IN THE

Supreme Court of the United States

October Term, 1955 - 1961

No. 10, Original

STATE OF ARIZONA

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA and COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants.*

UNITED STATES OF AMERICA, *Intervener.*
STATE OF NEVADA, *Intervener.*

Memorandum of Arizona (a) in Reply to Motion of the United States for Preliminary Determination of Questions of Law; and (b) in Reply to California's and Nevada's Exceptions to the Master's Report on the Question of Joinder of Four States.

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JURISDICTION

This case comes to this Court under its original jurisdiction, leave to file the Complaint having been

* This Court has not yet declared what briefs, if any, are required on the exceptions; but the Motion of the United States appears to require a Response. Since it relates to the same subject matter as the exceptions, it appears most economical of time to treat the entire problem under one cover.

given at 344 U.S. 919 (1953). On June 1, 1954, this Court referred the matter to a Special Master, 347 U.S. 986. Subsequently, this Court also referred to the Master the question of joinder of parties which had been moved by the State of California, 348 U.S. 947. On July 11, 1955, the Special Master filed his report on the question of joinder of parties.

STATEMENT

This is an action by the State of Arizona to determine its rights to a claimed 3,800,000 acre feet of Colorado River water in accordance with the terms of the Colorado River Compact, the Boulder Canyon Project Act, 45 Stat. 1057, and various other federal and state enactments. The 3,800,000 acre figure is made up of 2,800,000 acre feet of water allowed to Arizona under its contract with the United States for water from Lake Mead, subject to its availability under the applicable provisions of law and with due allowances for the interests of Utah and New Mexico, and 1,000,000 acre feet of water from other sources. The action was originally brought against the State of California and others by Arizona in 1952. The United States, as custodian of the works at Lake Mead and as the possessor of other interests, was permitted to intervene by an Order of this Court, 347 U.S. 986. The State of Nevada also intervened, 347 U.S. 986.

A few words of background will illuminate the general problem. The Colorado River and its tributaries drain or adjoin the seven states of Arizona, California, Nevada, New Mexico, Utah, Wyoming, and Colorado. For many years there has been dispute as to the distribution of the water of this system. As an initial step towards solution the Colorado River Compact

was drafted in 1922. This Compact made one basic determination: It divided the basin into two parts, an Upper Basin and a Lower Basin, the division point being Lee Ferry in Arizona. Basic ground rules were laid down in the Compact relating to the use of water in each Basin, and requiring the Upper Basin to let down a certain amount of water at regular intervals to the Lower States.

This Compact was slow in its ratification, Arizona in particular holding out against it for a number of years. However, upon the passage of the Boulder Canyon Project Act in 1928, *supra,* it was promptly ratified by the six states other than Arizona, and it was finally ratified by Arizona in 1944. (Ariz. Laws, 1st Spec. Sess., Ch. 5, 1944).

The Compact itself, though it divided the states into two Basins, did not attempt to work out the distribution of water within the Upper and the Lower Basins. This task was left to each Basin separately, to be solved among themselves, either by further compact or by litigation. The Upper Basin States proved able to solve these internal problems of distribution by compact, and this they did by the adoption of the Upper Colorado River Basin Compact, approved 63 Stat. 31, which, so far as they were concerned, settled their difficulties. Notwithstanding that the Congress in Section 4 (a) of the Project Act outlined a proposed distribution of Lower Basin water identical with Arizona's present request, no solution by agreement proved possible in the Lower Basin; all efforts to achieve agreement for distribution by Compact proved unsuccessful.

Against this background, the following events occurred:

1. In both the Eighty-First and Eighty-Second Congresses, the Senate of the United States passed legislation for the Central Arizona Project, a great reclamation work intended to utilize what Arizona conceives to be its share of the mainstream water of the Colorado. This legislation was not passed in the House of Representatives, largely due to the insistence of the State of California that the title to the water to be used in the State of Arizona was not clearly established, and that, indeed, a portion of the water required was rightfully that of the State of California.[1] In both Houses the Californians pressed the series of so-called "Suit Resolutions," repeatedly assuring the various committees that in the words of the chief counsel for the State of California:

