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IN THE

Supreme Court of the United States

October Term, 1955 69 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.*

Reply of California Defendants to Arizona's Memorandum Filed November 1, 1955, Directed to the Report of the Special Master

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By her memorandum Arizona simultaneously attacks the "Motion of United States for Determination of Questions of Law Presented by the Pleadings in the Cause and the Report of the Spe-

cial Master", and the Exceptions to the Report of the Special Master filed by the California Defendants and by Nevada.

I. THE CLAIMS OF THE UNITED STATES ARE NOT "FRIVOLOUS". THEY ARE "OPEN TO SERIOUS QUESTION", AND THE PRESENCE OF ALL THE STATES IS NECESSARY TO THEIR ADJUDICATION

Arizona opposes the motion of the United States on the grounds that the United States is estopped to present it, that its grounds are frivolous, and that the matters the Government raises are not open to serious question. We also oppose the Government's motion (see California's memorandum filed October 21, 1955), but on opposite grounds.

1. The Government is not estopped to raise the questions it now presents. California's motion at the hearing before the Special Master to require the United States to state its position, particularly with respect to Indian claims, was objected to by Colorado and Arizona, not the Government, and the objection was sustained by the Special Master. (Transcript, p. 355-57.) We renewed the motion, and the Special Master said he intended to call upon the United States for an authoritative statement of its position. (*Id.*, p. 419.) He died before doing so, in advance of a conference he had called on this and other subjects for October 12, 1955. Arizona may not complain if the Government now asks the Court for instructions. We differ with the Government in that we think the issues involved in the federal claims, which we say are basin-wide in scope, can be decided on the

merits only after joinder of the other States, rather than before.

2. Nor are the Government's issues "frivolous." Arizona has not suggested how federal claims to 11,785,250 acre-feet of water per year are to be satisfied from the 8,500,000 acre-feet per annum that both Arizona and the United States say is available to the Lower Basin; nor why the Government's demands for Colorado River System water for Mexico, which the Mexican Water Treaty calls guaranteed "from any and all sources", are claims against the Lower Basin only; nor why the requirements of navigation and flood control, under which the Government claims the right to empty any reservoir, are not claims against the whole river system; nor why, as Arizona now implies (p. 13), the Government's claims for Indians shall be charged against "surplus" but not against Arizona; nor how the question of whether Indian claims are in or out of the Compact has suddenly been settled without hearing from the United States as guardian of the Indians. If there ever was any doubt that the Government contends that its Indian claims are outside of the Compact and prior and superior to claims under the Compact, that doubt is dispelled by the language of the Government's pending motion.

3. Certainly Arizona, like California and Nevada, should welcome the presence here of the other four States which we say must share the federal burdens. Of what possible advantage is it to Ari-

zona to leave only herself, California and Nevada to litigate the impact of federal claims which are half again as large as those of Arizona, California and Nevada all put together, and which are alleged to cut right across the Compact?

4. Are the Government's issues "not open to serious question"? The one issue which Arizona apparently most fears is the question of how she can simultaneously claim rights as beneficiary under the California Limitation Act (which Congress and California's legislature both stipulated should be operative only if a seven-state compact should *not* come into existence), and as party to a seven-state compact whose very existence—if it exists at all—precludes the existence of the Limitation Act. No one has yet submitted briefs on the merits of this question—it cannot be decided in the absence of the States which are parties to the Compact and beneficiaries of the Limitation Act—but it is obviously one which is "open to serious question", and it is certainly not frivolous. For example: Just how did Arizona, by delaying ratification until 1944, acquire a better position for herself, and impose greater burdens on California, than she could have acquired by timely ratification within the six months prescribed by Congress for her to make her election?

II. THIS IS A QUIET TITLE ACTION AGAINST THE ABSENT STATES OF THE UPPER DIVISION, MASKED AS AN ACTION FOR DECLARATORY RELIEF

Arizona says (p. 22), that "this is not a quiet title action so far as the Upper Basin States are concerned."

