlands Project, and as a result how much would be permitted to flow into Pyramid Lake. The plan called for an elaborate system of consultation with the Bureau of Indian Affairs, the Bureau of Reclamation, the Truckee Carson Irrigation District (which has had the contractual responsibility for the day to day management of the Newlands Project since 1926) and with the tribe. The results were to be announced in September, and for this reason the trial date was postponed until October 24,

1972. In September the Secretary revealed his proposed new "voluntary" regulations, which were to replace his other new "non" regulations, which had been thrown out by the court.

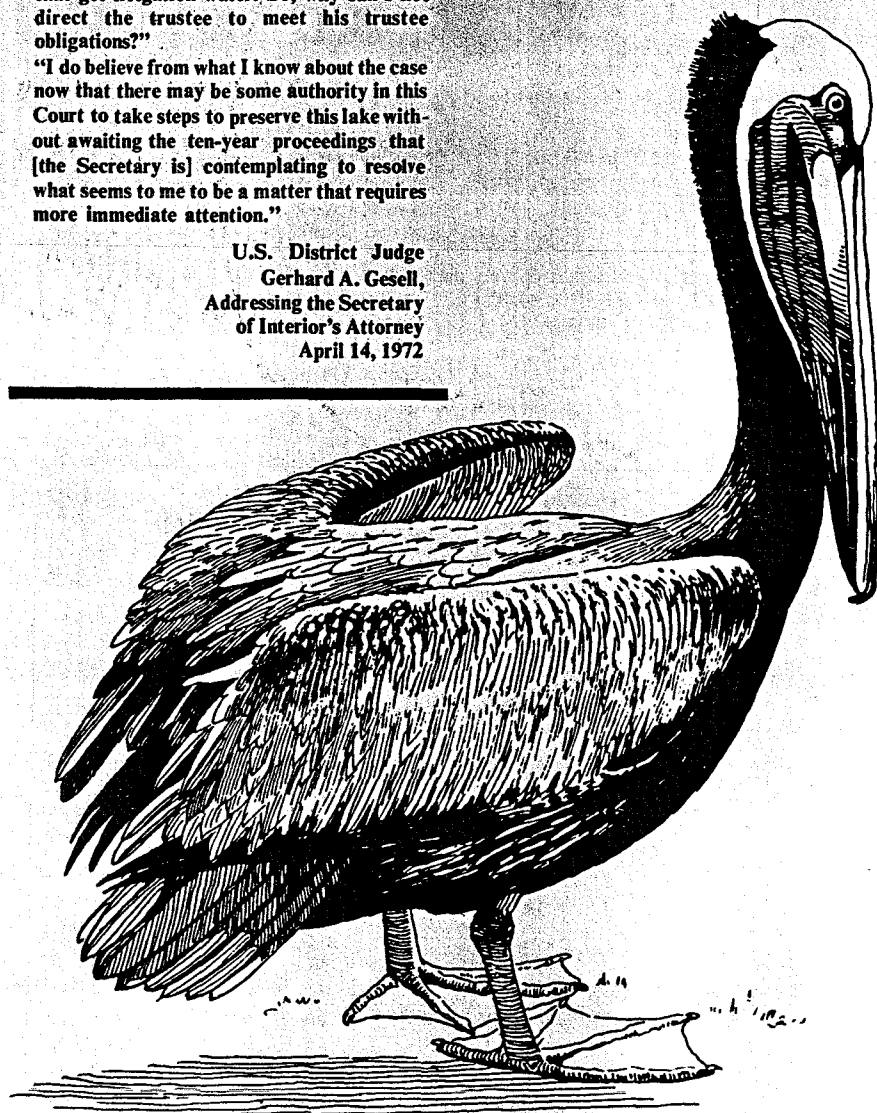
His new "voluntary" regulations reduced the amount of water going to the Newlands Project from 406,000 acre feet of water per year (afy) to 378,000 afy, a savings of 28,000 afy. The uproar from the non-Indian farmers in the Truckee-Carson Irrigation District was predictable, but not understandable. The 406,000 afy allocation had originally been based on the presumption that there were 75,000 acres under irrigation in the project. According to the Bureau of Reclamation itself, there has never been more than 63,000 acres under irrigation at Newlands.

