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IN THE

SUPREME COURT

OF THE

UNITED STATES

IN EQUITY

October Term, 1934

No. [redacted] ORIGINAL

THE STATE OF NEBRASKA,
Complainant,

VS.

THE STATE OF WYOMING,
Defendant.

BRIEF OF COMPLAINANT IN ANSWER TO RESPONDENT'S BRIEF ON MOTION TO DISMISS

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BRIEF OF COMPLAINANT IN ANSWER TO RESPONDENT'S BRIEF ON MOTION TO DISMISS

To the Honorable The Chief Justice and The Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE

This is an action in equity, brought by the complainant, State of Nebraska, against the defendant, State of Wyoming, to restrain certain actual and threatened wrongs,

alleged by complainant to be either actually carried on by defendant, or to be immediately threatened; in both instances in the exercise of the quasi-sovereign powers of defendant as one State of the United States.

The action relates to the distribution for irrigation purposes of the waters of the non-navigable stream known as the North Platte and Platte river, which is an interstate stream flowing through the states of Wyoming and Nebraska.

The State of Nebraska claims that the State of Wyoming (the upper state on the river) is not allowing Nebraska her equitable share of the waters *(Wyoming* v. *Colorado,* 259 U. S. 419; *Connecticut* v. *Massachusetts,* 282 U. S. 660; *New Jersey* v. *New York,* 283 U. S. 336), and that since both states recognize the doctrine of appropriation rather than riparian rights, the apportionment should be on the basis of priority of appropriation so that prior appropriators of water in Nebraska should not be required to go without water in order that Wyoming junior appropriators might use it *(Wyoming* v. *Colorado,* 259 U. S. 419).

We refer the Court to the Bill of Complaint for a full statement of the issues raised herein. Briefly stated, complainant seeks to obtain relief in the following respects: (1) To require that Wyoming in the administration of the waters of said stream should deny water to her direct flow water users having junior priorities, when water is needed by senior Nebraska appropriators; (2) to require that Wyoming prevent her appropriators for storage from taking water for such purposes when the water is needed by senior Nebraska appropriators; (3) to prevent Wyoming

from allotting to a new irrigation project, known as "Casper-Alcova" a 1904 priority when, as Nebraska claims, it is only entitled to a 1934 priority, and many Nebraska projects of priority of 1904 and later, would be deprived of water in the administration of the stream with a 1904 priority for Casper-Alcova; (4) as an incident to said direct relief and in order to provide an exact basis for a decree covering the administration of the stream in the future, to fix and determine the respective priorities on the stream of Nebraska and Wyoming appropriators.

The bill of course alleges in detail the basis upon which Nebraska asks this court to grant the relief above referred to; it sets out in detail the nature of appropriations for direct flow and for storage respectively; it sets out the damage which will accrue if the relief is not granted; and it goes into detail with reference to certain of the storage and direct flow projects on the North Platte and Platte rivers, and in reference to the Casper-Alcova project. Any attempt to go into further detail in this brief would constitute only an unnecessary repetition.

The motion of defendant is directed to the claim that there is a defect of parties and that the petition fails to state a cause of action.

It is claimed that the State of Colorado and the Secretary of the Interior of the United States, respectively, should have been made parties. It is also claimed that the bill is insufficient in that (as claimed) it does not state a cause of action in equity.

SUMMARY OF ARGUMENT

I.

Since no relief is asked by complainant as against the State of Colorado, and since the State of Colorado has no interest in the relief asked as against the State of Wyoming, or in the controversy between the State of Nebraska and the State of Wyoming, the State of Colorado is not a necessary or indispensable party.

a. Independent of the Declaratory Judgments Act, complainant cannot properly bring suit against the State of Colorado unless in the Bill of Complaint it can be alleged in good faith that the State of Colorado is substantially violating the rights of complainant or is immediately threatening such rights.

Payne v. *Hook,* 7 Wall. (74 U. S.) 425, 19 L. Ed. 260.

Arizona v. *California,* 283 U. S. 423, 75 L. Ed. 1154.

New Jersey v. *Sargent,* 269 U. S. 328, 70 L. Ed. 289.

Massachusetts v. *Mellon,* 262 U. S. 447, 67 L. Ed. 1078.

b. Under the Federal Declaratory Judgments Act, there must be a "case of actual controversy" before the courts of the United States have power to declare rights or other legal relations of an interested party.

Act of June 14, 1934, c. 512, 48 Stat. 955, Judicial Code Section 274 d., U. S. C. A. Title 28, Sec. 400.

c. A possible party is not a necessary or indispensable party to a suit in equity unless such possible party will be directly affected by a decree; or, though not directly affected by a decree made in his absence, he is interested in the controversy between the complainant and defendant. Where he is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter which may be conveniently settled in the suit and thereby prevent further litigation, he may be a party or not, at the option of the complainant.

Williams v. *Bankhead,* 86 U. S. 563, 22 L. Ed. 184.

Barney v. *Latham,* 103 U. S. 205, 26 L. Ed. 514.

Bacon v. *Rives,* 106 U. S. 99, 27 L. Ed. 69.

South Dakota v. *North Carolina,* 192 U. S. 286, 48 L. Ed. 448.

Heckman v. *United States,* 224 U. S. 413, 56 L. Ed. 820.

Pennsylvania v. *West Virginia,* 262 U. S. 553, 67 L. Ed. 1117.

Salem Trust Co. v. *Manufacturers' Finance Co.,* 264 U. S. 182, 68 L. Ed. 628.

Kentucky v. *Indiana,* 281 U. S. 163, 74 L. Ed. 784.

Columbia Finance & Trust Co. v. *Kentucky Union Ry Co.,* (C. C. A. 6th Circ.) 60 Fed. 794 (opinion by Circuit Judge Lurton, Circuit Judge Taft concurring).

