IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 20, Original

THE STATE OF KANSAS, Plaintiff,

vs.

THE STATE OF COLORADO, Defendant.

A BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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This is the brief of the State of Colorado in opposition to the motion of the State of Kansas for leave to file its complaint.

Although Colorado believes that it can prevail on the merits, Colorado sees no reason for the Supreme Court of the United States to consider the case and presents two principal reasons why the complaint should not be filed.

I. DE MINIMIS

The Supreme Court has frequently had occasion to state the principle that it will not accept every dispute which may arise between sovereign states.

Perhaps the most widely quoted language is that of Mr. Justice Holmes in the case of *Missouri v. Illinois and the Sanitary District of Chicago,* 200 U.S. 496, 521, 50 L. ed 572, 26 S.Ct. 268 (1905), where he said:

> "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 considerations on the other side. See *Kansas v. Colorado,* 185 U.S. 125."

The same quotation was cited by Mr. Justice Clarke in the case of *New York v. New Jersey,* 256 U.S. 296, 309, 65 L. ed 937, 41 S.Ct. 492 (1920).

The same quotation again appears in the case of *North Dakota v. Minnesota,* 263 U.S. 365, 374, 68 L. ed 342, 44 S.Ct. 138 (1923).

In *Connecticut v. Massachusetts,* 282 U.S. 660, 669, 75 L. ed 602, 51 S.Ct. 286 (1930), a suit which involved 2.93 percent of the watershed of the Connecticut River and two percent of the flow of the Connecticut River at the Massachusetts state line, Mr. Justice Butler said:

> "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." Citing *New York v. New Jersey, supra* and *Missouri v. Illinois, supra.*

Again on page 674, he said:

> "Injunction issues to prevent existing or presently

threatened injuries. One will not be granted against something merely feared as liable to occur at some indefinite time in the future." Citing *New York v. Illinois,* 274 U.S. 488, 71 L. ed 1164, 47 S.Ct. 661 (1927) and *New Jersey v. Sargent,* 269 U.S. 328, 331, 338, 70 L. ed 289, 46 S.Ct. 122 (1925).

However, the strongest language, and the language most applicable to our fact situation, is that of the Court in the case of *Alabama v. Arizona,* 291 U.S. 286, 291-292, 78 L. ed 798, 54 S.Ct. 399 (1933), a suit to enjoin the enforcement of laws forbidding sale of prison made goods.

There the Court said:

"This Court may not be called on to give advisory opinions or to pronounce declaratory judgments. *Muskrat v. United States,* 219 U.S. 346. *Willing v. Chicago Auditorium Ass'n.,* 277 U.S. 274, 288 and cases cited. *Nashville, C. and St. L. Ry. v. Wallace,* 288 U.S. 249, 261-262. Its jurisdiction in respect to controversies between states will not be exerted in the absence of absolute necessity. *Louisiana v. Texas,* 176 U.S. 1, 15. * * * * Our decisions definitely established 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. *New York v. New Jersey,* 256 U.S. 296, 309. *North Dakota v. Minnesota,* 263 U.S. 365, 374. Leave will not be granted unless the threatened injury is clearly shown to be of serious magnitude and imminent. *Missouri v. Illinois, supra,* 521. * * * * The burden upon the plaintiff State fully and clearly to establish all essential elements of its case is greater than that generally

required to be borne by one seeking an injunction in a suit between private parties. *Connecticut v. Massachusetts,* 282 U.S 660, 669."

The language of Mr. Justice Holmes was again quoted by Mr. Justice Cardozo in the case of *Washington v. Oregon,* 297 U.S. 517, 522, 80 L. ed 837, 56 S.Ct. 540 (1935).

On page 524, Mr. Justice Cardozo also said:

"As to this and other charges of damage or wrongdoing, the burden of proof falls heavily on complainant, more heavily, we have held, than in a suit for an injunction where states are not involved. *North Dakota v. Minnesota, supra; Connecticut v. Massachusetts, supra.* * * * * Whether this is so or not, certain at least it is that the injury, if there is any, does not appear 'by clear and convincing evidence' to be one 'of serious magnitude'. *Connecticut v. Massachusetts, supra; New York v. New Jersey, supra.* Between the high contending parties whose interests are involved, nothing less will set in motion the restraining power of the court."

And again on page 529 Mr. Justice Cardozo said:

"We are to bear in mind steadily that the controversy is between states, and not between private litigants, the burden and quantum of the proof being governed accordingly. *North Dakota v. Minnesota, supra.*"

How do the facts in the instant case meet these criteria?

The answer is that they do not meet the requirements of this Court that the matters be of "serious magnitude". The complaint itself shows that we are talking about a

stream whose annual runoff is one "ranging from 800 acre-feet to 6,400 acre-feet of water". The complaint also reveals that the storage capacity of the reservoir in question is only 2,898 acre-feet of water. This places a definite limitation on the amount which can be affected.

The flow of the Arkansas River at the Kansas gaging station near the state line, including the diversion of the Frontier Ditch, is in the neighborhood of 164,000 acre-feet annually (U.S.G.S. Water-Supply Paper 1511 (1957), Surface Water Supply of the United States — Lower Mississippi River Basin). Therefore, in the matter of water supply, we are talking about 1.8 percent.

In the case of the area involved, according to the complaint, the dam, when completed, "will control the runoff from a drainage area of 222 square miles, * * * *."

According to Water-Supply Paper above referred to, the contributing drainage area of the Arkansas Basin above the gaging station near the Kansas state line is 23,702 square miles, so that we are talking about something less than one percent of the drainage area of the Arkansas Basin according to the allegations of the plaintiff's complaint.

