IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 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*.

BRIEF OF NEW MEXICO OPPOSING MOTION OF CALIFORNIA TO JOIN AS PARTIES THE STATES OF COLORADO, NEW MEXICO, UTAH AND WYOMING.

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PRELIMINARY STATEMENT

On the 26th day of October, 1954, the Court entered an Order in this case which reads as follows:

> "Motion of California in ten original to join Colorado, New Mexico, Utah and Wyoming will be held for sixty days to enable those states to file printed responses."

In response to the Order of the Court, Colorado and

Wyoming have filed herein their separate brief limited to the question of joinder from the standpoint of the four states, Colorado, Wyoming, New Mexico, and Utah, as States of the Upper Basin. The status of Colorado, Wyoming, New Mexico and Utah as Upper Basin states, or as States of the Upper Division, are all identical insofar as the question of joinder is concerned. However, as will be seen by examination of the language of the Colorado River Compact of 1922, New Mexico and Utah are also states of the Lower Basin. For this reason, New Mexico adopts the brief filed herein by the states of Colorado and Wyoming in opposition to joinder based upon the Motion of California. However, in view of the fact that the brief filed by Colorado and Wyoming does not deal with the status of New Mexico and Utah as states of the Lower Basin, we deem it appropriate for these two states to file separate briefs opposing the Motion to join based upon the status of New Mexico and Utah as states of the Lower Basin.

STATUS OF NEW MEXICO AS DEFINED IN COLORADO RIVER COMPACT OF 1922

Article II of the 1922 Compact reads in part as follows:

"As used in this compact: —

(c) The term "States of the Upper Division" means the States of Colorado, New Mexico, Utah and Wyoming.

(d) The term "States of the Lower Division" means the States of Arizona, California and Nevada.

(f) The term "Upper Basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also

all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry.

(g) The term "Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry."

Article III reads in part as follows:

"(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin respectively the exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre feet per annum."

Thus by Article II c and II f, New Mexico is one of the "States of the Upper Division" and of the "Upper Basin"; also by II g it is one of the States of the "Lower Basin". (Text of Colorado Compact, November 24, 1922, Page 1, Appendixes to the Answer of California).

It should be noted that the allocation of "exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum," to both the Upper Basin and to the Lower

Basin, III a, includes "all water necessary for the supply of any rights which may *now* exist." The provisions of III b refers to the right of the Lower Basin to *increase* its beneficial consumptive use of such waters by one million acre feet per annum.

By Article VIII "Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact."

STATEMENT OF POSITION OF NEW MEXICO

New Mexico's principal interest in the consumptive use of water from the Colorado River System arises because of its status as one of the four states of the Upper Basin and of the Upper Division. Its interest as a State of the Lower Basin is dependent upon its ability to make consumptive use of a portion of the water of the Gila River and its tributaries which rise in the Western part of the State of New Mexico and flow across Arizona and into the Colorado River. It is physically impossible for New Mexico to divert for consumptive use in the State any waters from the main stream of the Colorado River, or from Lake Meade or any other reservoir on the main stream. Her water must come from the Gila or its tributaries in New Mexico, or possibly by exchange with Arizona, of main stream water for tributary water, which can be effected by negotiation —not by litigation.

The quantity of water which it may divert for beneficial consumptive use within the State is limited by physical and geographical factors. The acreage presently being irrigated is less than 10,000 acres, a figure which is infinitesimal compared to the claims of Arizona and California. Both states, however, recognize that New Mexico has the

right to an equitable share of the beneficial consumptive use of the waters of the Gila and its tributaries. (Answer of Defendants, page 66, paragraph 63—Bill of Complaint, page 30, Brief of Arizona.)

ARGUMENT

New Mexico objects to being joined as a party to this litigation because:

1. The pleadings do not show the existence of a justiciable controversy within the original jurisdiction of this court between New Mexico and any other party to the cause of action. This is true whether the status of New Mexico is considered as a "State of the Upper Division" or as a State of the Lower Basin.

