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In the

Supreme Court of the United States

In Equity

October Term, 1934

No. 5, ORIGINAL

THE STATE OF NEBRASKA, *Complainant*,

vs.

THE STATE OF WYOMING, *Defendant*.

REPLY BRIEF OF DEFENDANT ON MOTION TO DISMISS

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CAPITOL-PIONEER-CHEYENNE

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No. 16, ORIGINAL

THE STATE OF NEBRASKA, *Complainant,*

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REPLY BRIEF OF DEFENDANT ON MOTION TO DISMISS

I.

We will present our reply to the brief of the Complainant upon the grounds of the motion to dismiss in the order in which they are presented in Complainant's brief.

The counsel for the Complainant urge that the State of Colorado is not an indispensable party upon the ground that the State of Nebraska does not ask for any relief against the State of Colorado.

As we pointed out in our original argument, the Bill of Complaint shows that the North Platte River originates in Colorado and includes a considerable drainage area in that State. In order to direct the attention of the Court more definitely to certain allegations of the Bill of Complaint, which we believe justify our position that the question of an equitable division of all of the waters of the North Platte River, which would necessarily involve the State of Colorado, are to be considered in this case, we make the following quotations from the Bill of Complaint:

> "That the complainant, State of Nebraska, by interstate common law, is entitled to an equitable division and apportionment of the waters of the North Platte River, in order

> that (at all times having due regard to priorities of Wyoming water rights which are senior to the priorities of Nebraska water rights), complainant may enable its appropriators to enjoy their water rights without interference by junior appropriators, whether in Wyoming or Nebraska." (Bill of Complaint, Page 22, second paragraph)

It will be observed that this allegation is to the unrestricted effect that the State of Nebraska is entitled to an equitable division and apportionment of the waters of the North Platte River. It is true that the alleged purpose of such division is restricted to water users of Nebraska and water users of Wyoming, but we do not believe that such restriction limits the alleged right of equitable division and apportionment claimed by Complainant.

Again the prayer of the Bill of Complaint, which we understand to be an essential part of the Bill, contains this statement:

> "That the said defendant be by order of this Court, required to permit the waters of the North Platte River to reach the state line between Nebraska and Wyoming in such quantity as will afford to Nebraska its equitable apportionment of the waters of the North Platte River, and for that purpose that the defendant be required to close down and to prevent the appropriation in Wyoming by its appropriators of waters to the detriment of the right of Nebraska to its equitable apportionment of the waters of the North Platte River as determined by this Court." (Page 33, last clause of prayer on said page)

Clearly, this prayer for relief does not limit the apportionment requested to waters of the North Platte River, originating in Wyoming and Nebraska only, but includes the entire flow of the river.

II.

With reference to the necessity of making the Secretary of the Interior a party to this suit, as disclosed by the Bill of Complaint, we direct the attention of the Court to the following provisions of said Bill:

> Paragraphs Eighth and Ninth, Bill of Complaint, Pages 16 to 21.

In these paragraphs, after setting forth the construction of certain dams by the Bureau of Reclamation of the United States, and the impounding of certain waters, this language is used:

> "That all of the acts of the United States Bureau of Reclamation in operating said reservoirs, in impounding waters, and filling the same, and in releasing such waters, are subject to the authority of the State of Wyoming, defendant herein, and that said defendant State of Wyoming and its officers are charged with the duty of administering such waters fairly and impartially and of requiring that water should not be taken for storage when needed for direct flow appropriators, and are charged with the duty of preventing appropriators with junior rights from taking water which is required by appropriators with senior rights. That such duties extend to the duty of controlling appropriators whose appropriations are made and taken under the authority of the State of Wyoming from encroaching upon the water rights of Nebraska appropriators whose rights are prior to Wyoming appropriators, and from diminishing the flow of said streams so that such Nebraska prior appropriators are unable to obtain the waters included within their appropriations. That with the authority of the defendant State of Wyoming, the officers in charge of such dams and reservoirs have continually obstructed the streams and held back waters for storage purposes thereby diminishing the direct flow and depriving Nebraska water appropriators, both senior and junior in date to such storage appropriation, from obtaining direct flow water to which they are entitled by interstate common law. That such illegal and wrongful impounding of water for storage purposes amounts and has amounted in each year for the past several years to many thousands of acre feet, in some years running as high as fifty or sixty thousand acre feet valued at $1,800,000. That such waters, when released, are not made available to such direct flow appropriators, but are reserved and kept entirely for the benefit of lands watered by canals included in the original plans of the said North Platte project, and also for the benefit of holders of Warren Act contracts. That this complainant, by its duly constituted officers, has repeatedly and times without number protested vigorously, by telephone, by telegram, verbally, and by letter not only to the defendant,