Of course it is. Arizona alleges:

> (1) "The 7,500,000 acre-feet of water per year apportioned to the Lower Basin by Article III(a) was and is within the water present in the main stream and measured at Lee Ferry. . . . " (Reply to California's Answer, par. 8, p. 16.)
>
> (2) " . . . that the 75,000,000 acre-feet specified in Article III(d) bears a direct quantitative relationship to the 7,500,000 acre-feet per year apportioned to the Lower Basin by Article III(a)." (*Id.*, par. 11, p. 18.)
>
> (3) She has title to "2,800,000 acre-feet out of the 7,500,000 acre-feet apportioned to the Lower Basin by Article III(a) of the Compact. . . . " (Complaint, par. XVII, p. 21.)
>
> (4) Since Arizona concedes California 4,400,000 acre-feet (Complaint, p. 30) and Nevada 300,000 (Reply to California's Answer, par. 63, p. 46), her title to 2,800,000 acre-feet per annum is utterly dependent, upon her own pleadings, on the establishment of title in the Lower Basin to 7,500,000 acre-feet of III(a) water at Lee Ferry.

As all this is in the face of the mandate of Article III(a) that the apportionment is from the waters of the "Colorado River System", defined by Article II(a) to include "its tributaries", and that this apportionment shall include "all water necessary for the supply of any rights which may now exist," Arizona's case turns upon the rewriting of Article III(a) to cast the whole burden of the Lower Basin's apportionment thereunder upon the States of the Upper Division, while exempting Arizona—and Arizona alone—from any charge for the use of water upon the tributaries.

This is a quiet title action against the States of the Upper Division, cloaked under a plea for declaratory relief. The declaratory relief which Arizona asks with respect to the meaning of "beneficial consumptive use", the identification of the Gila River with the "increase of use" permitted by Article III(b), the classification of Article III(b) as an "apportionment", and so on, all has just one purpose: the elimination of the Gila River from the accounting which the Lower Basin must make for its consumptive uses under Article III(a), and the resulting inflation of its claims upon the main stream, for Arizona's benefit, against the States of the Upper Division. This is to be done

> (1) by down-grading Arizona's oldest uses, those on the Gila, from the status of "rights which may now exist" under Article III(a) and "present perfected rights" under Article

VIII to the status of a mere "right to increase its beneficial consumptive use" under Article III(b);

(2) by tailoring the rights on the Gila to fit the 1,000,000 acre-feet allowed by Article III(b), ignoring the fact that over 2,000,000 acre-feet of measured water is used each year in that area, and asserting that a new standard of "depletion of the virgin flow of the main stream"—applicable to Arizona, but not California—has replaced the statutory definitions of consumptive use in the Boulder Canyon Project Act and the Mexican Water Treaty, thus writing off 1,000,000 acre-feet of actual consumptive use;

(3) by offering, as an appendix to Arizona's reply to California's answer, the very same ex parte statements that this Court rejected in *Arizona* v. *California,* 292 U.S. 341 (1934), to prove that the Compact and Project Act identified the Gila with Article III(b), and gave the III(b) uses exclusively to Arizona.

But all of Arizona's "elaborate argument"—as the Court called it in 292 U.S. 341, 352—is simply the underbrush surrounding and confusing the main point: that this is essentially a quiet title action, first, against the States of the Upper Division, to brand as apportioned to the Lower Basin all of the 75,000,000 acre-feet they are obligated

to deliver each decade at Lee Ferry, and thus to convert the Compact from a System-wide agreement covering *uses* to a main-stream agreement covering *flow;* second, against California and Nevada to fix the rights of the three States in the water won from the States of the Upper Division.

