No. 9, Original

In the Supreme Court of the United States

OCTOBER TERM, 1937

THE STATE OF NEBRASKA, COMPLAINANT

v.

THE STATE OF WYOMING, DEFENDANT

AND

THE STATE OF COLORADO, IMPLEADED DEFENDANT

REPLY BRIEF OF THE UNITED STATES IN SUPPORT OF ITS MOTION FOR LEAVE TO INTERVENE

INDEX

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The objections filed by the States of Nebraska, Wyoming, and Colorado to the motion of the United States for leave to intervene in this proceeding evince in various material respects a misunderstanding of the position taken by the United States in support of its motion for leave to intervene. To correct this misunderstanding, and to reply to certain erroneous interpretations which the States have placed upon the pertinent Acts of Congress and decisions of this Court, this brief is filed.

The immediate question presented by the motion for leave to intervene is whether the United States has an interest in the subject matter of the litigation which the States are not competent to represent, or are not adequately representing, and which, therefore, the United States is entitled to represent, as a party. The motion sets forth two distinct interests of the United States which will be affected by the litigation: First, its interest in the appropriations of the waters of the North Platte River which have been made (or initiated) by the United States for Federal reclamation projects; and, second, its interest in the unappropriated waters, if any, of that River. The objections of the States to the granting of the motion will be discussed separately in their bearing upon each of these two interests which the United States asks leave to protect.

I

The United States Is Entitled to Intervene to Protect the Appropriations Which Have Been Made or Initiated by the United States for Federal Reclamation Projects

The objections of the States to the intervention of the United States in this proceeding assume, and indeed explicitly assert, that the United States will be bound by whatever decree the Court may enter (Nebraska, pp. 2, 10–11; Wyoming, pp. 1, 3; Colorado, pp. 1, 21–23). In view of the position taken

by the States in opposing the intervention of the United States, it is clear that denial of the motion for leave to intervene would be tantamount to a holding that the United States, even in its absence, may be so bound. Compare *Wyoming* v. *Colorado,* 286 U. S. 494, 508–509; *Nebraska* v. *Wyoming,* 295 U. S. 40, 43; *Hinderlider* v. *La Plata and Cherry Creek Ditch Company,* No. 437, this Term, decided April 25, 1938. But see *Arizona* v. *California,* 298 U. S. 558, 571–572.

The suit contemplates the equitable apportionment of the waters of the North Platte River among the States of Nebraska, Wyoming, and Colorado. The bill of complaint filed by Nebraska discloses that the suit was brought primarily for the purpose of obtaining an adjudication of rights asserted on behalf of private water claimants in Nebraska as against the rights of the Federal reclamation projects which use the waters of the river—that is the North Platte and Kendrick reclamation projects (see Bill of Complaint of Nebraska, pp. 16–21, 25–32). A primary concern of Colorado in the suit is to defeat the water rights claimed by the United States for the Kendrick Project (see Answer and Cross Bill of Colorado, pp. 47–48).

The suit has proceeded thus far on the assumption that the decree to be entered allocating the waters between the States will be binding upon every claimant to water of the River, including the United States, at least with respect to the total

amount of water which may be diverted from the River in any one State, so that every such claimant will thereafter be obliged to look to the quota of waters allocated to one of the States for the satisfaction of his claim. If the prayer of Nebraska is granted, the decree to be entered will adjudicate not only the total amount which may be withdrawn from the waters of the River in any one State but "the respective priorities of the various appropriators of such waters, including the United States," in each of the States (Bill of Complaint, pp. 32–33, 25).