> "We believe the questions required to be presented to the Supreme Court in this matter are all questions of law, interpretation of statutes, compacts, and documents of which the Court would take judicial notice, and that no protracted case or hearing shall be involved, of the character of which the committee has probably heard or may be familiar, with respect to" (various of the long drawn-out cases.)[2]

Repeated assurances of speedy litigation, many of which are collected in Arizona's response to defend-

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[1] The language adopted by a House Committee on April 18, 1951 was a recommendation of postponement of the Central Arizona Project "until such time as use of water of the *lower* Colorado River Basin is either adjudicated or binding or mutual agreement as to the use of the water is reached by the States of the *lower* Colorado River Basin." (Emphasis added) Hearings, House Rep. Com. on Interior & Insular Affairs, 82nd Cong., 1st Sess., on H. R. 1500 and 1501, Pt. 2, p. 739.

[2] Hearings before Sub. Com. No. 4, H. Rep. Com. Jud., H. J. Res. 225, 226, 236, & H. R. 4097, 80th Cong., 1st Sess., p. 32.

ants' motion to join the States of Colorado, New Mexico, Utah, and Wyoming, previously filed in this action, were given by California. In response to a direct question by Senator O'Mahoney, inquiring whether any of the Upper Basin states would need to be involved in such litigation, one of California's principal attorneys in this action said:

> "So far as California is concerned, I think the answer is 'No'. We have no controversy with any of the Upper Basin States that requires any judicial examination."[3]

In the face of these representations, a House Committee concluded not to pass upon the Central Arizona Project until the litigation requested by California could be concluded.[4]

2. Thereupon Arizona filed the instant proceedings. It very carefully confined its case to the exact matters which had been in issue before the Congress. A glance at its prayer for relief will show that it asked in varying ways for the establishment in it "of 3,800,000 acre feet of the water *apportioned to the Lower Basin* by the Colorado River Compact." (Emphasis added) It asked for no relief whatsoever aimed at any water which was not apportioned to the Lower Basin of the Colorado by the Compact.

3. Thereafter the United States intervened. The claims of the United States are either limited explicitly to Lower Basin interests or are limited to claims "as against the parties to this cause;" see, for example,

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[3] Hearing, Subcommittee of the Committee on Interior and Insular Affairs, United States Senate, 80th Cong., 1st Sess., S. J. Res. 145, p. 120.

[4] See n. 1, supra.

the basic claim of the United States in paragraph XXX of its petition for intervention. The United States claims were thus limited to Lower Basin controversies.

4. Nevada filed its petition of intervention made also only against the Lower Basin interest.

5. California then moved for the joinder of the States of New Mexico, Utah, Colorado, and Wyoming in their Upper Basin capacity, and the States of Utah and New Mexico in their Lower Basin capacity. A word of explanation is here required: The states of Wyoming and Colorado are in the Upper Basin of the Colorado. The states of New Mexico and Utah are predominantly in the Upper Basin, but small areas in each, covering comparatively minor tributaries, are below the line drawn through Lee Ferry which divides the two Basins.

6. This Court referred the question of joinder to the Special Master who heard five days of oral argument in Phoenix, Arizona, in April, 1955. At this argument, abundant opportunity to be heard was given to all, and all of the states were heard. The United States was there represented by Assistant Attorney General Lee Rankin and Mr. William H. Veeder. At the beginning the Special Master inquired of all counsel present whether they wished to be heard and the following dialogue took place:

> "The Master: How about the United States?
> "Mr. Rankin: The United States will not require any time on the motion.
> "The Master: You have filed no briefs and do not intend to speak?
> "Mr. Rankin: That is right.
> "The Master: What would you do if the Master asks you some questions?

"Mr. Rankin: We will try to answer, depending upon the question, though we may stand mute at times."

(Oral arguments before Special Master on motion to join, Volume 1, page 5.)

The same desire not to express itself was reiterated by the United States at Volume 2, page 356, of the oral argument. At that point California had sought to induce the United States to take some position. In response the Master noted in particular that he was anxious to find out from the United States what its position was in regard to the Indians, "because that is the subject of considerable mystery to me so far, and I think we all ought to know; but I believe that goes to the merits." Nonetheless, he said, if the United States wished to file no brief and make no argument saying, "We will stand by the result whatever it may be," then, said Mr. Haight, "I think that is their privilege." In reply Mr. Veeder said, "Thank you, Your Honor." Id. p. 356.