The 28,000 afy "voluntarily" made available to the tribe was literally a drop in the bucket; they needed at least 385,000 afy to stabilize the lake at its current level and had only been getting about 250,000 afy. The tribe's attorneys protested to the Secretary, but to no avail, and the matter went to trial before Judge Gesell. In October a 4-day trial was held in Washington, D.C. The case was argued for the tribe by its local attorney, Robert D. Stitser and Fund attorney, Robert S. Pelcyger, assisted by Reid Peyton Chambers, of Counsel to the Fund.

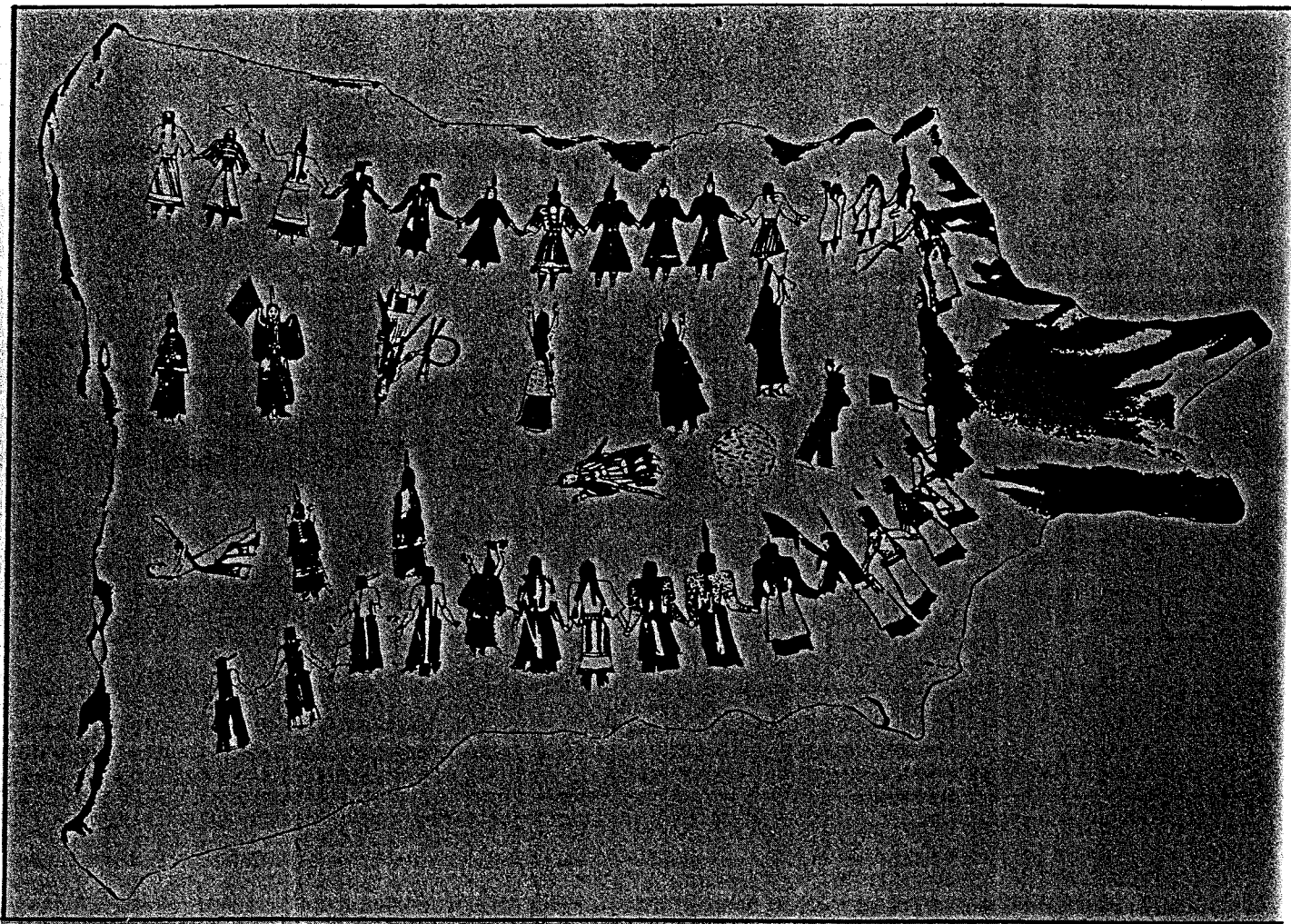
On November 8, 1972, just a little more than two years after the tribe had filed suit, Judge Gesell issued his order. He called the Secretary's action "an abuse of discretion and not in accordance with law," and said that "the effect was to deprive the Tribe of water without legal justification." He ordered the Secretary to submit to him by January 1, 1973 new proposed regulations which would provide that the "amount of water diverted [to the Newlands Project would] be wholly consistent with the Secretary's fiduciary duty to the Tribe."