It cannot be challenged, therefore, that the United States is entitled to intervene in the suit, as of right, to protect the appropriations for the North Platte and Kendrick projects if (1) it possesses interests of property in those appropriations such as would give it a standing in ordinary litigation; and (2) if those interests cannot properly be represented, to the exclusion of the United States and over its objection, by the litigant States. Compare *Florida* v. *Georgia,* 17 How. 478, 492; *Barnes* v. *Alexander,* 232 U. S. 117, 123; *Credits Commutation Co.* v. *United States,* 177 U. S. 311, 315–316. The States oppose intervention upon both these grounds. They deny that the United States is the owner of the appropriations which have been made for the Federal reclamation projects. They assert that, even if the United States is the owner, it is not entitled to defend those appropriations in

this suit, but must rely for their defense upon the States. None of the States recognizes any internal inconsistency in the position that the States are entitled to be the sole protectors of interests the very existence of which they deny.

1. THE UNITED STATES IS THE "APPROPRIATOR" OF WATER FOR FEDERAL RECLAMATION PROJECTS, AND (UNLESS THE STATES HAVE EXCLUSIVE POWER, OR POWER DESPITE THE PROTEST OF THE UNITED STATES, TO REPRESENT ITS INTERESTS) IS THE PROPER PARTY TO DEFEND THE APPROPRIATIONS

Colorado has asserted (brief, p. 21) that "under the Reclamation Act, the United States is not the owner of the water rights" acquired or reserved for the benefit of Federal reclamation projects—that "the United States is 'simply a carrier or distributor of the water.' " Substantially similar contentions are advanced by Nebraska (brief, pp. 8, 22) and Wyoming (brief, p. 6). The essence of the States' position (brief for Nebraska, p. 8) is that the appropriator is not the United States or the Secretary of the Interior but the land owner upon the reclamation project. *Ickes* v. *Fox,* 300 U. S. 82, is relied on by the States for this proposition.

The States' contention rests upon grave misapprehension of the effect of the decision in *Ickes* v. *Fox.* Under any view of that decision, however, the contention is wholly inadequate as a basis for opposing intervention by the United States in the present proceeding, for three reasons.

In the first place, the contention has no application whatever to the water rights of the Kendrick Project. Although the United States has initiated appropriations of waters for the Kendrick Project, which will, when perfected, have priorities as of the date of their initiation, those appropriations have not yet been perfected. As yet, therefore, none of the waters of that project have become appurtenant to land, nor has any land owner as yet any interest whatever in the waters of that project. If anyone at the present time is the owner of the water rights for that project, it is the United States. Eventually waters of the project will be devoted to irrigation, and at that time rights in those waters may become appurtenant to the lands to which they are applied. A substantial part of those lands will, however, be public lands of the United States, and as long as title to those lands remains in the United States it will, under any theory, be the owner of the rights in the waters. Since public land in irrigation projects is open to private acquisition only under the homestead laws, it will be several years before title to those lands can pass from the United States.

In the second place the waters of the North Platte Project are used, not merely for irrigation, but are used also for the development of electric power by the United States itself. And a very large power development is under construction in connection with the Kendrick Project. The rights

thus to use these waters for power development belong, under any theory, only to the United States.

In the third place, a claim of absolute ownership of property is not necessary to a right to intervene in litigation respecting it. Even if, as suggested by Colorado (brief, p. 4), the United States had only "a lien upon the water and land until repaid", nevertheless such a lien, whether equitable or legal, would be a sufficient basis for intervention. *Barnes* v. *Alexander,* 232 U. S. 117, 123; *United States* v. *Radice,* 40 F (2d) 445 (C. C. A. 2d).

The basic answer to the contention that the water rights of Federal reclamation projects belong to the land owners and not to the United States, however, is that as to all such water rights the United States has the standing of an "appropriator," and is the proper party in interest so far as concerns litigation with outsiders for the protection of the water rights of the project. The States in their pleadings and briefs have already recognized that the United States is the appropriator of waters for the North Platte and Kendrick Projects. (See Appendix to Motion of United States, p. 68.) This Court has specifically so adjudged with respect to a similar project in *Ide* v. *United States,* 263 U. S. 497, 506, quoted in the Appendix, *supra,* p. 67. The same proposition has been explicitly declared or assumed in a long line of lower federal court decisions.[1] (See cases cited

