No. 80, Original

IN THE

Supreme Court of the United States

October Term, 1977

STATE OF COLORADO, *Plaintiff*

v.

STATE OF NEW MEXICO,
AND TONEY ANAYA,
ATTORNEY GENERAL OF THE STATE OF
NEW MEXICO, *Defendants*

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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SUBJECT INDEX

INDEX OF AUTHORITIES

Constitutional Provisions:

Miscellaneous:

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STATEMENT OF THE CASE

The Vermejo River is a small, non-navigable stream rising on the southeastern slopes of the Sangre de Cristo mountains just above the Colorado-New Mexico state line. Some twenty-eight square miles of Vermejo River drainage lie in Colorado. The area is uninhabited, and no use or diversion of Vermejo waters has ever been made in Colorado.

The only stream gage on the Vermejo River in New Mexico is near the abandoned town of Dawson. The gage measures flow from a total drainage area of approximately 300 square miles,

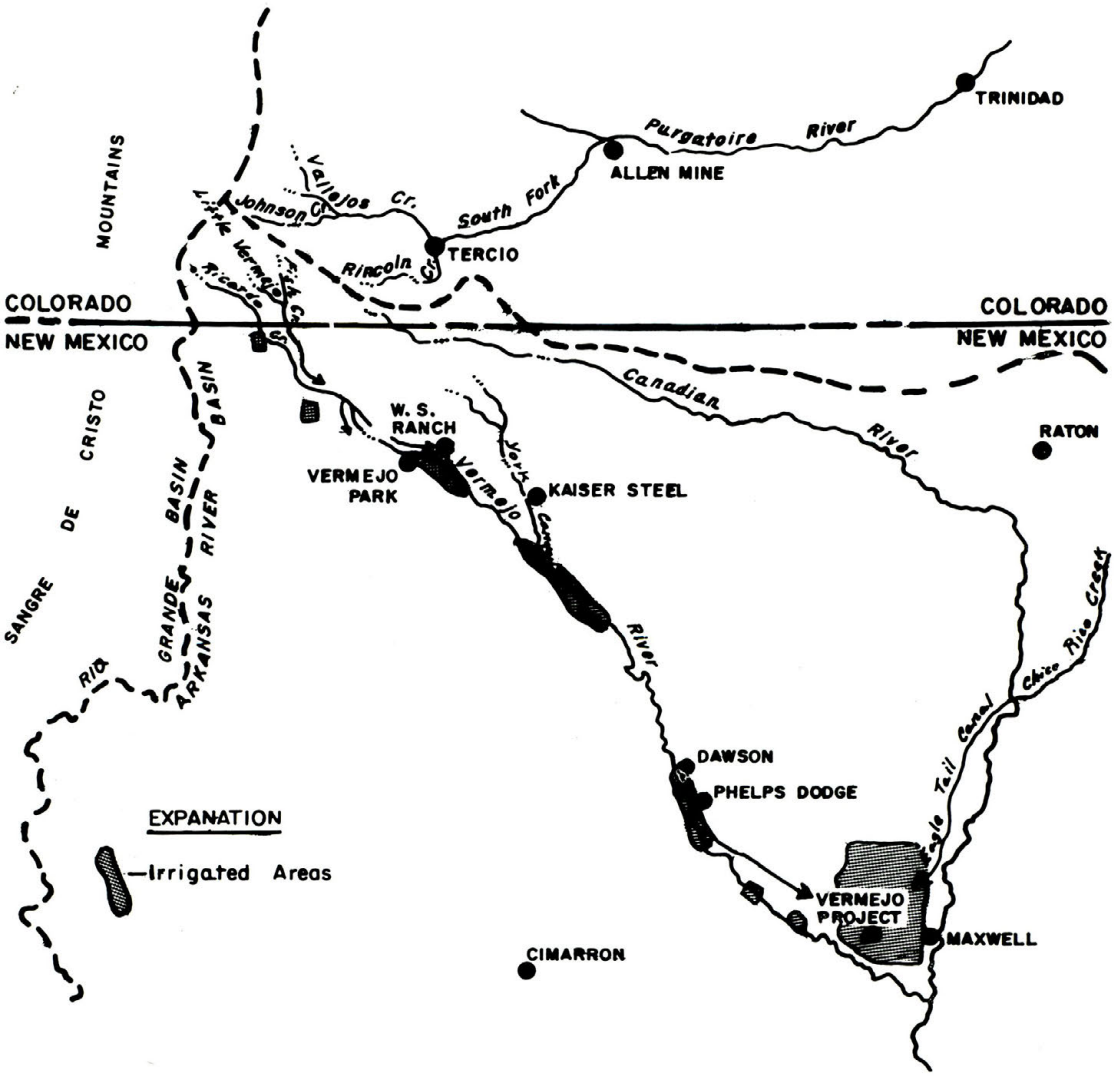
including the area in Colorado. United States Geological Survey records show the average annual flow at Dawson to be 13,100 acre feet for the period 1927-75. The minimum annual flow, which occurred in 1951, was 1,300 acre feet. At times there is no flow in the river at the gage.

Historically there have been no uses of Vermejo River waters in Colorado. There is none today. In New Mexico, on the other hand, an agrarian and industrial economy has developed from actual diversion and application to beneficial use of Vermejo waters dating back to the middle 1800s. The river is fully appropriated, and the economy of the area depends upon the continued flow of the river.

In Colorado there is no economic or social dependence upon the Vermejo River. However, on May 5, 1973, Colorado Fuel and Iron Steel Corporation filed an application in Colorado district court for Water Division No. 2, numbered W-3961, seeking judicial approbation of a conditional or inchoate water right for a proposed trans-mountain diversion of Vermejo waters into the Purgatoire River system for a planned industrial development of some 260,000 acres of corporation-owned land in Las Animas County, Colorado. Obviating local apprehension, CF&I's notice of intent to appropriate was published with the caveat that "(t)he water claimed in this application is not tributary to any stream in Colorado and is not subject to call by any existing Colorado decrees." (Bent County Democrat, June 7, 1973, Las Animas, Colorado).

Pursuant to Colorado law the water referee issued an order on April 18, 1975, denying CF&I's application *inter alia* because:

> 5. . . . (S)aid waters are proposed to be diverted, and the lands upon which said ditch is to be located, are all outside Water Division No. 2, and are located in an area of Colorado which is not in any of the Seven Water Divisions.