21 Corpus Juris, 303-304.

d. One state should not lightly seek to require that another state answer a complaint in an original action in this

court. Such a suit should not be brought unless the actual or threatened invasion of rights is of serious magnitude.

New York v. *New Jersey,* 256 U. S. 296, 309, 65 L. Ed. 937, 943.

Missouri v. *Illinois,* 200 U. S. 496, 521, 50 L. Ed. 572, 579.

North Dakota v. *Minnesota,* 263 U. S. 365, 374, 68 L. Ed. 342, 345.

Connecticut v. *Massachusetts,* 282 U. S. 660, 669, 75 L. Ed. 602, 607.

e. Since the bill in this case affirmatively shows that there is no water available from Colorado through the South Platte river, the defendant State of Wyoming cannot, on motion to dismiss, require complainant to make the State of Colorado a party. In this respect, Wyoming is seeking to require Nebraska to proceed against Colorado to obtain water which Nebraska alleges she cannot obtain.

II.

The Secretary of the Interior of the United States is not a necessary party to this suit since, by Act of Congress, he is in the same position as any other appropriator of water from the State of Wyoming; and all of the water claimants in each state which is a party to the action are represented by the states respectively and are bound by the decree as parties by representation.

a. The authority of the United States over waters and streams located in the various states is limited to two features: (1) The control of navigability so that nothing shall be done to impair that feature of waters otherwise

navigable, and (2) the preservation of water rights equitably incident to public lands, and the reclamation of such public lands as are arid, through irrigation. Except as limited by such rights and powers of the United States, each state has complete and absolute authority over such waters, not only as to prescribing the method of use, and the choice between administration in accordance with the riparian rights or prior appropriation; but each state has also authority to establish administrative departments with power to fix priorities and to administer and allot the waters in accordance with fixed rules.

U. S. v. *Rio Grande Dam & I. Co.,* 174 U. S. 690, 703-706, 43 L. Ed. 1136, 1141-1142.

Gutierres v. *Albuquerque Land & Irr. Co.,* 188 U. S. 545, 47 L. Ed. 588.

Kansas v. *Colorado,* 206 U. S. 46, 85-95, 51 L. Ed. 956, 970-974.

Winters v. *United States,* 207 U. S. 564, 52 L. Ed. 340.

Bean v. *Morris,* 221 U. S. 485, 55 L. Ed. 821.

Wyoming v. *Colorado,* 259 U. S. 419, 460-465, 66 L. Ed. 999, 1011-1014.

United States v. *Hanson,* (C. C. A. 9th Circ.) 167 Fed. 881.

Burley v. *United States,* (C. C. A. 9th Circ.) 179 Fed. 1.

b. By a series of acts of Congress, the United States has recognized the powers of the states above outlined, and has provided that federal action in the reclamation of arid public lands shall be under the authority of, and subject

to regulation by such state authority as may be set up to regulate the appropriation of waters for irrigation purposes.

Act of July 26, 1866, Ch. 262, Sec. 9, 14 Stat. at L. 251, U. S. C. A. Tit. 43, Sec. 661.

Act of July 9, 1870, Ch. 235, Sec. 17, 16 Stat. at L. 217, 218, U. S. C. A., Tit. 43, Sec. 661.

Act of March 3, 1877, Ch. 107, Sec. 1, 19 Stat. at L. 377, U. S. C. A., Tit. 43, Sec. 321.

Act of August 18, 1894, Ch. 301, Sec. 4, 28 Stat. at L. 422, U. S. C. A., Tit. 43, Sec. 641.

Act of June 17, 1902, Ch. 1093, Sec. 8, 32 Stat. at L. 390, U. S. C. A., Tit. 43, Sec. 383.

Broder v. *Natoma Water & Mining Co.,* 101 U. S. 274, 25 L. Ed. 790.

United States v. *Rio Grande Dam & I. Co.,* 174 U. S. 690, 703-706, 43 L. Ed. 1136, 1141-1142.

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Burley v. *United States,* (C. C. A. 9th Circ.) 179 Fed. 1.

Twin Falls Salmon River Land & Water Co. v. *Caldwell,* (C. C. A. 9th Circ.) 272 Fed. 356.

c. In the interpretation of a statute, the practical application given to it by the administrative officers acting under it is entitled to great weight.

Wisconsin v. *Illinois,* 278 U. S. 367, 413, 73 L. Ed. 426, 433.

d. In interpreting a statute, that construction will be placed upon it which makes for orderly administration, avoiding conflicts between state and federal governments, and avoiding the confusion growing out of such conflicts.

Sorrels v. *United States,* 287 U. S. 435, 446-450, 77 L. Ed. 413, 419-421.

e. Section 8 of the Reclamation Act (Act of June 17, 1902), U. S. C., Title 43, Sec. 383, requires that the Secretary of the Interior of the United States shall assume the position of any other water appropriator in a state, in the operation of a Reclamation project.

Wyoming v. *Colorado,* 259 U. S. 419, 460-465, 66 L. Ed. 999, 1011-1014, and other cases cited supra under subdivision b.

f. In a suit between two states in relation to interstate water rights and the equitable apportionment of the waters of an interstate stream between such states, each state represents its water claimants, and such water claimants need not be joined as parties to the suit.

Wyoming v. *Colorado,* 259 U. S. 419, 468, 66 L. Ed. 999, 1015.

Pennsylvania v. *West Virginia,* 262 U. S. 553, 595, 67 L. Ed. 1117, 1131.

Wyoming v. *Colorado,* 286 U. S. 494, 508-509, 76 L. Ed. 1252.

III.