7. On July 11, 1955, the Special Master filed his Report concluding that the States of Utah and New Mexico ought to be joined in their Lower Basin capacity only, and not in their Upper Basin capacity; and that the States of Wyoming and Colorado ought not to be joined at all.

8. California and Nevada filed exceptions to the Master's Report, California also asking oral argument. California also filed a brief on the exceptions in supplement to the earlier briefs filed in the joinder question. The United States on October 20, 1955 also filed a motion for determination of questions of law presented by the pleadings in the cause and report of

the Special Master. The questions which the United States wished to determine in advance were, principally, the question of whether Arizona is a party to the Compact (California contends that it is not); and how the Compact may be said to affect the rights of the Indians in general. To this California has filed a response, denying that these questions could or should be settled in advance by this Court but contending that the very existence of the Motion of the United States is further reason for joining the additional parties.

QUESTIONS PRESENTED

1. Whether this Court should order special argument on a series of questions of law raised by the United States before disposing of the Master's Report on Joinder?

2. Whether the Master's recommendations as to joinder should be approved?

3. Whether the Court should order oral argument before deciding the immediately preceding questions?

SUMMARY OF ARGUMENT

The motion of the United States and the exceptions of California and Nevada are so closely related that argument as to one necessarily touches the other.

A. THE MOTION OF THE UNITED STATES.

The United States is estopped from offering the motion now presented by it. It expressly renounced the opportunity to discuss before the Master the questions it now seeks to raise. Moreover, the principal matters raised by the United States on this motion are either frivolous or not open to serious question; for

there is not room for reasonable difference of lawyer's opinion over whether Arizona is a party to the Colorado River Compact, and the Master's determination that the rights of the Indians are to be satisfied from the waters of the Basin in which they are is sound. Piece-meal review can serve no useful purpose.

B. THE EXCEPTIONS.

The motion of the United States in any case loses all point if the Master's Report deserves confirmation on the question of joinder. Such matters are largely discretionary with him who serves as a trial judge; see *United Mine Workers* v. *Coronado Coal Company,* 259 U.S. 344, 382 (1922).

The exceptions go largely to matters of dicta, detail or expression which do not affect the ultimate judgment on joinder. The absent states are not indispensable parties under the doctrine of *Shields* v. *Barrow,* 17 How. 130 (1854). As to whether they should be joined as necessary or proper parties, the best test is whether any relief is sought as to them, *West Coast Exploration Co.* v. *McKay,* 213 Fed. (2d) 582 (C.A. D.C. 1954), cert. den., 347 U.S. 989 (1954), for a so-called "community of interest" is not enough, *Samuel Goldwyn, Inc.* v. *United Artists Corp.,* 113 Fed. (2d) 703 (C.A. 3, 1940).

The instant case is controlled by the First Order in *Nebraska* v. *Wyoming,* 295 U.S. 40 (1935), and is distinguishable from the Second Order in that case, 296 U.S. 553 (1935), because the Second Order was based upon assertions of actual threatening and immediate concrete dispute over the subject matter of the action.

The well-established policy of avoidance of needless interstate litigation precludes joinder of the Up-

per Basin States here, *Alabama* v. *Arizona,* 291 U.S. 286, 291-292 (1934). This is a policy of particular importance where, as here, the Upper Basin States have settled for themselves the bulk of questions in dispute in the Lower Basin by the Upper Basin Compact. See *Colorado* v. *Kansas,* 320 U.S. 383, 392 (1944).

Finally, no justiciable question is presented as to the absent states, *United States* v. *West Virginia,* 295 U.S. 463 (1935). As that case declares, the judicial power does not extend to the "adjudication of such differences of opinion" which is all that is here involved as to the Upper Basin States. The California contention that there need not be a justiciable controversy as to all parties to a law suit is unsound, *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947).

Nothing in the circumstances warrants oral argument on the joinder question.