6. . . . (S)aid water is claimed for irrigation, domestic, industrial, recreation, and power uses. Also that after written request by the Referee, the applicant has refused to give any more detail (sic) information as to what specific uses will be made of said water or where such uses will occur. Applicant has indicated to the Referee

that at this time they do not know how the water will actually be used.

7. . . . (S)aid proposed uses are speculation and do not constitute a bona fide conditional appropriation upon which a conditional water right can be based. (Ruling of Referee, *In the Matter of the Application for Water Rights of CF&I Steel Corporation,* No. W-3961, In the District Court in and for Water Division No. 2).

On May 6, 1975, CF&I moved for reconsideration, asserting that the referee was wrong respecting the jurisdictional reach of Water Division No. 2 and that the corporation's planned development was not speculative as a matter of law, but was definite in concept: "The project contemplated is one of very considerable magnitude on the part of a corporation which has vast acreages of land to develop." (Memorandum in Support of Motion for Reconsideration, p. 2, Cause No. W-3961, *supra*). CF&I also pointed out to the referee that "there is no other owner or potential owner in Colorado who would be affected by (the proposed) diversion or the tying up for future diversion of waters that would otherwise go into New Mexico."[1] (*Id.*, p. 6).

On May 12, 1975, the referee overruled his initial order and recognized an inchoate right to make a future diversion of 75 cfs from the headwaters of the Vermejo River, an amount likely in excess of the entire maximum flow of the river.

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1. In an attempt to obtain sufficient water rights for the related development of a washery for the Allen Mine in Las Animas County, CF&I recently attempted to revive water rights from a washery in Pueblo abandoned in 1918. The protests of the City of Trinidad and the Purgatoire River Water Conservancy District bear witness to the fully appropriated condition of the Purgatoire River system and suggest that CF&I's most recent attempt to obtain water for future development by taking it from New Mexico users, is somewhat intemperate, to say the least. *Cf., In re CF&I Steel Corporation in Las Animas County,* 183 Col. 135, 515 P.2d 456 (1973).

There are still no actual appropriations of Vermejo water in Colorado. The only other thought given to such an appropriation exists in the form of an application of the Colorado Water Conservation Board filed on November 12, 1976, for a right to a minimum instream flow of 5 cfs. (Cause No. W-4530, Water Division No. 2). By the terms of a stipulation between the Colorado Water Conservation Board and CF&I, filed in the proceedings in Water Division No. 2 on January 31, 1977, it was agreed that the Board would withhold further action on its application pending Colorado's attempt to obtain an apportionment of the Vermejo waters. CF&I agreed not to oppose the Board's application, and the Board agreed not to oppose CF&I's proposed trans-mountain diversion. What's good for CF&I is good for Colorado.

In contrast to Colorado's interest in Vermejo waters, i.e., CF&I's planned development, New Mexico's interests are real. On November 21, 1941, the New Mexico district court for Colfax County entered its final decree in *Phelps Dodge Corporation, et al. v. W. S. Land and Cattle Co., et al.,* No. 7201, adjudicating the rights to the use of Vermejo River waters in New Mexico. Irrigation and storage rights are decreed for approximately 15,000 acres with priorities ranging from 1867 to 1937. Industrial rights date from 1873. The Vermejo Conservancy District, serving a turn-of-the-century reclamation project of some 7,250 acres, has priorities dating from 1877 to 1906. Municipal and domestic rights also date from the 1800s. The New Mexico users with historically established and adjudicated rights have experienced chronic and often severe shortages of water.

Upon learning of CF&I's decreed conditional right, four New Mexico water users – Kaiser Steel Corporation, Phelps Dodge Corporation, Vermejo Park Corporation, and the Vermejo Conservancy District – filed suit on April 26, 1976, in federal district court in Albuquerque, asking that the court enjoin CF&I from diverting Vermejo waters "unless and until the prior rights

of Plaintiffs have been filled and satisfied. . . ." (Complaint, p. 3, *Kaiser Steel Corporation et al. v. CF&I Steel Corporation,* Civil No. 76–244). Applying the principles of prior appropriation indigenous to both Colorado and New Mexico, the federal district court entered its order of summary judgment on January 16, 1978, enjoining CF&I from any out-of-priority diversion of Vermejo waters. In effect, the court's order recognizes the fully appropriated condition of the Vermejo River, protects existing uses from threatened interference, and, as a practical matter, precludes CF&I's planned diversion of Vermejo waters.

Notice of appeal to the 10th Circuit Court of Appeals was filed by CF&I on February 13, 1978. (*Kaiser Steel Corporation, et al. v. CF&I Steel Corporation,* 10th Cir. No. 78-1193). On August 16, 1978, Judges Lewis and McWilliams issued the 10th Circuit's order removing the appeal from the active calendar of the court "pending a decision of the Supreme Court of the United States" in this action.

During the pendency of the federal district court action, Governor Richard Lamm of Colorado wrote to New Mexico Governor Jerry Apodaca on September 15, 1976, noting that there "may be a potential conflict" between water rights long established under New Mexico law and CF&I's development plans, and suggested that the two states negotiate a settlement in lieu of an equitable apportionment action in this court. In the spirit of comity, Governor Apodaca agreed to discuss the "problem," but noted his opinion that the doctrine of equitable apportionment was inapplicable because of the reliance in New Mexico "upon long established appropriations of Vermejo River waters. . . ."

Representatives were appointed by each state, and after an informal gathering on February 8, 1977, a formal meeting was scheduled for May 19, 1977. At that meeting the "compact" negotiations to which Colorado has alluded in her proposed

complaint were promptly terminated by New Mexico on the ground that "there are extensive uses of the waters of the Vermejo River system in New Mexico with ancient priority dates, that these uses suffer severe and chronic shortages, and there are not now, and never have been, diversions from the system in Colorado." The negotiations, it was thought, seemed "more a strain on comity than (they) would seem to engender comity." It was New Mexico's view that Colorado's primary interest in seeking to negotiate a compact was to acquire some semblance of integrity in anticipation of this action.[2]

Colorado thus comes before this Court with no existing uses and no existing equities, seeking leave to justify an "equitable apportionment" of the waters of the Vermejo River. In truth, however, Colorado seeks not an equitable apportionment, but rather an avaricious apportionment. She possesses only one interest in Vermejo waters – the paper right of CF&I. The proposed action, in reality, is nothing greater than an attempt by CF&I to enjoin long established uses in New Mexico in order to make water available for contemplated uses of its own. Nominally designated an action in equitable apportionment, Colorado's proposed complaint is an effort at corporate expansion wrapped in the rhetoric of constitutional law.