[1] In the state courts in the western States litigation is steadily conducted on the understanding that private irriga-

in Appendix, *supra,* p. 58.) The laws of Western States, including the litigant States, expressly or impliedly recognize that the United States has a property interest in the waters appropriated or purchased for Federal reclamation projects. See, *e. g.,* Neb. Laws, 1911, c. 151, p. 495; Neb. Laws, 1915, c. 205, p. 441; Neb. Laws, 1919, c. 190; Wyo. Laws, 1925, c. 53, § 2, p. 40; Colo. Laws, 1909, c. 176, § 1, p. 422; Colo. Stat. Ann. 1935, c. 90, § 387; Wash. Laws, 1905, c. 88, §§ 1, 4, pp. 180, 182.

The destructive contention—contrary to the States' own pleadings—that the United States is not an appropriator and does not have standing in litigation to defend, as against outside claims, appropriations for Federal reclamation projects is attempted to be rested on certain expressions in this Court's opinion in *Ickes* v. *Fox,* 300 U. S. 82. Those expressions do not justify any such conclusion. That was a suit brought by the owners of lands in a Federal reclamation project to enjoin the Secretary of the Interior from enforcing an order which would reduce the plaintiffs' supplies of water. The Secretary moved to dismiss the suit upon the ground that the only rights of the plaintiffs in their supplies of water were contractual, and that the suit was in substance for the specific performance of contracts with the United States, so that the United States was an indispensable

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tion districts (against whom the contention now advanced might more readily be urged) are proper parties in interest to defend the water supply of the district.

party defendant. The Court held that "so far as these respondents are concerned" they, and not the United States, owned the water rights (300 U. S. at 93), so that the suit was not for the specific performance of contracts, but to protect property rights against unlawful interference. The Court did not, however, at all repudiate its holding in *Ide* v. *United States, supra,* that the United States was the proper party to protect the water rights of a Federal irrigation project against interference by an outsider.

The States' denial that the United States owns any interest in the appropriations for Federal reclamation projects would, if accepted, have wide application. It would overturn a uniform course of decision in the western States, expressly sanctioned by this Court, recognizing the United States as the proper party in interest to defend reclamation appropriations against outsiders. It would, for all practical purposes, leave many land owners upon reclamation projects remediless and would make impossible any legal protection of the interest of a reclamation project as a whole.

2. THE STATES DO NOT HAVE EXCLUSIVE POWER, NOR ANY POWER OVER THE PROTEST OF THE UNITED STATES, TO REPRESENT THE INTERESTS OF THE UNITED STATES WHICH WILL BE AFFECTED BY THE DECREE HEREIN

The second principal contention advanced by the litigant States in opposing the motion of the United States is that, even if it be conceded that the United

States has property interests as to which it will be bound by the decree herein, and which in ordinary litigation the United States itself would be entitled in its own name to protect, those interests can in the present proceeding be represented and protected only by one or another of the States.

It is, of course, true that in an original suit of this character (in which the States appear in a quasi-sovereign representative capacity) the ordinary doctrines as to parties, and the right of intervention, have no direct application. In an ordinary proceeding for the adjudication of rights in a stream, all water claimants are necessary parties, since their rights will be affected by the decree. *Moody* v. *Johnston,* 66 F. (2d) 999, 1003, 70 F. (2d) 835, 839 (C. C. A. 9th). Private appropriators are not necessary parties in the present suit only because the States themselves represent their interests. It is because their interests are so represented that private appropriators will be absolutely bound by the decree. *Wyoming* v. *Colorado,* 286 U. S. 494, 508–509; *Nebraska* v. *Wyoming,* 295 U. S. 40, 43; compare *Hinderlider* v. *La Plata River and Cherry Creek Ditch Co.,* No. 437, this Term, decided April 25, 1938. The question is whether this extraordinary doctrine of representation can have any application to the United States—or, more specifically, to the interests of the United States which are sought to be protected herein.