To do so, Arizona now repudiates the interpretation of the Compact she formally presented to this Court in *Arizona* v. *California,* 283 U.S. 423 (1931), when all seven States were before the Court:

> "The provision in paragraph (d) of Article III that the Upper Basin States will not cause the flow of the river to be depleted below 75,000,000 acre-feet over ten year periods, has, as the Colorado brief, page 41, correctly states, no bearing on the amount of the apportionment to the Lower Basin. This 75,000,000 acre-feet is not apportioned to the Lower Basin. It may not be appropriated in the Lower Basin. Only so much of it may be appropriated as together with existing and future appropriations of water in or from tributaries entering the river below Lee Ferry will total 7,500,000 acre-feet per year. The 75,000,000 acre-feet includes all surplus waters which under paragraph (c) must first bear any Mexican burden, which may not be appropriated, and which are subject to apportionment after 1963. It is fundamental to an understanding of the Compact that the annual beneficial consumptive use in perpetuity of 7,500,000 acre-feet of water apportioned by it to the Lower Basin includes all

beneficial consumptive use in perpetuity which may be made from the whole river system, and is not merely an apportionment of such uses in main stream water flowing at Lee Ferry. The agreement not to deplete the flow at Lee Ferry below the specified amount does not mean, and cannot under the plain words of the Compact be construed to mean, that the guaranteed flow is apportioned to the Lower Basin or may be appropriated there. As to this, at least, there can be no shadow of doubt.

"Under the Compact, then, the only water of which the right to exclusive beneficial use in perpetuity may be acquired in the Lower Basin is the water apportioned to that basin. Such apportionment is limited to 7,500,000 acre-feet of water per annum by Article III(a). The Colorado brief, page 40, contends that paragraph (b) of Article III operates to increase this apportionment to 8,500,000 for the Lower Basin. This, we submit, is not the case. If it had been intended to apportion the larger amount, the Compact could easily have said so. The difference in language between paragraphs (a) and (b) is plain, and the difference in meaning is clear. Paragraph (b) does not *apportion in perpetuity,* as does paragraph (a), any beneficial use of water. It is very careful not to do this. It is to be read with paragraph (c) and relates solely to the method of sharing between the basins any future Mexican burden which this Government might recognize. This burden is to be satisfied first out of 'surplus' waters, and surplus waters are defined, not as surplus over quantities 'apportioned', but

> as surplus over quantities '*specified* in paragraphs (a) and (b).' Any deficiency remaining is to be borne equally by the two basins. Thus the Lower Basin, which without paragraph (b) might use water in excess of its apportionment without acquiring any exclusive right in perpetuity thereto, is enabled to retain such uses to the extent of 1,000,000 acre-feet per annum against the first incidence of the Mexican burden. Thereafter it is entitled to require the Upper Basin to share from its apportionment equally in the satisfaction of any deficiency. In other words, all that paragraphs (b) and (c) accomplish is to require the Upper Basin to reduce its apportionment in favor of Mexico before the Lower Basin is required to do so, the Lower Basin being entitled to contribute first, to the extent of 1,000,000 acre-feet, water which it may have used but to which it has no exclusive right in perpetuity—that is, water not apportioned to it. The water apportioned is that to which exclusive beneficial use in perpetuity is given in paragraph (a), less any deductions which may have to be recognized as provided in paragraphs (b) and (c)." (Brief of Complainant in Opposition to Motion to Dismiss the Bill of Complaint, pp. 32-34)

Has the Compact been amended, that Arizona now may quiet in the Lower Basin the title which she said in 1930 did not exist? Did Arizona's belated unilateral ratification of the Compact in 1944 change the meaning which Arizona so clearly spelled out in 1930? May Arizona obtain a judicial reconstruction of the agreement in the

absence of all its parties, and in respects which amplify the obligations of the absent States of the Upper Division?

Why is Arizona so anxious to exclude now the States which she joined in three earlier actions in this Court? The reason is obvious: if called upon to declare their interests, the four Upper States could not for an instant acquiesce in Arizona's new interpretation of their obligations. If left out of the case, they might hope to assert at some later time the reverse of Arizona's contentions as to the identity of Articles III(d) and III(a). But that is the very reason why a decree in the instant case, predicated upon Arizona's interpretation, absent those States, would be inequitable or futile or both. If the absent States do acquiesce in Arizona's enlargement of their obligations, let them say so in a form which will subject them to the decree in this case.