Judge Gesell's memorandum opinion is reprinted in full on page 8. Not only is it an opinion which will help to insure the lake's present level until further adjudication is completed, it is also a tool that the Pyramid Lake Paiutes can share with all tribes in the struggle to preserve and protect Indian lands and resources.

The Fund knows of no previous litigation brought by Indians that has



Pyramid Lake Pelican



Ghost Dance Painting on Buckskin

obtained affirmative relief for the protection of Indian property from the U.S. Government as trustee and fiduciary. Other adjudications have centered around efforts to obtain damages after the fact for property that has already been lost, damaged, or mismanaged.

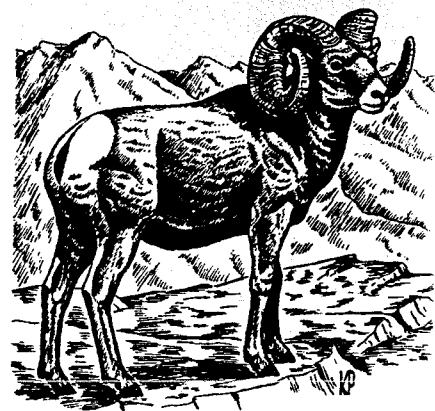
Many of Wovoka's followers danced the Ghost Dance in sacred "Ghost Shirts" which they believed no bullets could penetrate. The Paiutes have emerged with a potential for survival from the War of Ghosts, and unless the decision is reversed, they have also emerged with a legal victory that will provide armor for all their brothers, whether they be descendants of Wovoka's followers or not. It is an armor more suitable to the times and to the weapons of their enemies, and hopefully it will offer more protection than the Ghost Shirts did at Wounded Knee.

Is Peace At Hand?

The Pyramid Lake Paiutes learned too late that promises and agreements are only as trustworthy as the men who have the responsibility for their implementation.

The inconsistency which has plagued the Pyramid Lake Paiutes in the War of Ghosts is not found so much in the actual laws and decrees that have faced them, as it has been in the men who have administered them. If the Paiutes were able to push through the endless layers of bureaucracy in search of some single individual who held the authority to call a halt to the destruction of their lifeline — and providing they succeeded in meeting him face to face — they more often than not discovered that such a man is surrounded by an invisible lack of accountability. He cannot be held truly responsible for his

actions — because as all such men claim, such actions are beyond their control. Instead the Paiutes were told by a committee, a report, a field office memorandum, a "different interpretation" was the basis for the destruction of the lake.