Defendant's motion to dismiss, in its third paragraph consists of a general demurrer to the whole bill for want of equity. This should be overruled if there is any matter properly pleaded in the bill which is proper ground of equitable relief.

a. Where there is matter properly pleaded in the bill, which is proper ground of equitable relief, and which requires an answer or a plea, a demurrer to the whole bill ought to be overruled.

Buffington v. *Harvey,* 95 U. S. 99, 24 L. Ed. 381.
Gunton v. *Carroll,* 101 U. S. 426, 25 L. Ed. 985.
Pacific Ry. Co. v. *Missouri Pacific Ry. Co.,* 111 U. S. 505, 28 L. Ed. 498.
Stewart v. *Masterson,* 131 U. S. 151, 33 L. Ed. 114.

b. General certainty is sufficient in pleadings in equity. It is not necessary to aver all the minute circumstances which may be proven in support of the general statement or charge in the bill. It is sufficient if the main facts upon which relief is asked shall be fairly stated, so as to put defendant on his guard and apprise him of what answer may be required of him.

St. Louis v. *Knapp Co.,* 104 U. S. 658, 26 L. Ed. 883.
United States v. *Am. Bell Telephone Co.,* 128 U. S. 315, 356, 32 L. Ed. 450, 458.

c. A bill in equity is sufficient if it makes a short and simple statement of the ultimate facts upon which the

plaintiff asks relief, omitting any mere statement of evidence.

Federal Equity Rules, Rule 25, Sec. 3.
Prendergast v. *New York Telephone Co.*, 262 U. S. 43, 47, 67 L. Ed. 853, 857.

IV.

In an original action in this court between two of the states of the United States, the proceedings will so far as possible be conducted so as to disengage them from all unnecessary technicalities and niceties, and in the simplest form in which the ends of justice can be attained.

Florida v. *Georgia*, 17 How. (58 U. S.) 478, 15 L. Ed. 181.
5th Rule of the Rules of the Supreme Court of the United States.
California v. *Southern Pacific Co.*, 157 U. S. 229, 39 L. Ed. 683.

ARGUMENT

Point I.

Since no relief is asked by complainant as against the State of Colorado, and since the State of Colorado has no interest in the relief asked as against the State of Wyoming, or in the controversy between the State of Nebraska and the State of Wyoming, the State of Colorado is not a necessary or indispensable party.

The first paragraph of defendant's motion to dismiss relates to the claim that Colorado is a necessary and indispensable party to this controversy. In argument, it is

urged that this is so on two grounds—(a) that as shown by complainant's bill, the North Platte river rises in Colorado, and drains about eighteen hundred square miles in that state. It is argued that this gives Colorado an interest in the controversy between Nebraska and Wyoming so that she is a necessary and indispensable party thereto; (b) that the South Platte river, a tributary to the Platte river, rises in Colorado, and that Nebraska should be required to show what waters of the South Platte are available for the needs of irrigators between North Platte, Nebraska, and Grand Island, Nebraska; should be required to make a full disclosure with reference to the waters of the South Platte; and should be ordered to make Colorado a party so that there may be an adjudication of its liability to release some of the waters of the South Platte for Nebraska's benefit.

We will discuss these two points separately.

(a) Issues Relating to the North Platte.

In claiming that Colorado is necessarily involved in this controversy, Wyoming mistakes the object and purpose of the bill. Nebraska is not seeking a declaratory judgment to adjudicate all of the water rights on the North Platte-Platte river. The object of the suit, as above described, is to enjoin certain acts of the defendant alleged to be in violation of the rights of complainant. As shown by the prayer of the bill (pp. 32-33) the scope of the suit is much narrower than counsel for defendant seem to understand.

The bill shows grave wrongs actually being committed and threatened by the defendant against the complainant. It seeks injunctive relief, within the jurisdiction of this

court, to redress those wrongs. It discloses an actual controversy between the two states, parties to this suit, over the distribution of the waters of the North Platte river. Complainant seeks the aid of this court in compelling the defendant to respect her equitable rights in this interstate stream, so far as concerns waters over which Wyoming has physical control.

The bill refers to the drainage of the North Platte river from Colorado territory only for the purpose of giving a complete picture of the geographical setting and background. No claim is made that Colorado is doing any acts or threatening any acts which would interfere with the rights of Nebraska. There is no claim that any controversy exists between Nebraska and Colorado which would require a judicial determination whether by way of a declaratory judgment or otherwise. The waters in the control of which Nebraska seeks the aid of this court are all in Wyoming and Nebraska. No relief is asked or expected in this suit with reference to any waters in Colorado. It is of course conceivable that at some future time Colorado might threaten a diversion of waters from the North Platte and its tributaries which would interfere with Nebraska's rights. If this should occur, a suit against Colorado would be appropriate. In the present suit, however, complainant does not state a cause of action against Colorado.

This court has many times held that a state may not invoke the jurisdiction of this court unless the defendant is actually committing a wrong which seriously or gravely

affects the complainant's rights, or is directly threatening to commit such a wrong.

Massachusetts v. *Mellon*, 262 U. S. 447, 67 L. Ed. 1078.

New Jersey v. *Sargent*, 269 U. S. 328, 70 L. Ed. 289.

Arizona v. *California*, 283 U. S. 423, 75 L. Ed. 1154.

In *Payne* v. *Hook*, 7 Wallace 425, 19 L. Ed. 260, this court said: "It can never be indispensable to make defendants of those against whom nothing is alleged and from whom no relief is asked."

This suit was not brought primarily under the new Federal Declaratory Judgments Act (Act of June 14, 1934, c. 512, 48 Stat. 955, Judicial Code, Section 274 d, U. S. C. A., Title 28, Sec. 400). Although the prayer of the bill asks an adjudication of rights in certain respects, this is an incident to and in aid of the prayer for injunctive relief. However, if the action be construed as a suit for a declaratory judgment, this would not permit the inclusion of Colorado as a party defendant. By its express terms the Declaratory Judgments Act can be invoked only "In cases of actual controversy."