III. ARIZONA'S NEW CONTENTION THAT UNDER THE SPECIAL MASTER'S REPORT INDIAN DIVERSION RIGHTS OF 1,556,250 ACRE-FEET, WITHIN ARIZONA, MAY BE IN ADDITION TO THE 3,800,000 ACRE-FEET OF CONSUMPTIVE USES CLAIMED BY THAT STATE, NECESSITATES THE JOINDER OF THE STATES OF THE UPPER DIVISION, AS IT WOULD INVADE AND DESTROY THE "SURPLUS" WHICH ALONE PROTECTS THEM FROM THE MEXICAN BURDEN UNDER ARTICLE III(c) OF THE COMPACT.

Arizona's memorandum (p. 13, n. 8) says:

> ". . . 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 distribution within the Basin should be."

Arizona seems to think that the Indian rights should be treated as those of an additional State in the Lower Basin; that the 1,556,250 acre-feet of diversion rights claimed for Indians *in Arizona* (Petition of Intervention of the United States, Appendix II, pp. 56-57) may be *in addition* to the 3,800,000 acre-feet claimed by the State of Arizona; that California "misconstrues this conclusion of the Special Master" when we say he held that "Indian uses are to be charged to the *State* and Basin where they take place." (Arizona Memorandum, p. 13, n. 8, emphasis supplied.)

Arizona thus hints at her hopes for a windfall of 1,556,250 acre-feet of diversion rights over and above the 3,800,000 acre-feet she claims.

But at whose expense? All of the 8,500,000 acre-feet of consumptive use available to the Lower Basin under Articles III(a) and III(b) of the Compact is already accounted for, on her theory: 4,400,000 acre-feet to California, 300,000 to Nevada, 3,800,000 to Arizona. Where is the added 1,556,250 acre-feet of diversion rights to come from? Obviously only from the waters which are "surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b)", of Article III (Article III(c)). But these are the waters dedicated in those very words to the supply of the Mexican burden, insulating the States of the Upper Division from the obligation otherwise imposed

by Article III(c) to increase their deliveries at Lee Ferry to supply one-half of the Mexican deficiency.

This new disclosure alone, in Arizona's brief, would necessitate the joinder of the States of the Upper Division. The surplus thus to be invaded for Arizona's benefit is the surplus of the entire Colorado River System, the only cushion against the impact of the Mexican burden upon the States of the Upper Division.

IV. ARIZONA'S MEMORANDUM FAILS TO MEET THE ISSUES PRESENTED BY THE EXCEPTIONS

Arizona's memorandum carefully avoids any discussion of the question whether the absent States are necessary to an adjudication of the claims of the United States; whether their rights as third party beneficiaries of the California Limitation Act survive if Arizona has become a party to the Compact; whether the declaratory relief which Arizona seeks can be granted without affecting their interests; whether Arizona's prayers to quiet title, if granted, would take their water; whether Arizona's invasions of the "surplus" deprive them of their protection against Mexico; whether they are affected by Arizona's denial of their right, and California's, to appropriate "surplus"; and so on, as to all the substantive issues.

Arizona's argument begs the whole question of whether, under the classic doctrine of *Shields* v. *Barrow,* 17 How. 130, 139 (U. S. 1855), followed by this Court for a hundred years, these States "ought

to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. . . ." Manifestly, if these States have the interests which we have spelled out in our exceptions and brief, but which Arizona now declines to brief and on which she shuns oral argument (Arizona Memorandum, p. 25), then the absent States "not only have an interest in the controversy, but an interest of such nature that 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." (*Ibid.*)