2. The equitable share of New Mexico as a State of the Lower Basin, to the allocations made by Article III a and III b of the 1922 Colorado River Compact to the States of the Lower Basin, is admitted by both Arizona and California and disputed by no other party. It is not in the best interest of New Mexico at this time and in the present suit to be compelled to litigate and have determined the exact magnitude of this equitable share in terms of acre feet of water. Nor do the issues made by the pleadings between the real parties to this case make necessary the determination of the magnitude of such equitable interest of New Mexico at this time. Such a determination would depend upon facts that are hypothetical and highly speculative and under existing conditions would be premature.

3. Rule No. 19 of the Rules of Civil Procedure is not applicable or appropriate in this case.

4. It is not contended by California that the four

states of the Upper Division are "indispensable" parties in the sense that the case may not proceed without them.

5. Joinder of the four states at this time, under present status of pleadings, would be premature.

The following principles apply on the question of joinder of all four states, Colorado, Wyoming, Utah, and New Mexico, as well as to New Mexico and Utah as states of the Lower Basin:

> It will not grant relief against a state unless the complaining state shows an existing or presently threatened injury of serious magnitude. *Missouri vs. Illinois,* 200 U.S. 496, 521; *New York vs. New Jersey,* 256 U.S. 296, 309; *North Dakota vs. Minnesota,* 263 U.S. 365, 374; *Connecticut vs. Massachusetts,* 282 U.S. 660, 669; *Alabama vs. Arizona,* 291 U.S. 286, 291; *Washington vs. Oregon,* 297 U.S. 517, 528.
>
> A potential threat of injury is insufficient to justify an affirmative decree against a state. The court will not grant relief against something feared to occur at some future time. *Alabama vs. Arizona,* supra. The judicial power does not extend to the determination of abstract questions. *New York vs. Illinois,* 274 U.S. 288; *United States vs. West Virginia,* 295 U.S. 463.
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> The court will not give advisory opinions or pronounce declaratory judgments. Its jurisdiction will not be exerted in the absence of absolute necessity. *Alabama vs. Arizona,* supra., *Arizona vs. California,* 283 U.S. 423; *U. S. vs. West Virginia; Massachusetts vs. Missouri.*
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> To predetermine, even in the limited field of water power, the rights of different sovereignties pregnant with future controversies, is beyond the judicial function. *U.S. vs. Appalachian Power Company,* 311 U.S. 377, 432.
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> The exercise of original jurisdiction in an inter-state

case is not mandatory. (Georgia vs. Pennsylvania Railroad Company, 324 U.S. 439, 464; North Dakota vs. Chicago and Northwestern Railroad Company 257 U.S. 485.) The mere fact that a state is plaintiff is not enough (Wisconsin vs. Pelican Insurance Co., 127 U.S. 265; Oklahoma vs. A.T. & S.F. Ry., 220 U.S. 277).

Rule 19 of the Federal Rules of Civil Procedure is not necessarily controlling in this case. Rule 9 of the Supreme Court rules governing procedure in original actions, sub-paragraph 2 reads as follows: "The form of Pleadings and Motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken as a *guide* to procedure in original actions in this court." Sub-paragraph 3 of the rule governs the filing of the initial Pleading in an original action, and the procedure followed by the court in either granting or refusing a Motion for leave to file the initial petition. Sub-paragraph 6 of the rule states "additional Pleadings may be filed and subsequent proceedings had as the court shall direct."

In this case, the State of Arizona filed its Motion for leave to file its initial pleading and leave was granted by the court. The court no doubt determined that the petition stated a justiciable controversy between the State of Arizona and State of California and the nine additional defendants. California answered the petition of Arizona and joined issue on the allegations of Arizona's petition and asserted four affirmative defenses. Subsequently, the United States and the State of Nevada sought and were granted leave to intervene. We submit that the initial petition of the State of Arizona did not state a justiciable controversy with the states of Colorado, Wyoming, Utah and New Mexico. We submit further that neither the State of

Nevada nor the United States has alleged any fact creating a justiciable controversy with either of the four absent states.

In the case of *Nebraska vs. Wyoming,* 295 U.S. at page 43, the Court said:

> "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 proof may disclose a necessity to bring her into the suit."

We believe the above language is applicable to the pleadings in this case and that the motion of California should be denied.

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