In their objections to the motion of the United States the three States assume that the right of the

States to represent the United States in this proceeding depends upon whether the rights of the United States in the waters are the same as the rights of private appropriators, and the States assert that those rights are the same. Colorado flatly declares (brief, p. 14):

> The rights of the United States in the public domain and the water thereon (conceding for the moment that the United States owns such water) are no greater than those of a private individual.

This assertion is fundamentally and demonstrably erroneous, and this error vitiates the claim of the States of power to represent the interests of the United States. Moreover, even if the assertion were correct as a statement of the nature and extent of the substantive rights of the United States, it would not follow that the interests of the United States can be represented in this proceeding by the States in the same fashion as can those of a private individual.

(1) *The interests of the United States as an appropriator are different from the interests of private appropriators in that the United States possesses governmental power with respect to its property in addition to the ordinary rights of ownership.*—The position advanced by Colorado, and the other States, is answered by the express language of the Constitution itself (Art. IV, Sec. 3, cl. 2):

> The Congress shall have power to dispose of and make all needful Rules and Regula-

> tions respecting the Territory or other Property of the United States * * *.

The private ownership of land and of rights to the use of water is not attended by any grant of governmental power. By virtue of the quoted provision of the Constitution, the ownership by the United States of rights of property is so attended. Because of that provision, and because the United States is a government of delegated powers, it does not hold property in a proprietary but only in a governmental capacity. See *Van Brocklin* v. *State of Tennessee,* 117 U. S. 151, 158–161; *Utah Power & Light Co.* v. *United States,* 230 Fed. 328, 337 (C. C. A. 8th).

In *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 403–404, this Court rejected a contention that "the lands of the United States within a State * * * are subject to the jurisdiction, powers, and laws of the State in the same way and to the same extent as are similar lands of others." It said (pp. 404–405):

> From the earliest times Congress by its legislation, applicable alike in the States and Territories, has regulated in many particulars the use by others of the lands of the United States, has prohibited and made punishable various acts calculated to be injurious to them or to prevent their use in the way intended, and has provided for and controlled the acquisition of rights of way over them for highways, railroads, canals, ditches,

> telegraph lines and the like. The States and the public have almost uniformly accepted this legislation as controlling, and in the instances where it has been questioned in this court its validity has been upheld and its supremacy over state enactments sustained. *Wilcox* v. *Jackson,* 13 Pet. 498, 516; *Jourdan* v. *Barrett,* 4 How. 168, 185; *Gibson* v. *Chouteau,* 13 Wall. 92, 99; *Camfield* v. *United States,* 167 U. S. 518; *Light* v. *United States,* 220 U. S. 523, 536–537. And so we are of opinion that the inclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power. "A different rule," as was said in *Camfield* v. *United States, supra,* "would place the public domain of the United States completely at the mercy of state legislation."

See also *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 330–331.

The Constitution recognizes that the ownership of property by the United States, which is an ownership on behalf of all the people of the United States, stands on a different plane than ownership by an individual. In the same way, as this Court said in *Utah Power & Light Co.* v. *United States, supra,* 243 U. S. at 409:

> A suit by the United States to enforce or maintain its policy respecting lands [or other property] which it holds in trust for all the people stands upon a different plane * * * from the ordinary private suit * * *.

Apart from the question of the effect of Section 8 of the Reclamation Act, therefore, the position stated by Colorado is plainly untenable. The sole question of any substance is whether by Section 8 of the Reclamation Act Congress reduced the United States' ownership of waters appropriated for reclamation projects to the status of the ownership of a private individual, or whether (as the United States contends) that Section is merely a conformity act irrelevant to any question of the power of the United States in the future to exercise its usual governmental authority with respect to its property.