Counsel for defendant argue that this is a suit for equitable distribution of the waters of the North Platte river, and reasoning from that premise, counsel draw the conclusion that Colorado would be affected by the distribution and therefore is an indispensable party. The assumption involved in that argument is wrong. As above pointed out, insofar as the suit directly relates to the distribution of water, Nebraska only asks that Wyoming be required

to refrain from diverting from the stream water which Nebraska claims to be equitably hers. The suit therefore only refers to such water of the North Platte as may flow in or through Wyoming. No decree is asked affecting waters in Colorado, and those waters are of course in the physical control of Colorado, so that a decree apportioning as between Wyoming and Nebraska, such waters as flow into Wyoming and originate in that state, cannot possibly prejudice Colorado. A decree in this suit can do full and complete justice between the two parties to the suit without the presence of any third state.

The rule as to parties in equity is well stated by this court in *Williams* v. *Bankhead,* 86 U. S. 563, 22 L. Ed. 184:

> "The true distinction appears to be as follows: First. Where a person will be directly affected by a decree, he is an indispensable party unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. Second. Where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed to a decree without him if he can be reached. Third. Where he is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter which may be conveniently settled in the suit and thereby prevent further litigation he may be a party or not, at the option of the complainant."

This rule is also supported by the following cases:

> *Barney* v. *Latham,* 103 U. S. 205, 26 L. Ed. 514.
> *Bacon* v. *Rives,* 106 U. S. 99, 27 L. Ed. 69.

Heckman v. *United States,* 224 U. S. 413, 56 L. Ed. 820.
South Dakota v. *North Carolina,* 192 U. S. 286, 48 L. Ed. 448.
Kentucky v. *Indiana,* 281 U. S. 163, 74 L. Ed. 784.
Salem Trust Co. v. *Manufacturer's Finance Co.,* 264 U. S. 182, 68 L. Ed. 628.

It is clear that, if Colorado might be considered a proper party at all, she must fall within the third class described in that rule. A decree in this suit settling water rights as between Wyoming and Nebraska would not directly affect Colorado. Colorado has no interest in the waters after they leave her boundary, and accordingly she is not interested in the controversy between Nebraska and Wyoming over the apportionment of such waters. If Colorado has an interest, it would only be in the subject-matter, and it is a serious question as to whether her interest therein could conveniently be litigated in this action, since no controversy over her interest in such waters is disclosed. In any event, under the rule of this court, complainant could make her a party or not, at the option of complainant *(Barney* v. *Latham, supra, Williams* v. *Bankhead, supra).*

(b) The Issues Relating to the South Platte.

Defendant contends that since the South Platte flows into the Platte above the points where Nebraska uses Platte river waters for irrigation, Colorado should have been made a party so that this court could require it to supply some of the water which Nebraska needs.

Counsel have evidently overlooked the allegations of the Third Article of the Bill, found on page 8 of the printed

Bill of Complaint filed in this court. Complainant there alleges that, between the state line dividing Nebraska and Wyoming, and the city of Grand Island, Nebraska (the eastern limit of Nebraska irrigation in any appreciable quantity from Platte river waters), "there are no tributaries of the said North Platte and Platte rivers supplying any substantial amount of water."

This, of course, is an allegation of ultimate fact, admitted by defendant's motion to dismiss. If this is true, then it would be useless to bring Colorado in as a party and attempt to get from her water which is not available. If it is not true, then Wyoming may, to some extent, have a defense against Nebraska's claims; but such defense is not raised by a motion to dismiss which admits the allegations of the bill.

Moreover, even if there were water available from the South Platte which Colorado was wrongfully withholding from Nebraska, still Wyoming could not compel Nebraska to sue Colorado. Of course complainant cannot compel Wyoming to release to Nebraska water which another state should be supplying; but in a decree in this case (if the facts should develop as counsel for defendant are hinting) the court could take care of the situation by diminishing, to the extent that there was another available source of supply, the amount that Wyoming would be compelled to release.

Finally, upon this phase of the case, complainant does not wish lightly to bring suit against one of her sister states who is doing her no wrong, and with whom she has no controversy. This court has many times stated that a suit by one state against another should not be brought

unless the actual or threatened invasion of rights is of serious magnitude.

New York v. *New Jersey*, 256 U. S. 296, 309, 65 L. Ed. 937, 943.

Missouri v. *Illinois*, 200 U. S. 496, 521, 50 L. Ed. 572, 579.

North Dakota v. *Minnesota*, 263 U. S. 365, 374, 68 L. Ed. 342, 345.

Connecticut v. *Massachusetts*, 282 U. S. 660, 669, 75 L. Ed. 602, 607.

Complainant has no desire to violate a rule of this court, and has no desire to bring into this suit another state against which complainant has no ground for complaint, and which is not interested in the subject of the suit.

Point II.

The Secretary of the Interior of the United States is not a necessary party to this suit since, by Act of Congress, he is in the same position as any other appropriator of water from the State of Wyoming; and all of the water claimants in each state which is a party to the action are represented by the states respectively and are bound by the decree as parties by representation.

Turning to the second paragraph of defendant's motion to dismiss, we find a different situation from that presented in relation to the state of Colorado. Defendant's claim on this phase of the case is that the Secretary of the Interior of the United States is a necessary party, and that the suit should be dismissed for failure of complainant to make him a party. The interest of the Secretary

of the Interior is, of course, due to his position under the Reclamation Act, and to his interest in storage projects, including the Pathfinder and Guernsey dams and reservoirs now in operation (see Bill of Complaint, Articles Eighth and Ninth, pages 16-21); and likewise in the projects known as the Casper-Alcova and Seminoe Reservoir (Bill of Complaint, Article Eleventh, pages 25-29).