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2. This view was not without support. Along with Governor Lamm's initial letter to Governor Apodaca there was inadvertently enclosed a memorandum from the attorney general's office to Governor Lamm's executive assistant wherein it was stated that "this office and counsel for CF&I" were of the opinion that compact negotiations would place Colorado "on a better footing" in the anticipated litigation, viz., this proposed suit.

It should also be noted that New Mexico's participation in the private litigation in federal district court was not to "support" the New Mexico water users, as Colorado has stated, but simply to inform the court of the status of the purported compact negotiations. Colorado, on the other hand, actively participated in the New Mexico litigation by moving the court to stay its injunction on the theory that Colorado has an interest in interstate waters that transcends the equities of her citizens.

POINT I

COLORADO'S PROPOSED COMPLAINT IS NOT A COMPLAINT FOR EQUITABLE APPORTIONMENT, BUT RATHER A VEILED ATTEMPT TO DISSOLVE AN INJUNCTION AGAINST CF&I.

The proposed complaint is unique. Never in the history of litigation over interstate waters has an upstream, non-using state suddenly claimed an "equitable" right to the waters of a mountain stream long over-appropriated in the downstream state. There is no name for such a suit. In effect, the proposed action would invoke the aid of equity to secure a conversion at law.

Ostensibly Colorado's complaint states a cause in equitable apportionment, a "term used to identify the federal interstate disputes over water rights in the original jurisdiction of the Supreme Court." [Clark, Robert Emmet, *Waters and Water Rights,* Vol. 2 §132.1, p. 324; *see, e.g., Kansas v. Colorado,* 206 U.S. 46 (1907); *Nebraska v. Wyoming,* 325 U.S. 589 (1945)]. In fact, it is designed to secure for CF&I the water the company was denied by the federal district court's injunction of January 16, 1978.

As between states following the same internal law, the federal common law utilized in equitable apportionment suits derives from an application of common principles without regard to political boundaries. [*Wyoming v. Colorado,* 259 U.S. 419 (1922)]. Assuming the doctrine were applicable here, the Court would begin its analysis by applying priority of appropriation interstate.[3] At times, however, the Court has varied the strict

3. Essentially, this was the basis of the federal district court's decision in *Kaiser Steel Corporation et al. v. CF&I Steel Corporation,* Civil No. 76-244, *supra. Cf., Bean v. Morris,* 221 U.S. 485 (1911). On the principles of equity familiar to both states individually, CF&I's conditional decree could not have been granted. For obvious reasons new appropriations are not permitted on fully appropriated streams. Courts do not purposely create social disruption.

application of priority of appropriation interstate. For example, in *Wyoming v. Colorado,* 243 U.S. 622 (1917), the Court requested argument on:

> whether the rights asserted are to be tested and determined solely by the application of the general principles of prior appropriation, without regard to state boundaries, or whether, on the contrary, the general principles of prior appropriation are subject to be restricted or their operation limited in this case by state lines, and if so, by what principles, under the assumption, the case is to be controlled. (243 U.S. at 622).

Variations from the basic principle of priority of appropriation have been generated only when the fortuity of a state line enabled conflicting social institutions to develop simultaneously. Development on the North Platte River provides an example. When Nebraska initially sought an apportionment of the river on the basis of priority of appropriation interstate, out-of-priority diversions had been common because the states had never regulated their diversions in subordination to downstream seniors in the other states. (*Nebraska v. Wyoming, supra,* 325 U.S. at 592-607). Instead of applying the doctrine of priority of appropriation interstate, which would have profoundly changed the demographic and economic arrangement of the three-state area, Justice Douglas concluded that the circumstances warranted variation:

> . . . If an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible. For example, the economy of a region may have been established on the basis of junior appropriations. So far as possible these established uses should be protected though strict application of the priority rule might jeopardize them. Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several

> sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former – these are all relevant factors. They are merely an illustrative not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made.
>
> Practical considerations of this order underlie Nebraska's concession that the priority rule should not be strictly applied to appropriation in Colorado, though some are junior to the priorities of appropriators in Wyoming and Nebraska. (325 U.S. at 618-19).

Assuming this Court were to grant Colorado's motion for leave to file her complaint, no such delicate adjustment of interests could be made. On the Vermejo there has been no historic development of conflicting interests. Instead, Colorado would now call upon the equity jurisdiction of the Court to impose upon the states the social conflict it is ordinarily called upon to resolve. This approach asks for an equitable apportionment in a vacuum, at a time when the circumstances do not call for it. Not only would Colorado be asking the Court to put the cart before the horse, she would be asking the Court to do so at a time when there is no horse.[4] It is more likely, therefore, that the real motive in Colorado's proposed lawsuit is to

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4. The Gila River in New Mexico provides an example of the variation of priority of appropriation interstate. In order to protect a long established economy in New Mexico, the Court's decree in *Arizona v. California*, 373 U.S. 546 (1963), sanctions junior uses in New Mexico notwithstanding senior priorities in Arizona. The remedy of equitable apportionment, however, was made available because of "long established" competing economies. In the matter at bar Colorado's proposed action presumes the social conflict that forms the basis of the need to vary priority of appropriation.

collaterally dissolve the injunction issued against CF&I by the federal district court in Albuquerque.

Again assuming the proposed action were in reality an action for equitable apportionment, the question would be whether CF&I's 1975 paper right provides Colorado with the equitable interest in Vermejo waters requisite to a variation of prior appropriation interstate. The decision in *Arizona v. California,* 298 U.S. 558 (1936), is germane:

> Arizona, by her proposed bill of complaint, asserts no right arising from her own appropriation of the waters of the Colorado river. No infringement of her rights acquired by appropriation is alleged, and no relief for their protection is prayed. While it is alleged that definite plans have been made for the irrigation of 1,000,000 acres of unirrigated land in Arizona, and a right to share in the water for that purpose is asserted, it does not appear that any initial step toward appropriation of water for such a project has been taken. (298 U.S. at 566).