Arizona, avoiding all these questions, seemingly relies on the rule (Arizona Memorandum, p. 14) that a Special Master's finding of fact should be accepted by a District Court under Rule 53 (e) (2) of the Federal Rules of Civil Procedure. But the Special Master here held that, notwithstanding Rule 9 (2) of the Supreme Court Rules, Rule 19 of the Federal Rules, which would manifestly require joinder here if the parties were private, did not apply to this original action (Report, p. 25); and if not, then it is not clear why Rule 53 (e) (2) is applicable. Even if applicable, it relates only to findings of fact, and the Special Master in our case thought that he was making none, as no evidence had been taken. (Report, p. 4.) Moreover, the case on which Arizona principally relies,

Anderson v. *Mt. Clemens Pottery Co.*, 328 U. S. 680 (1946), is one in which the Court disagreed with a Special Master's finding of fact and sent the case back for further proceedings—notwithstanding that the employees aggrieved by the Master's finding had not appealed.

In the three cases which preceded the suit now before the Court, Arizona joined all six States. Were they proper parties, or did she improperly invoke the process of the Court to call her sister sovereigns here? If proper parties, it was only because the controversy she disclosed was justiciable as to them. She now says that "The claims for relief in those cases were radically different from those made here." (Arizona Memorandum, p. 20, n. 11) But in *Arizona* v. *California*, 292 U. S. 341 (1934), Arizona tendered a bill to perpetuate the identical testimony which she now annexes to her reply to California's answer (pp. 57-76), to establish the very contention she repeats here: that Article III(b) of the Compact was intended to apportion 1,000,000 acre-feet to Arizona. She told the Court in the 1934 case, in which she joined all these States, that at some time in the future she would commence an action against these six States "or some of them", in which she wished to use that testimony. This is that action. It is not a "radically different" one.

Arizona, while disclaiming the materiality of anything her counsel told this Court in pleadings and briefs in the three previous cases (Reply to

California's Answer, par. 40, p. 32), now dwells on the fact that various witnesses for California, testifying before Congressional Committees, have expressed the opinion that California could state a cause of action against Arizona that would not necessarily involve the Upper Basin States. That is not the problem here. It is Arizona, not California, which alleges that the water apportioned to the Lower Basin by Article III(a) is all to be found flowing at Lee Ferry, excluding the tributaries. It is Arizona, not California, which alleges that all of the deliveries by the States of the Upper Division under Article III(d) are apportioned to the Lower Basin and contain no water to satisfy the Mexican burden. It is Arizona, not California, which alleges that Article III(b) constitutes an apportionment in perpetuity to the Lower Basin. It is Arizona, not California, which seeks to use a million acre-feet of salvaged water free of any accounting under the Compact. It is Arizona, not California, which denies the existence of surplus above the quantities specified in Articles III(a) and III(b) and denies the right of any State to appropriate it if it exists. It is the United States which now asserts claims against the Colorado River System fifty per cent greater than the combined claims of Arizona, California and Nevada. In the light of all this, note the following colloquy in the hearings on the "Litigation Resolutions",* which Arizona omits:

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* See *Hearings before a Subcommittee of the Senate Committee on Interior and Insular Affairs on S.J. Res. 145,* 80th

"Senator MILLIKIN. Are you limiting the issues that you would raise before the court to those which have been mentioned here?

"Mr. ELY. Well, if we control the issues to go to the court, we would ask to have these three go.

"Senator MILLIKIN. And as to any others? Would you reserve the right to raise others?

"Mr. ELY. It would depend entirely upon what position the other States took.

"Senator MILLIKIN. Then you are reserving the right to raise any issues in your own interest, as you should.

"Mr. ELY. Yes, sir."

(*Hearings before a Subcommittee of the Senate Committee on Interior and Insular Affairs on S. J. Res. 145,* 80th Cong., 2d Sess., p. 114.)

Even if the suit had been restricted to the three issues on which Arizona asks declaratory relief, it was the opinion of counsel for the Upper States at the same hearing that they would have to be in the litigation. Counsel for Colorado said:

"Colorado is one of the signatory States to the Colorado River compact. We feel that any matter which involves the interpretation or application of the Colorado River compact necessarily involves every States (sic) which is signatory to that compact. In fact, we

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Cong., 2d Sess. (1948); *Hearings before Subcommittee No. 4 of the House Committee on the Judiciary on H.J. Res. 225, 226, 227, 236 and H.R. 4097,* 80th Cong., 2d Sess. (1948); *Hearings before the Senate Committee on Interior and Insular Affairs on S. 75 and S.J. Res. 4,* 81st Cong., 1st Sess. (1949).

feel that in any litigation each of the signatory States would be an indispensable party to the litigation." (*Id.*, p. 198.)