Of course complainant concedes that the Secretary of the Interior is in a different position from that of Colorado and that, like every other appropriator of water from the North Platte river in Wyoming, he has a direct interest in the outcome of the suit. If relief is granted to complainant as prayed, every appropriator in Wyoming, which has a priority later than the priority of the larger number of Nebraska water users, will be affected. All water users in both states have an interest in the controversy; but it does not follow that, by reason of such an interest, any of the water users are necessary, or even proper parties.

This court has many times held, that in original actions in this court between the states, each state represents those under its jurisdiction whose interests might be affected by the decree.

Wyoming v. *Colorado,* 259 U. S. 419, 468, 66 L. Ed. 999, 1015.

Pennsylvania v. *West Virginia,* 262 U. S. 553, 595, 67 L. Ed. 1117, 1131.

Wyoming v. *Colorado,* 286 U. S. 494, 508-509, 76 L. Ed. 1252.

Particularly with reference to suits relating to water rights, this court held in the case last cited above that the water claimants in the respective states which were par-

ties to the litigation, were represented by the states and were before the court by representation.

Wyoming v. *Colorado,* 286 U. S. 494, 508-509, 76 L. Ed. 1245, 1252.

The question really is, therefore, whether or not the Secretary of the Interior is in a different position from other water appropriators in Wyoming. This necessarily involves the question of the relation of the United States and its agencies to the waters of the streams of the respective states. This question has been the subject of Congressional legislation and judicial decision of this court ever since 1866, and we believe that the law is well settled.

The interest of the United States in streams flowing within one or more states is confined to two matters only, namely, navigability, and likewise the rights, appurtenant or otherwise, which the United States as owner of the public lands, may have in the flow of streams bordering the public lands.

U. S. v. *Rio Grande Dam & Irrigation Co.,* 174 U. S. 690, 703-706, 43 L. Ed. 1136, 1141-1142.

Gutierres v. *Albuquerque Land & Irr. Co.,* 188 U. S. 545, 552-556, 47 L. Ed. 588, 592-593.

Wyoming v. *Colorado,* 259 U. S. 419, 460-465, 66 L. Ed. 999, 1011-1014.

Excepting only rights of the United States, each state has exclusive jurisdiction and control of its waters, and the western states, admitted to the Union from time to time after the adoption of the Constitution, have no less

power or authority over their streams respectively, than have those states which were among the thirteen original colonies.

Kansas v. *Colorado*, 206 U. S. 46, 85-95, 51 L. Ed. 970-973.

The legislation of Congress on this subject was reviewed in *U. S.* v. *Rio Grande Dam & Irrigation Co., supra,* and *Gutierres* v. *Albuquerque Land & Irr. Co., supra.* In those cases it was held that Congress had given its approval to the adoption by any state or territory of the doctrine of prior appropriation and use of waters on non-riparian lands, as a substitute for the common law principles of riparian rights.

In *Kansas* v. *Colorado*, 206 U. S. 46, 91-92, 51 L. Ed. 956, 972, this court said:

> "At the time of the adoption of the Constitution, within the known and conceded limits of the United States there were no large tracts of arid land, and nothing which called for any further action than that which might be taken by the legislature of the state in which any particular tract of such land was to be found; and the Constitution, therefore, makes no provision for a national control of the arid regions or their reclamation. But, as our national territory has been enlarged, we have within our borders extensive tracts of arid lands which ought to be reclaimed, and it may well be that no power is adequate for their reclamation other than that of the national government. But, if no such power has been granted, none can be exercised.
>
> "It does not follow from this that the national government is entirely powerless in respect to this matter. These arid lands are largely within the terri-

tories, and over them, by virtue of the second paragraph of § 3 of article 4, heretofore quoted, or by virtue of the power vested in the national government to acquire territory by treaties, Congress has full power of legislation, subject to no restrictions other than those expressly named in the Constitution, and, therefore, it may legislate in respect to all arid lands within their limits. As to those lands within the limits of the states, at least of the Western states, the national government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property. We do not mean that its legislation can override state laws in respect to the general subject of reclamation. While arid lands are to be found mainly, if not only, in the Western and newer states, yet the powers of the national government within the limits of those states are the same (no greater and no less) than those within the limits of the original thirteen; and it would be strange if, in the absence of a definite grant of power, the national government could enter the territory of the states along the Atlantic and legislate in respect to improving, by irrigation or otherwise, the lands within their borders. Nor do we understand that hitherto Congress has acted in disregard to this limitation."

It is to be noted that in the Kansas-Colorado case, the United States intervened and was a party to the adjudication.

In *Wyoming* v. *Colorado*, 259 U. S. 419, 462, 66 L. Ed. 999, 1012, this court said:

"Of the legislation thus far recited it was said, in *United States* v. *Rio Grande Dam & Irrig. Co.*, 174 U. S. 690, 706, 43 L. Ed. 1136, 1142, 19 Sup. Ct. Rep. 770: 'Obviously by these acts, so far as they extend-

> ed, Congress recognized and assented to the appropriation of water in contravention of the common-law rule as to continuous flow'; and again: 'The obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common-law rule, which permitted the appropriation of those waters for legitimate industries.'"

With the background of these decisions, and the legislation recited and interpreted therein, Congress on June 17, 1902, passed the Reclamation Act, containing as Section 8 the following (U. S. C., Title 43, Secs. 383, 372):

> "Nothing in this act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, *and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws,* and nothing herein shall in any way affect any right of any State or of the Federal Government or of any land owner, appropriator, or user of water, in, to, or from any interstate stream or the waters thereof: Provided, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, measure, and the limit of the right."