Bighorn Sheep now gone from Pyramid Lake Reservation

United States of America v. States Of Nevada And California

On September 22, 1972, the Solicitor General of the United States filed an original complaint in the Supreme Court on behalf of the United States against the states of Nevada and California. This action, if the Supreme Court agrees to hear it, will finally adjudicate all rights to the waters of the Truckee River. In their complaint the United States government asked that a:

“decree be entered declaring the right of the United States for the benefit of the Pyramid Lake Paiute Tribe of Indians to the use of sufficient waters of the Truckee River to fulfill the purposes for which the Pyramid Lake Reservation was created, including the maintenance and preservation of Pyramid Lake and the maintenance of the lower reaches of the Truckee River as a natural spawning ground for fish and other purposes beneficial to and satisfying such use to be with a priority of November 29, 1859.”

The suit is the product of a series of strange reversals in the War of Ghosts. The second task force, which was created after the deadlock on the Interstate Compact resulted in the proposal to “drain the lake to save it,” had also recommended that the only way to solve the morass was to go to court for a final adjudication of all rights to the Truckee waters. The *Orr Ditch Decree* adjudication only involved the water users in Nevada. The government had not “appreciated” in 1913 the fact that the fishery of Pyramid Lake was being endangered — and was only seeking “a determina-

tion of individual water rights, primarily for irrigation, within Nevada, with no focus on California water releases or preservation of residual water for Pyramid Lake.”

The Pyramid Lake Task Force report was the first reversal, the suit filed before Judge Gesell, the second, and the third was the fact that the Secretary of Interior asked the Justice Department to file a suit — a decision innumerable secretaries, assistant secretaries, and endless committees had been agonizing over for years. The government decided among the alternatives open to it to file an original action in the Supreme Court. Had there been different men with different assistants, the government might have proceeded differently. It could have moved to re-open the *Orr Ditch* case, or to have filed concurrent actions in the District Courts of Nevada and California, or to have done nothing as before. The Paiutes were understandably relieved that the government chose the course of action that it did. They feel that the past rulings of the Supreme Court have been ones which have been supportive of the right of the United States to withdraw waters on the public domain from private appropriation and to reserve them for federal uses. The 1908 decision in *Winters v. United States* and in the 1963 decision in *Arizona v. California* firmly established for Indian reservations the

fact that “whether or not any mention of water rights is made in the act withdrawing the lands, the reservation of sufficient waters to satisfy the purpose for which the lands were withdrawn is implicit.”

The Supreme Court will decide whether or not to hear *United States of America v. States of Nevada and California* very soon. If the Court decides to hear the case their decision will have broad implications for the Paiutes and all American Indian tribes. The Supreme Court can only provide a “Declaration of Peace” and the Paiutes know this. The implementation of that peace, and thus the restoration of the Paiutes’ right to life rests with men who are still not yet identified. These men who will have the responsibility for carrying out the Court’s decree, will continue to be as fearful and unseen to the Paiutes, as Wovoka’s Ghost Dancers were to the American government a century ago.

“My . . . father told me the earth was getting old and worn out, and the people getting bad, and that I was to renew everything as it used to be, and make it better.

“He told us also that all our dead were to be resurrected; that they were all to come back to earth, and that as the earth was too small for them and us, he would do away with heaven, and make the earth large enough to contain us all; . . . we must tell all the people we meet about these things.”

Wovoka





Contributions to the Native American Rights Fund

The Ghost Dance - Pray

The Ford Foundation as previously indicated has provided the major impetus and core funding support for the development of the Native American Rights Fund. The litigation undertaken on behalf of the Paiutes and many other tribes would not have been possible without the kind of financial support and encouragement given by the Foundation and its staff.

Recently the Twentieth Century Fund requested a study of the impact of the major foundations on American Society (*The Big Foundations*, Waldemar A. Nielsen, Columbia University Press, 1972). Ironically, Mr. Nielsen's study concluded that programs funded by foundations like Ford had made no significant difference in American life. Measuring any kind of impact on American life is certainly not an easy undertaking, but from the perspective of the Paiutes their ability to shape their world and thereby to have an impact on the dominant society has been strengthened immeasurably by a Foundation program.