the State of Wyoming and its officers charged with the duty of administering the waters of the North Platte River in the State of Wyoming, as hereinbefore described, but also to the administrative officers of the United States Bureau of Reclamation and to the Washington office of the United States Bureau of Reclamation, but that said defendant, the State of Wyoming, and each and every one of such officers to whom such protests have been made have failed, neglected, and refused to aid this complainant, but on the contrary said officers, and said State of Wyoming through its duly authorized and constituted officers, have declared their intentions to administer the waters of the North Platte River in the State of Wyoming without regard to the rights and other claims of this complainant and its appropriators. That unless restrained by this court, the defendant will continue to permit, aid, and abet its appropriator, the United States Bureau of Reclamation, in its wrongful, illegal and unjustifiable impounding of direct flow water to which your complainant's appropriators are entitled, thereby depriving Nebraska appropriators of many thousands of acre feet of water in each year hereafter."

Again the Complainant claims that certain rules of priority apply in the States of Nebraska and Wyoming, and that the officers of the Defendant have so interpreted and applied such rules as to deprive the Complainant of its rights to an equitable distribution of the waters of the North Platte River. (Bill of Complaint, Paragraph Tenth, Page 21 to 25)

Paragraph Eleventh of the Bill of Complaint, Pages 25 to 29, makes a direct attack upon the construction and development of the Casper-Alcova and Seminoe Reservoir projects in the State of Wyoming. The Bill of Complaint alleges that the State of Wyoming has allotted to the Casper-Alcova project a direct flow right with a priority of December 6, 1904. It also alleges that such priority date should not be earlier than March, 1934. It alleges that said projects will absorb all of the waters flowing at any time of the year in the North Platte River above the Casper-Alcova and Seminoe projects, and then uses this language:

"That the development of the Casper-Alcova, Seminoe projects, as planned and threatened by the defendant State of Wyoming and by the United States Bureau of Reclamation

> will completely exhaust all of the waters of the North Platte River above the state line between the State of Wyoming and the State of Nebraska, except for such small quantities of water as may flow into the stream by way of accretion between the point of Alcova and Guernsey; and as complainant is informed and verily believes, all of such accretions will be used for the purpose of filling the Guernsey Reservoir, and all of the accretions below Guernsey and between Guernsey and the state line will be used by Wyoming junior appropriators, leaving practically no water flowing across the state line into the State of Nebraska."

The Reclamation Act of 1902 and subsequent amendments thereof clearly give the Bureau of Reclamation authority to segregate and reclaim public lands of the United States, and such projects, as we construe the Act, may also include certain privately owned lands which may lie within the bounds of any reclamation district.

We take it that we must assume that in establishing the Casper-Alcova Reclamation project, the Secretary of the Interior, through the Bureau of Reclamation, is acting within and pursuant to authority bestowed by the Reclamation Act and amendments thereto. We think it is beyond controversy that one of the direct purposes of the present suit is to deprive the Casper-Alcova project of a priority date as of December 6, 1904, which is the date of priority of said project asserted and claimed by the Bureau of Reclamation and the Secretary of the Interior.

The lands which the Secretary of the Interior desires to reclaim by the Casper-Alcova project are principally public lands of the United States, and we believe that the officer of the United States charged with the duty of administering those lands and of reclaiming same is an indispensable party to any action which involves the right to reclaim such lands.

In the case of Arizona vs. California et al., 283 U. S. 423, 75 L. Ed. 1154, we find this language used:

> "The claim that quasi-sovereign rights of Arizona will be invaded by the mere construction of the dam and reservoir rests upon the fact that both structures will be located partly within the State. At Black Canyon, the site of the dam, the middle channel of the river is the boundary between Nevada and Arizona. The latter's statutes prohibit the

construction of any dam whatsoever until written approval of plans and specifications shall have been obtained from the State engineer; and the statutes declare in terms that this provision applies to dams to be erected by the United States. Arizona Laws 1929, c. 102, Sections 1-4. See also Revised Code of 1928, Sections 3280-3286. The United States has not secured such approval; nor has any application been made by Wilbur, who is proceeding to construct said dam in complete disregard of this law of Arizona.