Arizona insisted that the Court would "not hold itself restricted to the rigid application of local rules governing private rights. . . ." (298 U.S. at 568). The Court, however, determined that the proposed equitable apportionment was premature:

> The allegations and prayer of the bill are of significance only if Arizona, in advance of any act of appropriation, and independently of any rights which she may have acquired under the Boulder Canyon Project Act, may demand a judicial decree exempting the available water of the river, or some of it, from appropriation by other states until the indefinite time in the future when she or her inhabitants may see fit to appropriate it. A justiciable controversy is presented only if Arizona, as a sovereign state, or her citizens, whom she represents, have present rights in the unappropriated water of the river, or if the privilege to appropriate the water is capable of division and when partitioned may be judicially protected from appropriations by others pending its exercise. (298 U.S. at 567).

As in *Arizona v. California,* Colorado's proposed complaint does not present a controversy that can be articulated as an equitable apportionment. At best it's a rather arcane collateral attack on the existing injunction against CF&I. It would have the Court effectively enjoin existing uses in New Mexico in order to facilitate contemplated uses in Colorado. Instead of posing a dispute arising out of historical fact, Colorado asks the Court to manufacture the problem by pitting CF&I's aspirations against the continued welfare of thousands of New Mexico citizens and then to solve it in a way that rewards CF&I's aspirations. Such a procedure would hardly be equitable. In effect, Colorado would ask the Court to substitute rapacity for equity and to impose it on a contrived controversy.

POINT II

COLORADO MAKES NO BENEFICIAL USES FROM THE VERMEJO RIVER AND THEREFORE HAS NO EQUITABLE RIGHT TO ITS WATER. ACCORDINGLY, THE PROPOSED EQUITABLE APPORTIONMENT ACTION DOES NOT PRESENT A JUSTICIABLE CONTROVERSY.

The Court should recognize initially that in an equitable apportionment action, equitable right derives from the beneficial uses a state makes of the water of an interstate stream. Such a suit is appropriate, according to Justice Brandeis, when a river flows between two states "*and in each state the water is being used beneficially. . . .*" (*Hinderlider v. La Plata River & Cherry Creek D. Co.,* 304 U.S. 92, 101 (1938), emphasis supplied.) Only then "must (the waters of the river) be equitably apportioned between the two." (*Id.*). The phrase "equality of right" used throughout the cases refers not to proportionate

shares of water, but to the constitutional equality of states before this Court:

> One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, however, as in the case of *Missouri v. Illinois,* 180 U.S. 208, the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. [*Kansas v. Colorado,* 206 U.S. 46, 97-98 (1906)].
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> * * *
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> As was shown in *Kansas v. Colorado,* 206 U.S. 46, 100, such disputes are to be settled on the basis of equality of right. But this is not to say that there must be an equal division of the waters on an interstate stream among the States through which it flows. It means that the principles of rights and equity shall be applied having regard to the "equal level or plane on which all the States stand, in point of power and right, under our constitutional system. . . . [*Connecticut v. Massachusetts,* 282 U.S. 660, 670 (1931)].
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> * * *
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> What was said (in *Kansas v. Colorado*) about "equality of right" refers, as the opinion shows (p. 97), not to an equal division of the water, but to the equal level or plane on which all the States stand, in point of power and right, under our constitutional system. [*Wyoming v. Colorado,* 259 U.S. 419, 465 (1932)].

In this action Colorado would seek an apportionment of the Vermejo River despite the fact that she makes no diversion from it. This position is untenable for two reasons. First, equitable apportionment arises only from a balancing of the equities

derived from beneficial use. Secondly, there is no territorial right to equitable apportionment that arises from the presence of a stream within the boundaries of a state. Colorado's adherence to this territorial doctrine has been discredited because it ignores the equitable basis of apportionment.

In *Colorado v. Kansas,* 320 U.S. 383 (1943), the Court provided its most extensive discussion of the jurisprudential basis of equitable apportionment. The Court's opinion included a discussion of the apportionment created in *Kansas v. Colorado, supra.* The apportionment there was made on the basis of the established, permissible uses that existed under the respective water codes of the two jurisdictions, riparian and appropriation. Because Colorado would not be enjoined from diverting water from the Arkansas River until Kansas could prove quantifiable injury to its riparian rights, the uses derived from both systems were respected. Colorado users were therefore permitted to appropriate water to the extent that they did not interfere with Kansas's right to undiminished flows. In addition, the Court required that before "the developments in Colorado consequent upon irrigation were to be destroyed or materially affected, Kansas must show not merely some technical right but one which carried corresponding benefits." (320 U.S. at 385-86). Need to account for the actual uses from which the equities derived was emphasized twice more:

> (I)n determining whether one State is using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one State or the other must be weighted as of the date when the controversy is mooted. (320 U.S. at 393-94).
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> * * *
>
> (T)he question to be decided, in the light of existing condition in both States, is whether, and to what extent, her action injures the lower State and her citizens by depriving them of a like, or an equally valuable, beneficial use. (320 U.S. at 393).

In a suit for an equitable apportionment the Court must balance equities derived from use. In this case, because Colorado possesses no beneficial uses, the Court could not do that. It would be asked to weigh the developed economy of northern New Mexico against the undeveloped economy of a small, uninhabited area of southern Colorado. It would be asked to weigh the specific against the hypothetical, or New Mexico's application of Vermejo water to beneficial use against Colorado's good intentions. How could such a division be made? Which vested New Mexico use would be judged inferior to Colorado's plans and on what basis? To attempt to make such a division would place the Court in the position rejected in *Colorado v. Kansas, supra.* There the Court indicated the manner in which a balancing of the equities is made. It is made "in the light of existing conditions in both states," according to an adjustment of "equally valuable" beneficial uses within them. Under such a standard, the absent Colorado uses could not be permitted to divest New Mexico's established ones. For this reason, taking Colorado's cause of action at face value, the Court is not presented with a justiciable controversy. A justiciable controversy arises only when a state asserts an interest that is cognizable at equity. *Cf., Missouri v. Illinois,* 200 U.S. 496 (1906); *New York v. New Jersey,* 256 U.S. 296 (1921); *North Dakota v. Minnesota,* 263 U.S. 365 (1933); *Connecticut v. Massachusetts, supra; Washington v. Oregon,* 297 U.S. 517 (1936); *Alabama v. Arizona,* 291 U.S. 286 (1934).