And counsel for Wyoming said:

"Now, there is another matter that I would like to mention briefly, and that is whether or not a suit, if commenced, will be in any way confined as to parties and whether or not Wyoming, for whom I speak, might not become a party. I doubt that very much. The resolution names all of the States in the basin except Colorado and Wyoming, but says "other parties." Regardless of what the resolution may say or what it may leave out, I do not believe that a controversy of this kind would be determined by the Supreme Court of the United States without Wyoming and Colorado being made parties to it." (Id., p. 302.)

V. THE PROPER TEST OF JOINDER IS THE EFFECT OF THE RELIEF SOUGHT AMONG PRESENT PARTIES ON THE ABSENT STATES, NOT THE LACK OF AN ALLEGATION OR CLAIM FOR RELIEF AGAINST THEM

Arizona asserts that the absent States are at most "proper parties" who have only a "possible intellectual interest" in the relief sought in the present controversy. She asserts magnanimously that all she wants is to live in peace with her neighbors to the north and west. (Arizona Memorandum, pp. 16-18.) Yet she carefully soft pedals any discussion or analysis of her claims which she seeks to have adjudicated. The reason is obvious. Arizona's claims to Colorado River water

can only be granted out of water to which the absent Upper States have present rights under the Colorado River Compact.

(1) Arizona's claim to quiet title to 2,800,000 acre-feet of main stream water under Article III (a) of the Compact can only be adjudicated by quieting title in her to Article III(d) water delivered by the Upper States in satisfaction of their Mexican obligation.*

(2) Arizona prays that her claims to "beneficial consumptive use" under the Colorado River Compact "be measured in terms of stream depletion." (Complaint, pp. 30-31.) This method of measurement would result in ballooning the rights of the Lower Basin (for the sole benefit of Arizona) against the absent Upper States from the 8,500,000 acre-feet per annum allocated to it under Articles III(a) and III(b) of the Compact to over 10,500,000 acre-feet of true consumptive use, measured by actual consumption at the site of use.**

(3) Arizona seeks an adjudication that the 1,000,000 acre-feet of "increase of use" permitted to the Lower Basin under Article III(b) of the Compact is apportioned in perpetuity to it (again, however, for the sole use and benefit of Arizona) as against the Upper Basin.***

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* See California Defendants' Brief on Exceptions, pp. 74-87.

** See California Defendants' Brief on Exceptions, pp. 57-66.

*** *Id.*, pp. 66-71.

These are but a few of Arizona's claims for relief that vitally affect the present legal rights of the absent Upper States. Arizona seeks to avoid their joinder by asserting that no party has formally asked for any relief against any of the absent states. However, if this were the test of joinder, no one would ever be found a necessary or indispensable party, for it is quite infrequent for a party litigant to admit that his asserted claims could involve the taking of property to which an absent party could have legal rights.* The Arizona position competely misconceives the question posed by a joinder motion. The issue is not whether the present parties have alleged a cause of action against the absent States, but whether their interests will be affected by the resolution of issues among the present parties. Former cases decided by this Court are clear that there need be no cause of action alleged, nor relief sought, nor allegation of a threat to infringe rights against the absent parties, as a prerequisite to their joinder, if they are affected by the issues to be resolved in the controversy before the Court. In *Arizona* v. *California,* 298 U.S. 558 (1936), this Court held that the United States was an indispensable party to a suit brought by Arizona to declare her equitable apportionment of the

* An exception to this in the present case is the United States, which frankly admits that unless its Indian claims are restricted under the Compact, which it submits they cannot be under Article VII of the Compact, then the Upper States are vitally affected, requiring joinder.

waters of the Colorado River System, even though there was no allegation by any of the parties that the United States was threatening to infringe any water rights, nor was any relief sought against the United States. The United States was indispensable solely because:

> " . . . The relief asked, and that which upon the facts alleged would alone be of benefit to Arizona, is a decree adjudicating to petitioners the 'unclouded . . . rights to the permanent use of' the water. Such a decree could not be framed without the adjudication of the superior rights asserted by the United States. . . . " (p. 571.)