The United States contends, and the Appendix to its Motion is in considerable part directed to showing, that the water rights of the Federal reclamation projects are not derived from the States but are in effect reserved and set aside out of the unappropriated waters of the United States, although, by reason of Section 8, in making those reservations State laws relating to the initiating and perfecting of appropriations are complied with. If the United States is correct in this contention as to the origin of the water rights of Federal reclamation projects, it is clear that the Property Clause of the Constitution applies to those rights, and that consequently

their status is different from that of rights of private individuals. For, assuming the Federal origin of those rights, it is plain that Section 8 cannot be construed as an abdication by Congress of its power under the Constitution "to dispose of and make all needful Rules and Regulations respecting" the property of the United States. We think it doubtful whether Congress could under the Constitution bind itself for the future not to exercise a power conferred upon it by the Constitution for the benefit of the whole people. No authority is cited by the States in support of their assumption that it could do so, and we are aware of none. In any event, we think, it is clear beyond controversy that no such abdication ought ever to be found by mere implication. Assuredly none is to be found in Section 8 which in express terms provides that:

> * * * nothing herein shall in any way affect any rights * * * of the Federal Government * * * in, to, or from any interstate stream or the waters thereof * * *.

Even if the contention of the United States as to the origin of the water rights of Federal reclamation projects be rejected, however, and it is concluded that they were derived from the States by appropriation under State laws, it remains true that Congress possesses governmental power with respect to those rights by virtue of the Property Clause of the Constitution. That clause applies alike to property acquired by cession from a foreign

power and to property acquired by a grant from a State or from private interests. See *Van Brocklin* v. *State of Tennessee, supra,* at p. 168. Compare *Ashwander* v. *Tennessee Valley Authority, supra.* For the same reasons that Section 8 cannot be construed as an abdication of powers already possessed under the Property Clause of the Constitution (if it be assumed that the United States owned the rights to the use of the waters), it ought not to be construed as exempting from the operation of that clause property subsequently to be acquired (if it be assumed that the States owned the waters). There is ground for doubting the constitutional power of Congress to make the waiver no less than the abdication. The reservation of the rights of the Federal Government contained in Section 8, and the assumption by Congress—as disclosed not only in the final proviso of Section 8 and elsewhere in the Reclamation Act, but also in subsequent statutes (Appendix, pp. 63–66)—that it possessed power to legislate with respect to water rights for reclamation projects, all serve to confirm the conclusion that Congress intended no such waiver. None of this legislation would be valid if Section 8 were to be construed as a disclaimer by Congress of all regulatory powers over water rights to be acquired for Federal reclamation projects.

As made clear in the Appendix to the Motion of the United States (pp. 68–69) no question is here at issue concerning the authority or present applicability of Section 8 of the Reclamation Act. That

section, it may be assumed, requires exact conformity with State law in the administration of the Reclamation Act, save as Congress has otherwise expressly directed (see Appendix, pp. 63–66). What is solely important is that if the existing exceptions to the requirement of conformity are valid, and if Congress has power further to depart from that requirement in the future, then the rights of the United States in the waters appropriated for federal reclamation projects do not fall in the same category as do the rights of private appropriators. The United States owns this property in the same manner as it normally owns property—namely, with power to dispose of it according to its own law (whether it be a conformity law, or otherwise) and to make all needful rules and regulations respecting it. The question is whether sovereign rights of ownership of this character can be represented in litigation by any State to the exclusion of the sovereign owner. To that question we now turn.

(2) *The States are not competent to represent in any litigation property interests of the United States with respect to which the United States possesses governmental power.*—The contention of the States that they are entitled to represent in this proceeding the interests of the United States is supported by no precedent. In no case has this Court ever declined on such a ground to give the United States a hearing. With the exception of the prior opinion in this case (295 U. S. 40, 43), dealing with representation not of the United

States but of the Secretary of the Interior, no authority for their contention has been proffered by the States. Examination of the history and basis of the doctrine of representation in original suits between States compels the conclusion that it can have no application to the United States. It is doubtful if the doctrine would be applicable even with respect to rights—if such there be—enjoyed by the United States in entire subordination to State law. Plainly, however, it is inapplicable to property interests which fall within the scope of the grant of governmental power contained in the Property Clause of the Constitution.