The words which we have italicized are, as contended by complainant, conclusive that the Congress, acting within its power, has placed the Secretary of the Interior in the position of any other water appropriator in the state where a Reclamation project stores or diverts water; and that the Secretary, both in building and in operating such a project, must operate under state laws, and be subordi-

nate to the control of water officials who administer the waters of the stream.

It may be that, under the decisions of the court in the *Rio Grande case*, the *Gutierres case*, and the *Kansas-Colorado case, supra,* the United States might have the power to build and operate a reclamation project for the benefit of public lands, without any reference to the State authorities. A discussion of that question, however interesting, would be merely academic. Clearly Congress did not intend that the Secretary of the Interior should be set up as an independent authority appropriating water from the stream subject to no regulation as to the quantity of water taken, or as to his actions in relation to other appropriators. It would hardly seem that clearer language could be used to express the purpose of Congress that, in appropriating water for use upon public lands, the Secretary should be in the same position as an appropriator for use upon lands privately owned, at least so far as concerns obedience to the State laws and subordination to lawful state regulations.

However, if this language be treated as ambiguous, so as to be subjected to usual rules of statutory interpretation and construction, the result reached would be the same.

One of the fundamental rules of statutory construction is that the administrative interpretation placed upon an act by the executive officers who are governed by it, is entitled to great weight. This court said in *Wisconsin* v. *Illinois,* 278 U. S. 367, 413, 73 L. Ed. 426, 433: "Nothing is more convincing in interpretation of a doubtful or ambiguous statute." Here, as alleged in the bill (Articles 8 & 11, pages 16-17, 25-27), the Secretary of the Interior

has before making any appropriations of water, made application to the Wyoming State authorities and received their approval.

Moreover, on March 20, 1903, the Director of the Geological Survey was authorized to designate suitable persons to file notices of water appropriation for the projects of the Reclamation Service, in the name of and on behalf of the Secretary of the Interior, in pursuance of the provisions of Section 8 of the Reclamation Act.

H. D., Vol. 53, page 26.

Likewise on September 5, 1903, the Secretary of the Interior decided that there is no authority to make such executive withdrawal of public lands in a State as will reserve the waters of a stream flowing over the same from appropriation under the laws of the State, or will in any manner interfere with its laws relating to the control, appropriation, use, or distribution of water.

H. D., Vol. 57, page 36.

Another rule of construction is that if possible an interpretation will be given to an Act of Congress which will not cause confusion, conflict or disorder, but rather one which will create an orderly, harmonious and peaceful administration. It will not be presumed that Congress intended to place the federal authorities in opposition to State authorities, or to cause confusion in the administration of the river, but rather the opposite presumption will be entertained.

The difficulties inherent in the creation of an independent agency with power to disregard state administration

and to divert water independent of control by state authorities, are obvious. Unless the federal government should reserve all the water for the public lands, there are certain to be private appropriators taking water under state authority for the irrigation of privately owned lands, as is the situation with reference to the North Platte and Platte rivers in the instant suit. State regulation is essential in order to settle conflicts of interests between these appropriators; and such state regulation exists both in Nebraska and Wyoming as well as in most western states having irrigation in any volume. The conflicts in interest are illustrated by this suit; and this suit further illustrates the difficulties which arise when two authorities, independent of each other, both attempt to regulate waters. The only solution of these difficulties is by an action in this court.

If there were still a third authority, independent of both Nebraska and Wyoming, the difficulties would increase in geometric ratio. If the Secretary of the Interior were established as a separate independent agent with power to dam up the stream, store the water, and divert large quantities independent of regulation, there would necessarily result a great amount of conflict between the Secretary and either or both states. However genuine the good faith between them, differences of interpretation and differences of point of view could cause frequent disagreements. Moreover, it would be difficult to establish the dates of priority, which is the fundamental fact necessarily to be determined and made definite as a basis of orderly administration of the waters of a river which is subject to the law of prior appropriation. Both Nebraska and Wyoming, for over forty years, have followed the principle that adjudications of water rights should be made by an authority having

quasi-judicial powers, and through proceedings which are in a certain sense *in rem*, so that the whole world is in a position to come in and be heard in opposition. Congress has made no provision with respect to adjudication of water rights for Reclamation Act projects. Instead, we believe that Congress has, in the legislation above quoted, made definite provision that the Secretary of the Interior is required to get the water right established through proceedings before the state authorities. It seems clear that, in the interests of orderly administration, Congress has required the Secretary to place himself in the same position as any other appropriator.

There is still a third reason why the interpretation of the Reclamation Act here urged, is the only reasonable one. Section 8 of the Act must, of course, be interpreted in the light of the other provisions of the Act, under the familiar rule that the purpose of the entire Act is governing and controlling.

Now it is clear not only from the last clause and proviso of Section 8 supra, but also from other portions of the Act, that the reclamation provided for in the Act was for the benefit of individual owners who were expected to acquire title to the land through the homestead laws. When reclaimed, the land was not to be held by the United States, but was intended to become the private property of homesteaders as rapidly as they could be placed on the land and comply with the homestead laws.

The proviso of Section 8 appearing as U. S. C., Title 43, Sec. 372, provides that water rights should be appurtenant to the land irrigated thereby showing an intention that the land should be separately owned in smaller tracts.

Section 3 of the Act (U. S. C., Title 43, Sections 416, 432 and 434) and Section 5 of the Act (U. S. C., Title 43, Section 431) provided for entry of the lands reclaimed under homestead laws.

Provision was also made for the reclamation of privately owned lands along with the public lands (see *Burley* v. *United States*, C. C. A. 9th Circ., 179 Fed. 1).