The United States may perform its functions without conforming to the police regulations of a State. Johnson v. Maryland, 254 U. S. 51; Hunt v. United States, 278 U. S. 96. If Congress has power to authorize the construction of the dam and reservoir, Wilbur is under no obligation to submit the plans and specifications to the State engineer for approval. And the federal Government has the power to create this obstruction in the river for the purpose of improving navigation if the Colorado River is navigable. Pennsylvania v. Wheeling and Belmont Bridge Co., 18 How. 421, 430; South Carolina v. Georgia, 93 U. S. 4, 11; Gibson v. United States, 166 U. S. 269; United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53, 64; Greenleaf Johnson Lumber Co. v. Garrison, 237 U. S. 251, 258-68. Arizona contends both that the river is not navigable, and that it was not the purpose of Congress to improve navigation."

We assume that the authority of the United States, acting by and through the Secretary of the Interior and Bureau of Reclamation, to construct irrigation projects and to reclaim the public lands of the United States is established by law beyond controversy. The purpose of the suit then being to affect the authority of the Secretary of the Interior, acting through the Bureau of Reclamation, to construct a lawful project, clearly, he is a necessary party to the suit. (Belknap v. Schild, 161 U. S. 10; Goldberg v. Daniels, 231 U. S. 218; International Postal Supply Co. v. Bruce, 194 U. S. 601, 605; Morrison v. Work, 266 U. S. 481.)

As bearing upon the question of the rights of the United States in the waters of unnavigable streams, which flow through public domain, we desire to direct the attention of the Court to the following cases:

Anderson vs. Bassman, 140 Fed. 14, 20;
Howell vs. Johnson, 89 Fed. 556, 558, 559;
Cruze vs. M'Cauley, 96 Fed. 369, 374;
U. S. vs. Conrad Inv. Co., 156 Fed. 123, 127, 132;
Winters vs. U. S., 143 Fed. 740, 747;
Winters vs. U. S., 207 U. S. 564.

In the case of Winters vs. U. S., 143 Fed. 740, 747, we find this language:

> "Prior to the time of settlement upon the land in question, and prior to the appropriation of the waters of Bear Creek by anyone, both the land and the water were the property of the government. When the government established the reservation, it owned both the land included therein and all the water running in the various nearby streams to which it had not yielded title. It was, therefore, unnecessary for the government to 'appropriate' the water. It owned it already. All it had to do was to take it and use it."

In the case of U. S. vs. Rio Grande Irr. Co., 174 U. S. 690, 703, this language is used:

> "Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property."

In Gutierres vs. Albuquerque Land Co., 188 U. S. 545, 554, the Court said:

> "Of course, as held in the Rio Grande case, (p. 703), even a State, as respects streams within its borders, in the absence of specific authority from Congress, 'cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property' ".

In the case of U. S. vs. Conrad Inv. Co., 156 Fed. 123, 127, 132, this language is used:

> "The government has not to make a prior appropriation to enable it to obtain the use of the water. It has only to take that which has been reserved or that which has never been subject to prior appropriation upon the public domain. It has only to come into its own when its needs may require —the Department of the Interior being the instrumentality by which it exercises that right and privilege—and all persons seeking appropriations from public streams must take subject to this paramount right."

It would seem to us that considering this view of the law, when the Congress passed the Reclamation Act in 1902, it served notice upon all subsequent appropriators that the United States intended to exercise its right to use waters of streams passing through or adjacent to public lands for the development and irrigation of those lands whenever and wherever that appeared advisable. The Secretary of the Interior served further notice upon the public as to such intent and purpose when he made his filings December 6, 1904, covering the development of the North Platte River project.

This Court has also expressed its attitude toward the appropriation of waters by the government and the effect of permits issued by the State Engineer.

In the case of Ide et al. vs. United States, 263 U. S. 497, 68 L. Ed. 407, this Court held:

> "Permits issued by the State Engineer to appropriate waters from a ravine are mere licenses to appropriate if water is available and do not affect the rights of the United States to water flowing in the ravine which has seeped from land upon which it was used under an irrigation project."

In that case the effect of the decision is that the seepage water accumulating from a reclamation project belongs to the United States and may be reclaimed with or without the consent of the State officials.

In that case it appeared that Ide et al. had filed upon this seepage water and had received a permit from the State Engineer. The Bureau of Reclamation applied for a permit to reclaim and use the same water. The State Engineer rejected this appli-

cation on the ground and for the reason that such water was included in the permit of Ide et al. The decision of the Court was that the water belonged to the United States, and that its application for a permit to appropriate the same was unnecessary and it could take and use the water. See also United States vs. Hanson, 167 Fed. 881.

We have cited these cases to show what the Courts have held with reference to acts or proceedings which may interfere with or affect waters in which the government is interested, and we submit that in view of such decisions the Secretary of the Interior is an indispensable party to this case.

Respectfully submitted,

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