In *Alabama v. Arizona,* the Court was presented with an application for leave to file a complaint by the State of Alabama, asking that the Court invalidate statutes enacted by 19 different states regulating or prohibiting the sale of goods produced elsewhere by convict labor. In denying leave, the Court held in part:

> Plainly the amended bill does not meet the requirements that reasonably should be imposed upon the applicant. It fails to show that Alabama has any agreement with any defendant or that there is any direct issue between them or that the validity of the statutes in question and Alabama's assertion of right may not, or indeed will not, speedily and conveniently be tested by the contracting company, that apparently is directly concerned, or by a seller of such goods. *Cf., Louisiana v. Texas, supra,* pages 18, 22 of 176 U.S., 20 S. Ct. 251, 44 L. Ed. 347. There is no allegation that an adequate market for the goods in question may not be found outside the five states named. The facts alleged are not sufficient to warrant a finding that the enforcement of the statutes of any defendant would cause Alabama to suffer great loss or any serious injury. If filed, the bill would have to be dismissed for want of equity. *Florida v. Mellon,* 273 U.S. 12, 47 S. Ct. 265, 71 L. Ed. 511 (291 U.S. at 292).

By emphasizing the fact that Alabama could not demonstrate a contractual agreement that was impaired by the statutes in any of the 19 states or that Alabama could not sell her products elsewhere, the Court was making the point that the jurisdiction of the Court could be invoked only by facts which would justify judicial intervention. Because Alabama could present only speculative allegations and not facts, the Court held that the bill, if filed, would have to be dismissed for want of equity. The significance for the instant case is that Colorado can present no facts that show that New Mexico has interfered with Colorado's right to Vermejo water because she has never used any. Like Alabama, Colorado does not have a sufficient interest in the subject of the litigation to justify the intervention of the Court.

In *Washington v. Oregon, supra,* the issue was joined in an apportionment action similar to that in this case. In its statement of the case, the Court announced that it had granted leave to the State of Washington to file a complaint for the apportionment of "the interests of the two states in the river and in

tributary streams and restraining any use or diversion of the waters found to be unlawful." (297 U.S. at 518-19).

> We turn at this point to a consideration of the acts of appropriation, their nature and effect, in an endeavor to ascertain whether they were legitimate or wrongful. For more than fifty years before the filing of this suit irrigators in Oregon at seasons of shortage maintained crude or temporary dams across the Walla Walla River close to the Red Bridge. During the low water period the effect of the dam was to turn the waters of the river away from the channel of the Tum-a-lum into the channel of the Little Walla Walla, where they were used for agricultural, domestic and kindred purposes. A small quantity of water necessary to supply the right of the East Side Ditch has been permitted to go by the dam without interference. With that exception, which is negligible, all the waters have been diverted without interruption and without protest for more than fifty years. Was this a wrong to Washington? (297 U.S. at 522).

It is significant that both states possessed appropriations, although Washington's had been unused for fifty years. It was held that the situation did not engender "the high equity that moves the conscience of the Court in giving judgment between states." (297 U.S. at 523, citing *North Dakota v. Minnesota, supra; Connecticut v. Massachusetts, supra; Kansas v. Colorado,* 206 U.S. 46, 109). If the Court could not be moved to apportion waters where vested rights had once existed but had been lost through abandonment, *a fortiori* it cannot do so where there is an absence of any right at all. If Washington's failure to use interstate water for fifty years could not provide her with the requisite equitable interest to apportion the water, Colorado's absence of any uses cannot provide any equity to begin with. As Justice Cordozo wrote: "(W)hen these (beneficial uses) are shown to be lacking, the water right will fail or fail to the extent that equity requires." (297 U.S. at 527-528).

Colorado's lack of an assertable interest is evident from the allegations of her proposed Complaint. For example, allegation No. 14 states that it is essential to the protection of the state of Colorado and the welfare of its citizens that an apportionment be made so that "valid water rights in Colorado may utilize such share" (CF&I's paper right). Colorado does not ask that a particular amount be apportioned commensurate with specific Colorado water rights. The interest claimed is amorphous. Colorado asks instead for an indeterminate "equitable share" that its citizens may later utilize.

Colorado has no objective right to a division of the Vermejo based upon the fact that the river flows through her territory. To argue otherwise, as Colorado does by asking for an apportionment of the river despite her lack of beneficial uses, is to restate the position that Colorado possesses a territorial right to interstate water that may be asserted without regard to its effect on neighboring states with vested uses. Colorado has sued for apportionment of the Vermejo despite the fact that it is over-appropriated in New Mexico, therefore asking for a division of the river despite any effect that this may have on New Mexicans. It marks the third time that the argument has appeared before the Court.

In *Kansas v. Colorado, supra,* Colorado took the position that each state possesses a territorial right to the waters within its borders and therefore may dispose of them at will, without regard to the effect on its neighbors. The argument was specifically addressed by the Court in *Wyoming v. Colorado, supra.* It was dismissed as follows:

> The contention of Colorado that she as a State rightfully may divert and use, as she may choose, the waters flowing within her boundaries in this interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary, cannot be maintained. The river throughout its course in both States is but a single stream wherein each State has an interest which should be respected by the other. A like contention was

> made in *Kansas v. Colorado* and was adjudged untenable. Further consideration satisfies us that the ruling was right. It has support in other cases, of which *Rickey Land & Cattle Co. v. Miller & Lux,* 218 U.S. 258; *Bean v. Morris,* 221 U.S. 458; *Missouri v. Illinois,* 180 U.S. 208, and 200 U.S. 496, and *Georgia v. Tennessee Copper Co.,* 206 U.S. 230, are examples. (259 U. S. at 466).

In this case Colorado would make the same argument, but from a less obvious standpoint than on the first two occasions. Instead of making diversions and then defending expressly with the theory that she is entitled to do what she wants with water within her territorial bounds, she is asking the Supreme Court to implicitly validate this principle for her. The effect of a decree of equitable apportionment giving Colorado rights to the Vermejo at a time when the river is over-appropriated in New Mexico would endorse the previously rejected contention of Colorado that she need not respect the rights of water users in other states. The reason for this is simple. If an apportionment could be awarded a state without beneficial uses in a situation in which all the available water has been appropriated by the other state, the Court would in fact not have taken those uses into account by making an apportionment between the two.