Arizona asserted there, as she does here, that her rights do not conflict with those of the absent parties sought to be joined. In *Minnesota* v. *Northern Securities Company,* 184 U.S. 199 (1902), the State of Minnesota brought an original action to enjoin the Northern Securities Company from acquiring the stock of and exercising control over two parallel and competing railroads in Minnesota. There was no cause of action against the railroads and no relief against them was sought. Moreover, there was no controversy between the railroads and the Northern Securities Co. Nevertheless, they were held to be indispensable parties because their rights necessarily would have been affected by the litigation. For similar rulings see *Northern Indiana R.R.* v. *Michigan Central R.R.,* 15 How. 233 (U.S. 1854); *Mallow* v. *Hinde,* 12 Wheat. 193 (U.S. 1827), and

Keegan v. *Humble Oil & Refining Co.,* 155 F.2d 971 (5th Cir., 1946).

The justiciability of Arizona's quiet title action does not depend on whether any claims of the absent States invade Arizona's rights; it depends upon whether Arizona's claims invade the rights of the absent States to such a degree that those claims cannot be fully adjudicated in their absence.

Arizona, avoiding all discussion of whether *her* claims affect the absent States to a degree which makes those States necessary parties, dresses her argument on the straw man of whether *California* alleges any wrongdoing by those States. If Arizona's case is justiciable against California, it is justiciable against the States of the Upper Division, for her claims cannot be sustained unless the States of the Upper Division are first required to yield to the Lower Basin the water which Arizona would then take from California and Nevada.

In the language of Mr. Justice Stone in *Arizona* v. *California,* 298 U.S. 558, 567 (1936), a justiciable controversy would there exist if Arizona, "as a sovereign state, or her citizens, whom she represents, have present rights in the unappropriated water of the river . . . . " This test of Mr. Justice Stone is similar to that asserted by the Court opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 141-142, 149-157 (1951), that "[t]he touchstone to justiciability is injury to a legally protected right. . . ." and the similar

tests laid down by Mr. Justice Frankfurter in his concurring opinion. Under all tests as applied to the facts and claims of the present suit (which the Arizona Memorandum neglects to do), it is clear that the decreed rights sought by the present parties would constitute an immediate invasion of the present rights of the absent States, thus posing a justiciable controversy with respect to them.

VI. THE NEBRASKA - WYOMING - COLORADO LITIGATION SUPPORTED JOINDER OF AN ABSENT STATE ON FACTS NO MORE INDUCIVE TO JOINDER THAN THOSE PRESENT IN THE INSTANT CASE

1. The First Order. (295 U. S. 40 (1935).)

Here the only ground alleged by Wyoming as to why Colorado was an indispensable party was because "the bill discloses that the North Platte rises in that state and drains a considerable area therein." (*Id.*, p. 43.) The Court properly held that that ground alone was "without merit," reserving the determination "whether at a later stage of the cause pleadings or proofs may disclose a necessity to bring her into the suit." (*Ibid.*) The mere fact that the water rises in the Upper State does not mean that there is any conflict between that State and the present parties to the controversy. Arizona asserts that the decision in the First Order is "on all fours" with the present case (Arizona Memorandum, p. 20)—in other words that the only ground asserted or present for joinder in the present case is that the Colorado River rises in and drains a considerable portion

of the Upper Basin States. This patently overlooks the claims of both the United States and Arizona to waters of the Colorado River System, asserted under as well as outside of the Colorado River Compact, which adversely affect the present legal rights and duties of the absent States to the same Colorado River System waters.