ARGUMENT

I. INTRODUCTION.

The interest of Arizona is to get on with the business at hand. Shortly before the opening of this term of Court, the Special Master passed away and this Court appointed in his stead Judge Simon Rifkind. We are advised that Judge Rifkind hopes soon to be ready to proceed with the matter, and we are anxious to give him the opportunity to do so. As this memorandum is prepared, this Court has not yet entered an order determining what briefs, if any, may be required in connection with the exceptions; but in view of the circumstance that we feel compelled to respond to the motion of the United States, which involves the same matter, it has seemed most expeditious to file under

one cover a statement of Arizona both as to the motion of the United States and as to the Nevada and California exceptions.

II. THE MOTION OF THE UNITED STATES SHOULD BE DENIED.

We submit that the motion of the United States for preliminary determination of questions should be denied. We doubt if this Court ever has referred a case to a master and then taken it back to decide two or three legal points before the master proceeds, as the United States now suggests. For the following reasons in particular, we see no reason for establishing such a precedent now:

A. The United States Is Estopped From Offering the Motion Now Presented by It.

The United States has had over a year within which it might have made its present proposal. As the quotations above show, the United States chose to stand mute before the Special Master, making no expression on the exact questions which it now wants this Court to take up and determine. It did so when the Special Master had made abundantly clear that he would be most glad to hear anything that the United States wished to say, and when the United States had explicitly agreed to abide the result of its silence. We can conceive of no reason which would permit the United States now to take the time of this Court to discuss the exact matters which it declined to discuss before the Special Master. Such a proceeding would utterly defeat the purpose of reference to a master.

B. The Principal Matters Raised by the United States Are Either Frivolous or Not Open to Serious Question.

1. With all due respect to the State of California, we submit that there is not room for reasonable difference of opinion as to whether Arizona is a party to the Colorado River Compact. California admits that Arizona passed an act of ratification (California Answer, Par. 59). In all this mountain of pleadings and proceedings, we find no concrete reason suggested as to why this ratification is thought to be ineffective. Clearly under Article XI of the Compact, Arizona was entitled to ratify in 1922 and nothing in the Compact put a time limit on the right of ratification. The legislative history of the Compact shows that those who drafted it considered that the time for ratification would be indefinite.[5] Nothing in the Boulder Canyon Project Act contains any limitation on the right to ratify, and nothing subsequent indicates any loss of the right. When Arizona finally in 1944 entered into its contract with the Department of the Interior, which was expressly conditioned upon its ratification of the Compact, Mr. Shaw, then counsel for California, was positively enthusiastic about Arizona's ratification.[6] The Upper Colorado River Basin Compact, approved by the Congress, necessarily assumes the validity of Arizona's ratification of the main Compact. Nothing in the sheer passage of time vitiates the power of rati-

[5] The minutes of the Twenty-First Meeting of the Compact Commission, November 20, 1922, page 9, contains a dialogue on the subject of time of ratification. Chairman Hoover raised the question of length of time. The consensus, as expressed by Mr. Davis for the Bureau of Reclamation, was "that the time was indefinite", to which Mr. Hoover replied, "All right, if that is clear, it satisfies me."

[6] See minutes of Committee of Fourteen on the drafting of the Arizona contract, May 3, 1943, page 27.

fying a compact, and numerous compacts have been outstanding for ratification for approximately as long as that here involved.[7]

2. The Special Master at pages 53 and 54 of his Report, dealing with the Indian question, analyzed the various provisions of the Compact and said:

> "From this, it appears that the rights of the Indian Tribes in the Upper Basin shall be satisfied solely from waters of the Upper Basin, and the rights of Indian Tribes in the Lower Basin shall be satisfied solely from water appropriated to that Basin.
>
> "The question of how Lower Basin water shall be divided among the Lower Basin States is one for final hearing."[8]

Further argument might delay, but we think could not materially alter, the acceptance of the Master's conclusions in this regard.

C. Piece-Meal Review in This Court Would Delay Proceedings to No Good End.

We assume that the United States is asking for a determination of these questions, not in the abstract, but because they are supposed to have some relation

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[7] See for one of numerous instances the Interstate Oil Compact of 1935, ratified by four states in 1945, by two states in 1947, and by one state in 1951; Book of the States, 1948-49, p. 40, 1952-53, p. 23.