It took their courage, perseverance, and virtually all their financial

resources just to survive in the War of Ghosts, but the offensive moves in the legal battle simply could not have been made without the financial support provided by the Ford Foundation and other individual contributors. One such contribution, made by Richard and Maya Miller, financed a major portion of the hydrological studies necessary to determine just how ineffective the water management program in the Newlands Project has been. To date more than \$35,000 of the Fund's resources have been spent on the Paiute litigation costs. This figure does not include the time of Fund attorneys, like Robert S. Pelcyger who has had the primary responsibility for the development of the case. Mr. Pelcyger has devoted more than half of the past two years on the Paiute litigation.

The Tribe will continue to need the assistance of the Native American Rights Fund for some time to come. If the Supreme Court decides to hear *United States of America v. States of Nevada and California*, it is expected that the litigation may last a decade or longer. Contributions to the Fund will insure that work like that undertaken

on behalf of the Paiutes will continue to be available to them and to all other tribes who are engaged in their own ghost wars.

Enclosed is my contribution to assist the Native American Rights Fund in the assertion and protection of Indian rights and the orderly development of the body of law affecting Indians: (please print)

Name _____

Address _____

City _____ State _____ Zip _____

\$5 \$10 \$25 \$50 \$100

Other \$ _____

Make your check payable to Native American Rights Fund.

Mail to:

Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302

Steering Committee of the Native American Rights Fund

EXECUTIVE COMMITTEE

Charles Lohah, Chairman (Osage)
David Risling, Jr., Vice-Chairman (Hoopa)
LaNada Boyer, Executive Committee
(Shoshone-Bannock)
John Stevens, Executive Committee
(Passamaquoddy)

OTHER MEMBERS

Wendell Chino (Mescalero Apache)
Curtis Custalow (Mattaponi)
Martha Grass (Ponca)
Leo LaClair (Muckleshoot)
Cipriano Manuel (Papago)
Janet McCloud (Tulalip)
Francis McKinley (Navajo-Ute)
Joseph Upicksoun (Inupiat Eskimo)

Native American Rights Fund Staff

Director
David H. Getches
Deputy Director
John E. Echohawk (Pawnee)

Staff Attorneys
L. Graeme Bell, III
Joseph J. Brecher
Thomas W. Fredericks (Mandan)
Daniel H. Israel
Yvonne T. Knight (Ponca)
Douglas R. Nash (Nez Perce)
Robert S. Pelcyger
Thomas L. Smithson
Charles F. Wilkinson
Of Counsel
Reid Peyton Chambers
Vine Deloria, Jr. (Standing Rock Sioux)
Thomas N. Tureen

Native American Rights Fund Offices

Requests for assistance and information may be directed to the main office,
David H. Getches, Director
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
Telephone (303) 447-8760

or to the Washington, D.C. office,
L. Graeme Bell, III,
Staff Attorney
Native American Rights Fund
1712 N. Street, N.W.
Washington, D.C. 20036
Telephone (202) 785-4166

Announcements and Catalogue Request Form

Please check the boxes for publications you wish to receive:

1972-73 Issues of <i>Announcements</i>	<input type="checkbox"/>
National Indian Law Library	<input type="checkbox"/>
Current Holdings Catalogue	<input type="checkbox"/>
Document Catalogue	<input type="checkbox"/>
Subject Catalogue	<input type="checkbox"/>
Native American Rights Fund The National Indian Law Library 1506 Broadway Boulder, Colorado 80302	
Name (please print) _____	
Address _____	
City _____	State _____ Zip _____

TIME VALUE

Nonprofit Org.
U.S. POSTAGE
PAID
Boulder, Colorado
Permit No. 589

Native American Rights Fund
The National Indian Law Library
1506 Broadway
Boulder, Colorado 80302