2. The Second Order. (296 U. S. 553 (1935).)

Some eight months later, the Court unanimously and without opinion ordered that Colorado be made a party "in accordance with the prayer of the amended and supplemental answer of the State of Wyoming. . . . " (*Ibid.*) That amended and supplemental answer,* so far as it dealt with Colorado's actions, alleged no present injury by Colorado but recited only contemplated and threatened diversions by Colorado of waters which were the "subject matter pro tanto of the determination of the rights in this action of the present parties." Hence the crucial point was not the threat but the fact that the rights of Colorado to the use of water of the North Platte conflicted with the asserted rights to the same waters claimed by Nebraska and Wyoming in their suit for an equitable apportionment. Wyoming made this fact clear when she stated in her amended and supplemental answer, after alleging Colorado's contemplated diversion, that

* See pp. 13-14 of California Reply Brief on this Motion for the pertinent paragraphs of the Amended and Supplemental Answer.

> " . . . . if the present suit is permitted to proceed without making the State of Colorado a party, defendant will be subject to further litigation with the State of Colorado and its appropriators, involving the waters of the North Platte River which constitute the subject matter of this suit. And defendant says that a proper and equitable allocation of the waters of the North Platte River, as complainant well knows, cannot be made between the present parties upon any equitable basis without at the same time determining the rights, whatever they may be, of the State of Colorado and of its appropriators in said waters. . . . " (*Ibid.,* Paragraph Twentieth.)

This Court, in its final opinion (325 U.S. 589 (1945)), removed any doubt or ambiguity as to its action in joining Colorado in 1935. Colorado, after final hearing, moved to be dismissed from the suit on the ground that she had not injured or threatened to injure downstream water users in Wyoming and Nebraska. Indeed the actual uses of Colorado at that time did not exceed the amounts to which she was limited by the decree. Colorado asserted that her proposed projects were not planned for the immediate future and hence did not constitute a present threat. The Court held that

> "The fact that Colorado's proposed projects are not planned for the immediate future is not conclusive in view of the present overappropriation of natural flow. . . . If this were an equity suit to enjoin threatened in-

> jury, the showing made by Nebraska might possibly be insufficient. But Wyoming v. Colorado, supra, indicates that where the claims to the water of a river exceed the supply a controversy exists appropriate for judicial determination. . . ." (*Ibid.*, pp. 609-610.)

There is no question but that the Colorado River, like the North Platte, is greatly over-appropriated, *Arizona* v. *California et al.*, 298 U. S. 558 (1935), so that the claims of the present parties to the suit cannot be granted without quieting title to water to which the absent States may have present rights.

The case now before the Court is much stronger than the second *Nebraska* v. *Wyoming* order for the joinder of the absent States. In addition to factors almost identical, the present litigation is based upon the interpretation of the meaning and effect of the Colorado River Compact and Statutory Compact which control the rights and obligations of all seven States of the Colorado River Basin. Contrary to Arizona's assertion that the Colorado River Compact settled the major differences between the Basins, her claims raise new interpretations of the Compact that strike at the heart of the understood rights between the Basins. Arizona's Complaint hence raises the central issue of the extent of rights allocated to the Lower Basin under the Compact, which directly involves the converse rights and obligations of the absent Upper States under that document.

CONCLUSION

The "business at hand", as Arizona calls it (memorandum, p. 10) would be a good deal further along if Arizona had joined the necessary parties in the first place, and if Arizona had not resisted, for the past year and more, California's efforts to cure that defect. This is the first of Arizona's four cases in this Court in which the United States, an indispensable party, has intervened, and hence the first in which there has been an opportunity for a complete settlement of the Colorado River controversy. In the other three cases, all seven States were before the Court upon Arizona's summons, but the United States was not. We respectfully submit that it will not be in the interest of any State of the Basin if the present opportunity for a final determination is lost through the failure to join the parties necessary to that determination.

Respectfully submitted,

(See list of signatures to this Reply on page 28.)

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