[8] We believe that California in its exceptions, p. 21, misconstrues this conclusion of the Special Master when they read the passage as a holding that the "Indian uses are to be charged to the State and Basin where they take place." We believe that the Master held that the uses should be charged to the Basin in which they take place, reserving the question of what the distribution within the Basin should be.

to the only matter now concretely before this Court, namely whether the Master's Report on the question of joinder should be accepted. We submit, for the reasons set forth in the Master's Report, supported by the balance of the argument in this brief, that the Master's Report should be accepted; and that it could serve no useful purpose to delay the resolution of that question pending consideration of these preliminary issues. By familiar doctrine, this Court does not sit to decide abstractions, however interesting.

III. THE JUDGMENT AS TO JOINDER WAS WITHIN THE FAIR DISCRETION OF THE MASTER AND SHOULD NOT BE LIGHTLY DISTURBED.

Questions of joinder involve large areas of discretion, and while they may be reviewed for abuse of discretion, the determination on such a question will not be lightly set aside. *United Mine Workers* v. *Coronado Coal Company,* 259 U.S. 344, 382 (1922); and see on the related question of intervention of parties, *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137, 141, 142 (1944); 4 Moore's *Fed Prac.,* 62-64. We appreciate that a Master does not stand in the identical position of a trial court, although the relationship is a very close one; see, *e.g., Anderson* v. *Mount Clemens Pottery Co.,* 328 U.S. 680 (1946), on the finality of master's reports as to matters of fact. While a master's report on a question of law is reviewable, *Louisiana* v. *Mississippi,* 282 U.S. 458, 465 (1931), the conclusions of the Master are nonetheless entitled to very serious consideration; *Lupton* v. *Chase National Bank,* 89 Fed. Supp. 393 (1950).

We respectfully submit that these discretionary considerations are particularly applicable in the circum-

stances of this case, where the matter was heard with singularly exhaustive patience by one well qualified to make the necessary determination.

IV. ON FAMILIAR PRINCIPLES OF JOINDER, THE UPPER BASIN STATES SHOULD NOT BE INCLUDED IN THESE PROCEEDINGS.

A. Introduction.

This Court has before it a question of joinder of parties, and of joinder only. In the course of determining that question it could lay out its position on numerous matters of law, but there is no necessity to do so. The Special Master attempted in his ruling and opinion generally to outline his understanding of the various matters presented, as much for the purpose of revealing to counsel where he needed further clarification himself as for the purpose of disposing of the matters involved. As a result, there are dicta in the Master's Report. There are also little slips of a word here or there; thus, as California points out at page 67 of its Exceptions, at one point the Master used the word "apportionment" when he may have meant to use the word "appropriation;" and as California contends at page 52, the Master may have erred in attributing certain language to Senator Hayden when in fact that language was used by then Secretary Hoover to Senator Hayden. But this Court need not concern itself with matters of dicta, or vocabulary, or citation. All that matters here is the end result; and we respectfully submit that many of the objections made to the Master's Report can only highlight the circumstance that the concrete question before him was soundly answered.

B. Under the Applicable Rules, the Resisting States Cannot be Joined. They are at Most "Proper" Parties, and are Neither Indispensable Nor Necessary Parties.

Under the familiar doctrine of *Shields* v. *Barrow,* 17 How. 130, 139 (1854), indispensable parties are those without whom "a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." Necessary parties are those required to be present in order that "complete relief may be accorded between those already parties." *Greenleaf* v. *Safeway Trails,* 140 Fed. (2d) 889, 890 (C.A. 2, 1944). It is these parties who are covered by Rule 19 of the Rules of Civil Procedure. In the instant case, the absent parties are neither indispensable nor necessary. Far from being essential to a disposition of the case, this Court will have to reach far afield indeed to take any action which might affect the absent states. At most, the absent states are proper parties, permissibly joinable under Rule 20; see 3 Moore, *Federal Practice,* 2153 (2nd Ed.); although it is not conceded that they are even this.