The Court should carefully consider Colorado's position in this alleged apportionment action, both from the standpoint of the effect on New Mexico users and from the perspective of the holdings in *Kansas v. Colorado* and *Wyoming v. Colorado, supra.* Additional consideration should be given to *Nebraska v. Wyoming, supra,* in which in discussing the factors which the Court would consider in reaching an apportionment of interstate water, Justice Douglas organized the opinion around the respect that the Court would accord to the intrastate development derived from that water:

> A mass allocation was made in *Wyoming v. Colorado.* But there is no hard and fast rule which requires it in all cases.

> The standard of an equitable apportionment requires an adaptation of the formula to the necessities of the particular situation. We may assume that the rights of the appropriators inter se may not be adjudicated in their absence. But any allocation between Wyoming and Nebraska, if it is to be fair and just, must reflect the priorities of appropriators in the two States. Unless the priorities of the downstream canals senior to the four reservoirs and Casper Canal are determined, no allocation is possible. The determination of those priorities for the limited purposes of this interstate apportionment is accordingly justified. The equitable share of a State may be determined in this litigation with such limitations as the equity of the situation requires and irrespective of the indirect effect which that determination may have on individual rights within the State. *Hinderlider v. La Plata Co.*, 304 U.S. 92, 106-108. . . . (325 U.S. at 627).

Each factor contemplates the reconciliation of competing uses and equities in more than one state. They presume competition between interests developed from beneficial use. A mere assertion of sovereign interest is insufficient. Because Colorado can claim only that, leave to file her complaint should be denied.

POINT III

COLORADO LACKS STANDING TO SUE FOR AN EQUITABLE APPORTIONMENT OF THE VERMEJO RIVER BECAUSE SHE MAKES NO BENEFICIAL USES FROM IT. SHE THEREFORE SUFFERS NO INJURY FROM NEW MEXICO'S ESTABLISHED USES.

The "gist of the question of standing," the Court said in *Baker v. Carr*, 369 U.S. 186 (1962), is whether the plaintiff has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the

presentation of issues upon which the Court so largely depends for illumination of difficult questions." (369 U.S. at 204).

In Point II we discussed Colorado's inability to assert a justiciable interest in the waters of the Vermejo. It follows that Colorado cannot assert injury to an interest if she possesses none. Because Colorado makes no appropriations from the Vermejo, she has no interests that are jeopardized by diversions in New Mexico and therefore has no interests that are injured by New Mexico.

This is apparent from the proposed complaint. Colorado can only advance the notion that she is equitably entitled to a share of the Vermjeo by discussing her claims amorphously. No specific injury to identifiable water uses can be alleged.

The Court has treated the standing requirements for suits between states differently than in suits between private parties. It has held that it will not take jurisdiction of interstate suits in the absence of absolute necessity, that the damages must be actual and imminent rather than speculative, and that they be "clearly shown" to be of "serious magnitude." Colorado can posit none of these requirements.

In *Alabama v. Arizona, supra,* the Court addressed issues pertaining to jurisdiction in original actions. Although the standing question was not identified as such, the Court's opinion in this respect focused on Alabama's failure to allege facts that would have established an invasion of an interest legally cognizable in the Court's original jurisdiction. The Court held:

> (Our) jurisdiction in respect of controversies between states will not be exerted in the absence of absolute necessity. *Louisiana v. Texas,* 176 U.S. 1, 15, 20 S. Ct. 251, 44 L. Ed. 347. 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 with the action of a state. *Missouri v. Illinois,* 200 U.S. 496, 520, 521, 26 S. Ct. 268, 50 L. Ed. 572; *New York v. New Jersey,* 256 U.S. 296, 309, 41 S. Ct. 492, 65 L. Ed. 937; *North Dakota v. Minnesota,* 263 U.S. 365, 374, 44 S. Ct. 138, 68 L. Ed. 342. Leave will not be granted unless the threatened injury is clearly shown to be of serious magnitude and imminent. *Missouri v. Illinois, supra,* page 521 of 200 U.S., 26 S. Ct. 268, 50 L. Ed. 572. (291 U.S. at 291-292).

In this case, Colorado's complaint manifestly fails to show any facts which create an "absolute necessity" for the relief requested. It is true that paragraph No. 14 of the complaint states that it is essential for the welfare and protection of the state that an apportionment of the Vermejo be made, but this is not a fact. It is a statement of Colorado's opinion. The factual allegations of the complaint only serve to illustrate the underlying basis for this opinion – that Colorado makes no usage of Vermejo waters. Although Colorado insists that this situation demands the inference that an apportionment should be made, under *Alabama v. Arizona, supra,* the opposite is true. The absence of any beneficial use in Colorado means that there is not a sufficiently injurable interest for which relief is "absolutely necessary."

In cases in the Court's original jurisdiction, as in the case of suits between private parties, a state must show its injuries to be direct and imminent rather than speculative. *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923); *Florida v. Mellon,* 273 U.S. 12 (1927). This principle was a factor in both decisions, the former case reaching a decision on the merits and the latter denying jurisdiction. In *Florida v. Mellon,* a case in which the state sought to enjoin the Secretary of the Treasury and the Commissioner of Internal Revenue from attempting to collect federal inheritance tax, Justice Sutherland denied leave to file the complaint:

> Plainly, there is no substance in the contention that the state has sustained, or is immediately in danger of sustaining, any direct injury as the result of the enforcement of the act in question. See *In re Ayers,* 123 U.S. 443, 496; *Massachusetts v. Mellon,* 262 U.S. 447, 488 (273 U.S. at 18).

Nor is there in the instant case. Action by the Court in denying Colorado's motion for leave to file her complaint, by recognition of New Mexico's existing uses, will not directly injure Colorado. It will only preserve the respective economies of southern Colorado and northern New Mexico as they have existed for over one hundred years. It is true that if leave is denied by the Court in order to protect New Mexico's uses, CF&I will not be able to pursue her plans for development. But this will not injure an actual Colorado interest. It will only frustrate her plans, the benefits of which are necessarily speculative and beyond the protection of this Court.

In interstate suits in the Court's original jurisdiction, the plaintiff state has always been able to prove a specific, non-hypothetical injury to an identifiable interest. In *North Dakota v. Minnesota, supra,* the Court discussed the nature of such litigation:

> The jurisdiction and procedure of this Court in controversies between States of the Union differs from those which it pursues in suits between private parties. This grows out of the history of the creation of the power, in that it was conferred by the Constitution as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force. The jurisdiction is therefore limited generally to disputes which, between states entirely independent, might be properly the subject of diplomatic adjustment. They must be suits "by a state for an injury to it in its capacity of quasi-sovereign." (263 U.S. at 372-73).