The entire legislation clearly shows that the Secretary of the Interior was merely intended to be included for the purpose of developing reclamation for the ultimate benefit of private individuals who would become the owners of the land. The direct interest of the United States was but temporary until the lands could be patented under the homestead laws and the outlay of the government repaid.

Since this was the purpose, it was but natural that water rights and water administration should be made subordinate to state laws; since the homesteaders and their grantees and assigns would be citizens of these states and the ultimate beneficiaries of the water rights, they should properly be treated the same as any other appropriators.

The cases cited by counsel *(Moody* v. *Johnston,* 66 F. 2nd, 999, and *Moore* v. *Anderson*, 68 F. 2nd, 191) are not in point. They were both cases in which individual claimants under reclamation projects were seeking to establish rights to water. Obviously in such cases, the Secretary of the Interior, as the appropriator under whom the individuals were claiming, was a necessary party. The cases do not involve any decision as to the Secretary's status as an appropriator, in relation to the state in which the project was located. If they were claiming under an ap-

propriation of water made in the name of a private corporation, or a quasi-municipal corporation (such as many irrigation districts which are organized in Nebraska), obviously such a corporation would be a necessary party to a suit involving the individual water rights. Nevertheless, such a corporation would not, as above shown, be a necessary or proper party to a suit between two states, even though the corporation had acquired its water right through one of them.

It is clear that this is a suit between two quasi-sovereign states, each representing her appropriators and endeavoring to protect their rights respectively. In such a suit, the appropriators themselves are not necessary or proper parties.

Wyoming v. *Colorado,* 286 U. S. 494, 508-509, 76 L. Ed. 1245, 1252.

Point III.

Defendant's motion to dismiss, in its third paragraph consists of a general demurrer to the whole bill for want of equity. This should be overruled if there is any matter properly pleaded in the bill which is proper ground of equitable relief.

In what amounts to a general demurrer to the whole bill of complaint, defendant moves to dismiss on the ground that "Said Bill of Complaint fails to state facts sufficient to constitute a valid cause of action in equity against this defendant and does not state any matter of equity entitling the complainant to the relief prayed for."

The only attempt to discuss the allegations of the bill under this head comes in two paragraphs on page 9 of defendant's brief. It is there conceded that the facts alleged *"might be held sufficient to show some equities in the complainant."*

It is urged, however, that complainant fails to show what lands, if any, are irrigated in Wyoming and are entitled to receive water for that purpose from the North Platte river. Taking a somewhat distorted view of the bill, counsel say that Nebraska is demanding all of the water of the North Platte as an equitable apportionment.

This, of course, is an unfair statement. Article Ten (pp. 21-25) of the Bill clearly sets forth that defendant knows and has known all priorities on the river, both in Wyoming and Nebraska, and that Wyoming has some water rights which are prior to some Nebraska rights. In the second paragraph of page 22 of the Bill, complainant clearly states that it wishes at all times to have "due regard to priorities of Wyoming water rights which are senior to priorities of Nebraska water rights." Nowhere in the bill can be found any demand that Nebraska should have the entire flow of the river.

It is always difficult to know exactly where to draw the line between averments of ultimate facts, and allegations covering merely evidence. A bill in equity must, of course, contain all of the former and omit the latter.

> Federal Equity Rules, Rule 25, Section 3.
> *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43, 47, 67 L. Ed. 853, 857.

As drawn, the bill covers almost thirty printed pages. Any attempt to enter any portion of the field covered by it, by detailed allegations of what complainant expects to prove, would expand the bill to impossible and intolerable lengths, and complainant would have risked a dismissal on that ground. It is well settled that general certainty is sufficient in pleadings in equity. It is sufficient if the main facts upon which relief is asked are fairly stated, so as to put defendant on his guard and apprise him of what may be required of him.

As this court said in *City of St. Louis* v. *Knapp Co.*, 14 Otto (104 U. S.) 658, 26 L. Ed. 883:

> "It was not necessary, in such a case, to aver all the minute circumstances which may be proven in support of the general statement or charge in the bill. While the allegations might have been more extended without departing from correct rules of pleading, they distinctly apprise the defense of the precise case it is required to meet. There are some cases in which the same decisive and categorical certainty is required in a bill in equity as in a declaration at common law. Cooper, Eq. Pl., 5. But in most cases, general certainty is sufficient in pleadings in equity. Story, Eq. Pl., secs. 252, 253, p. 228, 9th ed. by Gould.

See also *United States* v. *American Bell Telephone Co.*, 128 U. S. 315, 356, 32 L. Ed. 450, 458.

The language of Mr. Chief Justice Fuller, used in ruling upon the demurrer of Colorado to the Bill of Complaint filed by Kansas in the case of *Kansas* v. *Colorado,* 185 U. S. 125, 144-147, 46 L. Ed. 838, 845, 846, is peculiarly appropriate in this case:

> "Applying the principles settled in previous cases, we have no special difficulty with the bare question

whether facts might not exist which would justify our interposition, while the manifest importance of the case and the necessity of the ascertainment of all the facts before the propositions of law can be satisfactorily dealt with, lead us to the conclusion that the cause should go to issue and proofs before final decision.

"The pursuit of this course, on occasion, is thus referred to by Mr. Daniell [Ch. Pl. & Pr., 4th Am. ed.] (p. 542): 'The court sometimes declines to decide a doubtful question of title on demurrer, in which case the demurrer will be overruled without prejudice to any question. A demurrer may also be overruled, with liberty to the defendant to insist upon the same defense by answer, if the allegations of the bill are such that the case ought not to be decided without an answer being put in. . . . A demurrer will lie wherever it is clear that taking the charges in the bill to be true, the bill would be dismissed at the hearing; but it must be founded on this: that it is an absolute, certain, and clear proposition that it would be so; for if it is a case of circumstances, in which a minute variation between them as stated by the bill and those established by the evidence may either incline the court to modify the relief or to grant no relief at all, the court, although it sees that the granting the modified relief at the hearing will be attended with considerable difficulty, will not support a demurrer.'