"There is no prescribed formula for determining in every case whether a person or corporation is an indispensable party or not," *Niles-Bement-Pond Co.* v. *Iron Moulders Union,* 254 U.S. 77, 80 (1920). In making these practical determinations, the best test is the test of the relief to be granted; if relief is impossible without absent parties, those parties are indispensable; if relief amongst the parties to the action will be rendered greatly more effective by the addition of other parties, those parties are "necessary," but this only if those parties would otherwise be affected by the actual op-

eration of the judgment. *West Coast Exploration Co.* v. *McKay,* 213 Fed. (2d) 582 (C.A. D.C. 1954).

California and Nevada confuse possible intellectual interest in particular points with the proper test, which is that of the actual bearing of the relief to be granted. A so-called "community of interest" is not enough, *Samuel Goldwyn, Inc.* v. *United Artists Corp.,* 113 Fed. (2d) 703 (C.A. 3, 1940), even as in that case where identical contracts of persons sought to be joined might be affected by the litigation. As the Third Circuit there held, it was immaterial that the holding would affect the strangers to the litigation for "Such a conclusion however would not constitute an adjudication" (113 Fed. (2d), at 706) of the rights of the others, nor was there any relief which was actually being sought by the moving parties against the strangers. In those circumstances, said the Court, there could be no justiciable controversy between the parties and those sought to be joined.[9]

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[9] The cases cited by California do not require inclusion of the absent states. As California concedes in its original brief at page 49, the *Shields* case is of course distinguishable; it involved rescission of a contract. No more in point is *Niles-Bement-Pond Company* v. *Iron Moulders Union,* 254 U.S. 77 (1920), a suit in which a corporation sought to enjoin a strike not against itself but against a subsidiary corporation without making the subsidiary a party. Omission of the subsidiary corporation in those circumstances was a palpable fraud on the jurisdiction, and the Court, of course, held the subsidiary not merely a necessary but an indispensable party in the circumstances. *Gregory* v. *Stetson,* 133 U. S. 579 (1890), also relied upon, is particularly clearly inapplicable because it involved a suit for the proceeds of a note which by the very terms of the contract was "subject to the joint order and direction" of other persons, who hence were held not merely necessary but indispensable parties under the familiar rule. The further citation of a dictum in *National Licorice Company* v. *N.L.R.B.,* 309 U.S. 350, 363 (1940), is in substance approximately as remote from the conventional problem of joinder as the title of the case

In the instant case no party is seeking any relief whatsoever against any of the absent states. Arizona and her neighbors to the north and west ask nothing but the opportunity to live in peace with each other. All Arizona seeks is its share of the Lower Basin water as against its rivals, California, and to a lesser extent, Nevada.

> "The general rule in equity has been that one against whom nothing is alleged and no relief is demanded need not be impleaded as a defendant . . . ," 6 *Cyc. Fed. Proc.* (3rd Edition) 548.

And see *Clark on Code Pleading* (2nd Ed.) 205.

C. The Rulings of This Court in the Nebraska-Wyoming-Colorado Litigation Preclude Joinder in the Instant Case.

Since all parties invoke as precedent the two orders of the Supreme Court on the joinder question in the Nebraska-Wyoming-Colorado litigation, the exact events there require special attention. We refer to *Nebraska* v. *Wyoming,* 295 U.S. 40 (1935), hereafter referred to as the First Order; and *Nebraska* v. *Wyoming,* 296 U.S. 553 (1935), hereafter referred to as the Second Order.

1. The First Order.

Nebraska sued Wyoming for an equitable apportionment, as between those states, of the waters of the North Platte River. Wyoming moved to dismiss on the ground, among others, that Colorado was an indis-

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would suggest; and the immediately succeeding passage in *National Licorice* shows its inapplicability to extra-contractual rights.