In the case at bar there has been no application to beneficial use of Vermejo waters in Colorado. Colorado, therefore, suffers

no cognizable injury as a quasi-sovereign by New Mexico's continuing uses of that water.

On the other hand, in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), cited in *North Dakota v. Minnesota,* the Court recognized Georgia's standing to enjoin the spread of noxious fumes by a factory in another state because of the nuisance it represented to a definable class of Georgia citizens. In his opinion, Justice Holmes wrote that the state suffered sufficient injury in its capacity as a quasi-sovereign to receive equitable protection on behalf of her citizens from the alleged injury. In *Missouri v. Illinois,* 200 U.S. 496 (1906), the Court recognized Missouri's standing to sue Illinois on a similar theory because deposits of typhoid in an interstate stream represented a health hazard to Missouri citizens. In *Pennsylvania v. West Virginia, supra,* the Court overturned a West Virginia statute prohibiting the shipment of natural gas at a time when the citizens of Pennsylvania had become dependent on it. The Court found the interests threatened by the West Virginia law to be sufficiently concrete to justify intervention. They derived from actual uses made of the gas and from the equities derived therefrom because there were demonstrable uses of West Virginia gas by the plaintiffs:

> The attitude of the complainant States is not that of mere volunteers attempting to vindicate the freedom of interstate commerce or to redress purely private grievances. Each sues to protect a two-fold interest – one as the proprietor of various public institutions and schools whose supply of gas will be largely curtailed or cut off by the threatened interference with the interstate current, and the other as the representative of the consuming public whose supply will be similarly affected. Both interests are threatened with serious injury. (262 U.S. at 591).

The same cannot be said of the injury that Colorado has alleged in this action. She claims a right to secure "a certain equitable share" of waters from the Vermejo. (Complaint,

paragraph No. 12). She claims that it is "essential to the protection of the State and the welfare of its citizens" that she receive a share of the fully appropriated waters of the Vermejo (Complaint, paragraph No. 14). No actual allegation of injury is presented by these paragraphs. They contain only the suggestion of inequitable conduct by New Mexico, and they are therefore insufficient to invoke the jurisdiction of the Court.

In a series of cases construing the Court's original jurisdiction, the Court has imposed a stricter standing requirement in suits in its original jurisdiction as opposed to those in its appellate jurisdiction. Two prerequisites must be met: a specific injury of "serious magnitude" that is "fully and clearly proved." *Alabama v. Arizona, supra; North Dakota v. Minnesota, supra; Colorado v. Kansas, supra; Connecticut v. Massachusetts, supra; Washington v. Oregon, supra; New York v. New Jersey, supra.* Typically, the Court has said:

> In such action by one State against another, the burden on the complainant State of sustaining the allegations of its complaint is much greater than that imposed upon a complainant in an ordinary suit between private parties. "Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of *serious magnitude* and it must be established by *clear and convincing evidence.*" *New York v. New Jersey,* 256 U.S. 296, 309; *Missouri v. Illinois,* 200 U.S. 496, 521. (263 U.S. at 374, emphasis supplied).
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> * * *
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> Before this court ought to intervene, the case should be of *serious magnitude, clearly and fully proved,* and the principle to be applied should be one which the court is prepared deliberately to maintain against all consideration on the other side. See *Kansas v. Colorado,* 185 U.S. 125. (200 U.S. at 521, emphasis supplied).

This standard has been decisive in several apportionment actions. In *Connecticut v. Massachusetts, supra,* it was applied

to an injunction action by the state of Connecticut against proposed diversions by Massachusetts and resulted in the dismissal of Connecticut's complaint:

> The exceptions filed by Connecticut need not be set forth or considered in detail. The governing rule is that this Court will not exert its extraordinary power to control the conduct of one State at the suit of another, unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence. *New York v. New Jersey,* 256 U.S. 296, 309. *Missouri v. Illinois,* 200 U.S. 496, 521. The burden on Connecticut to sustain the allegations on which it seeks to prevent Massachusetts from making the proposed diversions is much greater than that generally required to be borne by one seeking an injunction in a suit between private parties. *North Dakota v. Minnesota,* 263 U.S. 365, 374. There has been brought forward no adequate reason for disturbing the master's findings of fact. (282 U.S. at 669).

Although *Connecticut v. Massachusetts* involved an action between two riparian jurisdictions, the principle can be applied to the facts in this case involving a similar action between two appropriation states. The fact that Colorado appropriators have historically made no beneficial uses from the Vermejo removes the level of injury that the state can assert from that which can be established "by clear and convincing evidence." In fact, Colorado can assert no specific injury at all. At most she would argue that future plans for development will be frustrated. Because plans by their very nature must remain speculative and hypothetical until their development, Colorado cannot adduce evidence necessary to meet the *Connecticut v. Massachusetts* standard for actions in the original jurisdiction and certainly cannot prove that New Mexico's continuing use of Vermejo water is an invasion of her rights of "serious magnitude."

The same principle appears in *Washington v. Oregon, supra:*

> "Before this Court can be moved to exercise its extraordinary power under the Constitution to control the

> conduct on one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence." *New York v. New Jersey,* 256 U.S. 296, 309; *North Dakota v. Minnesota,* 263 U.S. 365, 374; *Connecticut v. Massachusetts,* 282 U.S. 660, 669; *Missouri v. Illinois,* 200 U.S. 496, 521. The Master has found: "There is no satisfactory proof that to turn down water past the Red Bridge in Oregon during the period of water shortage would be materially more advantageous to Washington users than to permit such water to be applied to surface irrigation in Oregon." (297 U.S. at 522).

The fact that Colorado possesses no beneficial uses and therefore cannot meet the standing requirements for interstate suits in original jurisdiction, gives the Court an opportunity to see the real nature of this action. It is the most complete assertion of the territorial doctrine yet to appear before this Court. Colorado makes no uses of Vermejo water, has no interest in the river beyond its expectations, suffers no demonstrable injury, and yet demands that she receive a share because the river flows through Colorado. As we have indicated, this theory was rejected in two previous cases: *Kansas v. Colorado* and *Wyoming v. Colorado.* It should be rejected now.