"Without subjecting the bill to minute criticism, we think its averments sufficient to present the question as to the power of one state of the Union to wholly deprive another of the benefit of water from a river rising in the former and by nature, flowing into and through the latter; and that therefore this court, speaking broadly, has jurisdiction.

"We do not pause to consider the scope of the relief which it might be possible to accord on such a bill.

Doubtless the specific prayers of this bill are in many respects open to objection, but there is a prayer for general relief, and under that such appropriate decree as the facts might be found to justify could be entered, if consistent with the case made by the bill, and not inconsistent with the specific prayers in whole or in part, if that were also essential. *Tayloe* v. *Merchants' F. Ins. Co.*, 9 How. 390, 406, 13 L. ed. 187, 193; Dan. Ch. Pl. & Pr., 4th Am. ed. 380. * * *

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"Sitting, as it were, as an international, as well as a domestic, tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand; and we are unwilling in this case to proceed on the mere technical admissions made by the demurrer. Nor do we regard it as necessary, whatever imperfections a close analysis of the pending bill may disclose, to compel its amendment at this stage of the litigation. We think proof should be made as to whether Colorado is herself actually threatening to wholly exhaust the flow of the Arkansas river in Kansas; whether what is described in the bill as the 'Underflow' is a subterranean stream flowing in a known and defined channel, and not merely water percolating through the strata below; whether certain persons, firms, and corporations in Colorado must be made parties hereto; what lands in Kansas are actually situated on the banks of the river, and what, either in Colorado or Kansas, are absolutely dependent on water therefrom; the extent of the watershed or the drainage area of the Arkansas river; the possibilities of the maintenance of a sustained flow through the control of flood waters; in short, the circumstances a variation in which might induce the court to either grant, modify, or deny the relief sought or any part thereof.

"The result is that in view of the intricate questions arising on the record, we are constrained to forbear

proceeding until all the facts are before us on the evidence.

"Demurrer overruled, without prejudice to any question, and leave to answer."

We believe that an examination of the bill will disclose that the facts are pleaded with such general certainty that defendant is clearly informed of the nature of complainant's claims, the objects it seeks to accomplish, and nature of the evidence that defendant will be called upon to meet. Further particularity in the bill would only encumber the record and obscure the issues.

For another reason the motion must be denied. It is well settled in this court that a general demurrer to a bill in equity will be overruled if there is any matter properly pleaded in the bill which is proper ground of equitable relief, and which requires an answer or a plea.

Buffington v. *Harvey,* 95 U. S. 99, 24 L. Ed. 381.
Gunton v. *Carroll,* 101 U. S. 426, 25 L. Ed. 985.
Pacific Ry. Co. v. *Missouri Pacific Ry. Co.,* 111 U. S. 505, 28 L. Ed. 498.

In the brief on behalf of defendant (page 9) it is conceded that the Bill "might be held sufficient to show some equities in the complainant." It would unduly extend the brief if we were to attempt to show in detail what these are. Defendant's admission sufficiently brings the case within the above rule, and for that reason, if for no other, it is clear that the motion to dismiss must be overruled.

Point IV.

In an original action in this court between two of the states of the United States, the proceedings will so far as

possible be conducted so as to disengage them from all unnecessary technicalities and niceties, and in the simplest form in which the ends of justice can be attained.

It is well settled that in original actions in this court, legal technicalities and niceties have no place. This court will so adjust its proceedings to their simplest form so that the ends of justice can be attained.

Florida v. *Georgia,* 17 How. (58 U. S.) 478, 15 L. Ed. 181.

California v. *Southern Pacific Co.,* 157 U. S. 229, 39 L. Ed. 683.

Clearly, judged by the above rule, there is no substance in defendant's motion, either in relation to the claimed defect of parties, or in respect to the general demurrer.

It must be remembered that the question of the right of the United States was before this court in *Gutierres* v. *Albuquerque Land & Irrigation Co.,* 188 U. S. 545, 47 L. Ed. 588, and was decided between private parties without any representation of the United States or any of its officers. In *Kansas* v. *Colorado,* 206 U. S. 46, 51 L. Ed. 596, the United States intervened generally, and after a full hearing on the question, this court held, as above indicated, that in view of the congressional legislation the United States had no interest in the waters which enabled it to override the choice of the state as to its method of administering the waters. In *Wyoming* v. *Colorado,* 259 U. S. 419, 66 L. Ed. 999, this court directed that the suit be called to the attention of the Attorney General; and by the court's leave, a representative of the United States participated in the subsequent hearings. In *Florida* v. *Georgia,* 17 How. (58 U. S.) 478, 15 L. Ed. 181, this court per-

mitted an anomolous species of intervention by the Attorney General, and he was allowed to participate in the hearings without an actual intervention, and without making the United States a party in the technical sense of the term. The Attorney General was apparently more than an *amicus curiae,* but less than an intervener.

We believe that the bill is sufficient both in form and in substance, and that all proper parties are before this court. However, we would have no objection to action by this court similar to that which was taken in the case of *Wyoming* v. *Colorado, supra.* This is, we believe, the most that this court should do, and that no additional parties are necessary in this suit.

Nebraska asks for nothing but the fullest and most complete disclosure of all the facts and circumstances having a bearing on the controversy; and Nebraska offers at all points to do equity to the fullest and most complete degree.

Respectfully submitted,

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