The *Goldwyn* case, *supra,* distinguishes *Commonwealth Trust Company* v. *Smith,* 266 U. S. 152 (1924), on which California particularly relied in the instant case, on the grounds that in that case the interests of the absent parties were cognizable in that suit.

pensable party. The contention was that the North Platte rose in Colorado, just as the Colorado rises in the Upper Basin States here. Wyoming rested its motion basically upon much the same cases as those offered by California in the instant situation.[10]

The position taken by Nebraska was the same as that taken here by Arizona, that "Since no relief is asked by complainant as against the State of Colorado, and since the State of Colorado has no interest in the relief asked, as against the State of Wyoming, or in the controversy between the State of Nebraska and the State of Wyoming, the State of Colorado is not a necessary or indispensable party." The Supreme Court accepted this position, saying of the Wyoming plea:

> "The contention is without merit. Nebraska asserts no wrongful act of Colorado and prays no relief against her. We need not determine whether Colorado would be a proper party, or whether at a later stage of the cause pleadings or proofs may disclose a necessity to bring her into the suit. It suffices to say that upon the face of the bill she is not a necessary party to the dispute between Nebraska and Wyoming concerning the respective priorities and rights of their citizens in the waters of the North Platte River."

2. The Second Order.

In due course, Wyoming filed a supplemental answer alleging that Colorado was *presently* contemplating and threatening the diversion of large amounts of water in the North Platte in such quantity as "will of necessity be the subject matter pro tanto of the deter-

[10] See particularly *Commonwealth Trust Company* v. *Smith*, 266 U. S. 152 (1924), which was just as applicable in the first Colorado case as it is here, and which was rejected as inapplicable by the Supreme Court in the first proceedings.

mination of the rights in this action of the present parties." In these circumstances, Wyoming prayed for an equitable apportionment which included Colorado. In these circumstances, this Court permitted the joinder of Colorado.

The differences between the order in the second case and the instant situation are glaring. In the instant case there is no allegation at all of any actual present interference by the Upper Basin with the flow of water in controversy among the Lower Basin States, nor is there any plea of equitable apportionment against the Upper Basin by any party in the Lower Basin. That these differences are significant is shown by the discussion in the final disposition of the merits of the controversy in *Nebraska* v. *Wyoming,* 325 U.S. 589, 608 (1945), where this Court observed that where the controversy was among states all seeking the identical water, it was necessary to join absentees, particularly where "states have not been able to settle their differences by Compact." In the instant case the states have settled their major differences among themselves as between Basins by the Colorado River Compact, and the Upper Basin States have further settled the detailed differences amongst themselves by the Upper Colorado River Basin Compact.

We respectfully submit that this matter is controlled by the first Wyoming-Colorado-Nebraska order, which is virtually on all fours with the instant situation.[11]

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[11] California also makes some argument based on the fact that in the preceding Arizona-California cases, 283 U.S. 423 (1931), 292 U.S. 341 (1934), and 298 U.S. 558 (1936), Arizona did join all the states. In each of those cases, Arizona did in fact seek relief against all of the states, a position it could then take because it had not ratified the Compact. The claims for relief in those cases were radically different from those made here.

D. The Policy of Avoidance of Needless Interstate Litigation Precludes Joinder of the Upper Basin States Here.

This Court has made clear its basic policy on this score in *Alabama* v. *Arizona,* 291 U.S. 286, 291-292 (1934), when it said:

> The Supreme Court's "jurisdiction in respect of controversies between States will not be exerted in the absence of absolute necessity. A state asking leave to sue another to prevent the enforcement of laws must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor. Our decisions definitely establish that not every matter of sufficient moment to warrant resort to equity by one person against another would justify an interference by this court for the action of a State. Leave will not be granted unless the threatened injury is clearly shown to be of serious magnitude and imminent." (Citations omitted)

The jurisdiction of this Court in respect to the Upper Basin States cannot, even by the most vivid imaginings, be fairly described as a matter of "absolute necessity."

This policy is of particular importance where the matters involved can best be settled by compact, for this Court prefers compact settlement where this is possible:

> "We say of this case, as the Court has said of interstate differences of like nature, that such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power." *Colorado* v. *Kansas,* 320 U.S. 383, 392 (1944).

In the instant case the involvement of the Upper Basin States in litigation which they obviously wish to avoid

can only have the effect of unsettling compact commitments which they have already made for themselves. The questions of apportionment among states, Indian rights, evaporation loss distribution, and definition of "consumptive use," which are at the heart of this case, the Upper Basin States have already determined by their own agreement.