In *Colorado v. Kansas,* 320 U.S 383, 390, 88 L. ed 116, 64 S.Ct. 176 the Master found that the "average annual dependable and fairly continuous water supply and flow" is 1,100,000 acre-feet of which 925,000 should be allocated to Colorado.

It becomes, therefore, abundantly clear that we are talking about a small fraction of one percent of the flow of the Arkansas River and that this is a miniscule por-

tion indeed. It would be difficult to find a case which was of less "serious magnitude" than this one and one in which there was less reason for the Court to permit the complaint to be filed.

II. EXHAUSTION OF ADMINISTRATIVE REMEDIES

However, in addition to the *de minimis* ground for refusing to let the complaint be filed, there is another reason why this Court should not grant the motion of the State of Kansas.

Largely as a result of the litigation which was terminated in the cases found in 185 U.S. 125, 46 L. ed 838, 22 S.Ct. 552 and 320 U.S. 383, 80 L. ed 116, 64 S.Ct. 176, between Kansas and Colorado, the Arkansas River Compact was agreed upon between the two states and ratified by Act of Congress of May 31, 1949 (63 Stat. 145).

This compact provides for machinery for the settlement of disputes between the two states.

The compact provides in Article I that one of the major purposes of the compact is to:

> "A. Settle existing disputes and remove causes of future controversy between the States of Colorado and Kansas, and between citizens of one and citizens of the other State, concerning the waters of the Arkansas River and their control, conservation and utilization for irrigation and other beneficial purposes."

In Article VI the compact provides:

> "A. (2) Except as otherwise provided, nothing in this Compact shall be construed as supplanting the

administration by Colorado of the rights of appropriators of waters of the Arkansas River in said State as decreed to said appropriators by the courts of Colorado, nor as interfering with the distribution among said appropriators by Colorado, nor as curtailing the diversion and use for irrigation and other beneficial purposes in Colorado of the waters of the Arkansas River."

In Article VIII the compact furnishes the machinery for the settlement of disputes. In Article VIII (D) the compact provides:

"In case of a divided vote on any matter within the purview of the Administration, the Administration may, by subsequent unanimous vote, refer the matter for arbitration to the Representative of the United States or other arbitrator or arbitrators, in which event the decision made by such arbitrator or arbitrators shall be binding upon the Administration."

Again in Paragraph H there is attention to disputes between the states.

Kansas should not allege, as it does, in Paragraph VIII of its complaint:

"The State of Kansas intended to propose arbitration of this controversy, pursuant to Article VIII (D) of the compact, provided that the State of Colorado would halt construction of the dam and reservoir project during the arbitration process. Such arbitration, under the compact provisions, would require the consent of the State of Colorado. The commissioners of the State of Colorado were not immediately available for such a meeting of the Compact Administra-

tion and such a meeting cannot be held before June, 1965. There is no assurance that the State of Colorado would consent to arbitration, that construction of the dam and reservoir project would be halted pending the outcome of arbitration, or that the result of arbitration would be observed by the State of Colorado."

This is far from the exhaustion of administrative remedies.

It is, on the other hand, a recognition of the fact by the complainant that an administrative remedy does exist and a refusal on the part of Kansas to follow it.

In Davis' *Treatise on Administrative Law* (1951 Edition), at pages 614 to 618, the author discusses this question of administrative remedy and says:

"The doctrine of primary jurisdiction is not concerned with judicial review but determines in some circumstances whether initial action should be taken by court or by an agency. The courts usually follow what the Supreme Court calls 'the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted'." Citing *Myers v. Bethlehem Ship Building Corp.*, 303 U.S. 41, 50-51, 82 L. ed 638, 58 S.Ct. 459 (1938).

"The principal reasons for requiring exhaustion of administrative remedies relate to efficient management and orderly procedure, use of the agency's specialized understanding, adequacy of legal remedies, exclusive jurisdiction and statutory requirement of final order.

"To interrupt and delay an administrative proceeding whenever a party chooses to challenge procedural or interlocutory action would permit a party to block effective administrative action by the simple expedient of shifting the proceeding back and forth interminably between agency and court. For this reason, all agree with the basic principle that judicial control of administrative action should normally await completion of an administrative proceeding.

"Premature judicial intervention may defeat the basic legislative intent that full use should be made of the agency's specialized understanding within the particular field. This is of course the main purpose behind the concept of primary jurisdiction, and the idea is equally valid as applied to the exhaustion rule, although the courts seldom make this reason explicit in their opinions." Citing *Illinois Commerce Commission v. Thompson,* 318 U.S. 675, 87 L. ed 1075, 63 S.Ct. 834 (1943).

"The best judicial discussions of the principle that courts should not prevent agencies from initially deciding questions within their particular fields of specialization appear in primary jurisdiction cases." Citing *Order of Railway Conductors v. Pitney,* 326 U.S. 561, 567, 90 L. ed 318, 66 S.Ct. 322 (1946), where the court said:

"The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress." See also *Thompson v. Texas Mexican Ry.,* 328 U.S. 134, 151, 90 L. ed 1132, 66 S.Ct. 937 (1946) where the court said:

"The court below should have stayed its hand and remitted the parties to the commission for a determination of the administrative phases of the questions involved. Until that determination is had, it cannot be known with certainty what issues for judicial decision will emerge. Until that time, judicial action is premature."

Again quoting from Davis on page 617:

"The exhaustion rule probably originated in equity cases refusing injunctions because the remedy at law, by completing the administrative proceeding and then petitioning for judicial review, was adequate."

III. CONCLUSION

Colorado therefore respectfully submits that permission to file the complaint should be denied the State of Kansas for the reasons that the controversy is not of sufficient magnitude to justify the attention of this Court and because Kansas has failed to exhaust its administrative remedies.

Respectfully submitted,

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