POINT IV

IF COLORADO'S COMPLAINT RAISED ISSUES JUSTICIABLE AS AN EQUITABLE APPORTIONMENT, IT WOULD BE BARRED BY LACHES; STRIPPED OF ITS EQUITABLE RHETORIC, HOWEVER, THE PROPOSED COMPLAINT RECITES NOTHING BEYOND THE PRIVATE LEGAL RELATIONSHIPS PROPERLY COGNIZABLE IN THE PENDING LITIGATION IN THE 10TH CIRCUIT COURT OF APPEALS.

In *Washington v. Oregon, supra,* the State of Washington sought an apportionment of the waters of the Walla Walla River.

The facts were not unlike those presented here. In both cases the plaintiff state could not assert equities derived from present beneficial uses. Nevertheless, Washington's position was stronger than that of Colorado in this case. Washington sought to have apportioned to her a quantity of water derived from previous uses which had been abandoned for over forty years. The Court disposed of the claim on grounds of laches:

> 'To limit the long established use in Oregon would materially injure Oregon users without a compensating benefit to Washington users.' These findings are well supported by the evidence. Complainant has brought forward no adequate reason for disturbing them. *Connecticut v. Massachusetts, supra,* at p. 669. Accepting them, as we do, we accept also the conclusion to which they point with inescapable directness. To restrain the diversion at the bridge would bring distress and even ruin to a long established settlement of tillers of the soil for no other or better purpose than to vindicate a barren right. This is not the high equity that moves the conscience of the Court in giving judgment between states. *North Dakota v. Minnesota, supra; Connecticut v. Massachusetts, supra; Kansas v. Colorado,* 206 U.S. 46, 109. Far from being that, it is rather "the *summum jus* of power." *Mutual Life Insurance Co. v. Johnson,* 293 U.S. 335, 339. In default of reasons for removal more urgent and compelling, the tillers of the soil will be left where they have settled. Cf.,*Hough v. Porter,* 51 Ore. 318, 415; 95 Pac. 732; 98 Pac. 1083; 102 Pac. 728; *Matheson v. Ward,* 24 Wash. 407, 411; 64 Pac. 520. (297 U.S. at 523).

In this case Colorado can present the Court with no history of use at all, while New Mexico users have fully appropriated the river, with vested rights extending back 100 years. If Washington has waited too long to predicate an apportionment on rights which had died, Colorado has waited too long to predicate an apportionment on rights which have been conceived but are still unborn.

The Court's decision in *Washington v. Oregon* is compelling because to reject it would be to say that equity can be derived from the total absence of rights in Colorado while no equity can be derived from abandoned rights in Washington. Logic is not susceptible of such a distinction, and the Court should not accept this case to create one. Indeed, the holding in *Washington v. Oregon* can admit of only one result in this action. Colorado should not be given leave to file her complaint.

Colorado can advance no equitable precedent for apportioning the Vermejo, and the Court could protect no equitable interest by doing so. The only real and undisguised cause of action arising from the history of Vermejo development is generated by CF&I's threatened diversion of waters that historically have been applied to beneficial use by New Mexico users. That action was filed (*Kaiser Steel Corporation et al. v. CF&I Steel Corporation,* Civil No. 76-244, D.N.M. 1978), and the court enjoined CF&I. An appeal is pending before the 10th Circuit Court of Appeals (*Kaiser Steel Corporation et al. v. CF&I Steel Corporation,* 10th Cir. No. 78-1193), and it is appropriate that the 10th Circuit resolve any issues that remain.

CONCLUSION

Article III, Section II provides the constitutional foundation for the Court's original jurisdiction:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls: – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – (and) to Controversies between two or more states. . . .

But it provides no more than that. There remained for the Court the job of shaping its original jurisdiction in such a way

as to allow for the most effective presentation of issues between competing states. It has not done so lightly. As we have attempted to show, the Court has erected barriers to justiciability and standing beyond those required of private litigants, to separate occasions of conflict from those of cognizable legal controversy in interstate disputes.

There is a conflict here. Competition for water in an arid region makes that inevitable. But there is no legal controversy. Colorado's non-use of Vermejo water makes that inescapable.

Colorado and New Mexico share a sense of equity that is reflected in the jurisprudential underpinnings of the doctrine of prior appropriation in each state. In neither state would a court grant a new appropriation on a fully appropriated stream. According to mutually familiar principles, such an appropriation would contradict the essential feature of each state's water laws, creating economic confusion and social uncertainty. Priority of appropriation would be rendered meaningless.

In circumstances where competing demands on an interstate stream have overtaken supply, local law may not accommodate an orderly or fair division between states. In response to such politically unmanageable situations, the Court has fashioned the doctrine of equitable apportionment and necessarily undertaken the burden of weighing the competing equities on a finite scale. Here there is no politically unmanageable situation, no clash of interests in interstate waters sufficient to importune the attention of the Court.

CF&I's proposed trans-mountain diversion posed a threat to private interests in New Mexico, and the federal district court, clothed with the appropriate jurisdiction, enjoined CF&I from any out-of-priority use of Vermejo waters. If this Court were now to entertain Colorado's proposed complaint it would provide the opportunity for CF&I to pull itself up by its own bootstraps, to acquire indirectly what it could not legitimately

acquire under principles of prior appropriation. To accept Colorado's complaint would be not only to give birth to, but to recognize as fully mature the embryonic right of CF&I. To permit the exercise of this right would make a mockery of prior appropriation and work a fraud upon the equity jurisdiction of the Court.

At present there is no diversion and use of Vermejo waters in Colorado – only the vulgar ambitions of CF&I. On principles of equity and fairness long embodied in the water law of both states, the federal district court has already addressed the only viable controversy on the river. Ignoring her own sense of equity, Colorado would call upon the conscience of the Court to imagine a controversy in order to convert the waters of the Vermejo to the use of CF&I. Such a design should not generate the respect and dignity of the Court. As a constitutional matter, there is no reason to entertain the proposed complaint.

Respectfully submitted,

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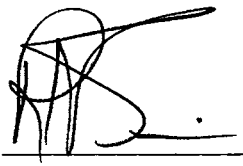
CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify, pursuant to Rule 9(3) and Rule 33(3) of the Rules of the Supreme Court of the United States, that on the 11th day of October, 1978, I served the requisite number of copies of the foregoing Brief in Response to Motion for Leave to File Complaint, by first class mail, on the Governor and the Attorney General of the State of Colorado.



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