V. NO JUSTICIABLE QUESTION IS PRESENTED AS TO THE ABSENT STATES.

The Special Master found that there was no justiciable controversy between the Upper and Lower Basin States. California in its exceptions takes the position that there need be no justiciable controversy between original parties to an action and additional parties as a condition of the addition of those parties. California contends (a) that there is a justiciable controversy between the Lower and Upper Basin States; and (b) that if not, none is required.

California relies on *United States* v. *West Virginia,* 295 U.S. 463 (1935), for the proposition that the Court has jurisdiction of quiet title actions, and then assimilates this to such an action. But this is not a quiet title action so far as the Upper Basin States are concerned. As the Court said in the *United States* v. *West Virginia,* at 475, speaking of quiet title actions:

> "The public assertion of the adverse claim by a defendant out of possession is itself an invasion of the property interest asserted by the plaintiff, against which equity alone can afford protection."

Here there is absolutely no public assertion of any adverse claim by any of the Upper Basin States.

We believe that *United States* v. *West Virginia* teaches quite a different lesson. In that case this Court

held that there was no case or controversy where the United States sought to enjoin the construction of a dam upon a navigable stream by a state which had not first obtained a license from the Federal Power Commission. The state had licensed the construction of the dam but, said the Court, this was not enough to allege the invasion of any property right of the United States. In language which directly parallels the instant situation, this Court said:

> "There is presented here, as respects the state, no case of an actual or threatened interference with the authority of the United States. At most, the bill states a difference of opinion beween the officials of the two governments, . . . There is no support for the contention that the judicial power extends to the adjudication of such differences of opinion." 295 U.S., at 473, 474.

For illustration of the requirement that there be a justiciable controversy as to each party involved in a case, see *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947), and for further affirmation that the case and controversy rule applies in full force to interstate litigation, see *Massachusetts* v. *Missouri,* 308 U.S. 1 (1939). See also the concurring opinion of Mr. Justice Frankfurter in *Joint Anti-Fascist Refugee Com.* v. *McGrath,* 341 U.S. 123, 149-157 (1951), none of whose tests are met by the proposed joinder of the Upper Basin States.

VI. THE EXISTENCE OF QUESTIONS OF LAW IN WHICH THE ABSENT STATES MAY HAVE SOME INTELLECTUAL INTEREST IS NOT SUFFICIENT TO REQUIRE JOINDER.

As it seems to Arizona, the bulk of the Nevada exceptions and the heart of the California contentions go to discussion of questions of law in which the Upper

Basin States are said to be "interested." For example, Nevada contends that if the United States is given all it asks in the Lower Basin there will be too little water left for the Lower Basin States and therefore somehow the Upper Basin will be "materially affected," presumably because of the added pressures which, given this unhappy result, the Upper Basin States would then feel from their Lower Basin neighbors. Similarly California contends that the settlement of the allocation of reservoir losses by evaporation will affect the amount of "surplus" in the River; that this in turn will affect the amount of water available for the Mexican Treaty; and that the Upper Basin States are therefore concerned with the resolution of the question because there might conceivably be some added call upon them someday for Mexican Treaty purposes.

In the interest of brevity, we have chosen only a sample of the contentions of each of the excepting states. The point is that the case and controversy doctrine preserves this Court from the necessity of deciding hypothetical questions. Arizona disclaims any controversy with the Upper Basin States, and they with her. So far as California is concerned, we think its position was correctly stated in the passage quoted in the beginning of this brief when one of its most respected counsel told Senator O'Mahoney, while urging the reference of these questions to this Court, that there was no necessity for joinder of the Upper Basin States. As California's attorney said then:

> "We have no controversy with any of the Upper Basin States that requires any judicial examination."

VII. NOTHING IN THE CIRCUMSTANCES WARRANTS ORAL ARGUMENT ON THE JOINDER QUESTION.

We are aware of no instance in which this Court has ever interrupted an original proceedings after reference to a master for oral argument on a question of joinder of necessary or proper (as distinguished from indispensable, cf. *Texas* v. *New Mexico,* No. 9 Original) parties. The briefs are commonly adequate for decision one way or another, and they are particularly so here when the Master's Report is so extensive.

CONCLUSION

It is respectfully submitted that the motion of the United States should be denied and that the Report of the Special Master on the question of joinder be approved by this Court without oral argument.

Respectfully submitted,

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