This Court's statements of the doctrine of representation in original suits between States have steadily been cast in terms of the political relationship between the State and the owner of the interest represented. Thus, in *Wyoming* v. *Colorado,* 286 U. S. 494, the Court described the suit (pp. 508–509) as "one between States, *each acting as a quasi-sovereign* and representative of the interests and rights *of her people* in a controversy with the other" [italics supplied]. Again, in *Kansas* v. *Colorado,* 185 U. S. 125, 142, the Court spoke of the State as invoking the original jurisdiction in the capacity of "parens patriae, trustee, guardian, or representative of all or a considerable portion of its citizens." The reference invariably is to the State as a representative of its "citizens" or "inhabitants," or of "the public." See *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 748; *Missouri* v. *Illi-*

nois, 180 U. S. 208, 241; *Kansas* v. *Colorado,* 206 U. S. 46, 49; *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, 237; *Hudson Water Co.* v. *McCarter,* 209 U. S. 349, 355; *New York* v. *New Jersey,* 256 U. S. 296, 302; *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 592; *North Dakota* v. *Minnesota,* 263 U. S. 365, 373. Similar language has been used by the Court with respect to the power of a State by compact to bind interests which, in a property sense, are not its own. See *Poole* v. *Fleeger,* 11 Pet. 185, 209; *Coffee* v. *Groover,* 123 U. S. 1, 29, 30; *Virginia* v. *Tennessee,* 148 U. S. 503, 525. Compare *Hinderlider* v. *La Plata and Cherry Creek Ditch Co.,* No. 437, this Term, decided April 25, 1938 (compact "binding upon the citizens of each State and all water claimants").

That the State sues in a sovereign or quasi-sovereign capacity, and that accordingly it can represent only those interests with respect to which it possesses the authority of a sovereign or quasi-sovereign, is confirmed by the views which this Court has repeatedly expressed as to the origin and purpose of the original jurisdiction. That jurisdiction was provided as a substitute for the lost powers of the States to enter into any treaties, alliances, or confederations, or to wage war or make compacts without the consent of Congress.

> The jurisdiction is therefore generally limited to disputes which, between States entirely independent, might be properly the

subject of diplomatic adjustment. (*North Dakota* v. *Minnesota, supra,* at p. 373.)

In the prosecution of an original suit, as in the making of a compact, the State thus exercises its residual powers of sovereignty. Only because sovereign, or quasi-sovereign, interests of the State as the representative of the public are involved is the suit maintainable (*Missouri* v. *Illinois, supra,* at p. 241; *Georgia* v. *Tennessee Copper Co., supra,* at p. 237; *Pennsylvania* v. *West Virginia, supra,* at 592); the bar of the Eleventh Amendment takes away from the State its former power "as a sovereign to present and enforce individual claims of its citizens as a trustee against a sister State." *North Dakota* v. *Minnesota, supra,* at pp. 374–376; *New Hampshire* v. *Louisiana,* 108 U. S. 76. The capacity in which the State sues (or is sued) is the measure of its competency to represent interests not its own. We submit that the high power to represent and to bind other interests, "irrespective of the assent or dissent" of the owners of those interests (*Hudson Water Co.* v. *McCarter, supra,* at 355) exists only when the State possesses sovereign or quasi-sovereign authority over the owner of the interest represented.

Specific statements by this Court bearing upon the question whether in a suit between States the interests of the United States can be represented by one of the litigant States are few. In *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 750, a boundary case, the Court suggested that the decree should be

"without prejudice to the United States, or any persons whom the parties could not bind." The cases most closely approximating the present one are *Florida* v. *Georgia,* 17 How. 478, 493–494, also a boundary case, and *New York* v. *New Jersey,* 256 U. S. 296, 307–308, a suit by New York to enjoin the pollution of New York Harbor by New Jersey.

The United States was interested in the outcome of *Florida* v. *Georgia* because its claim to certain lands depended upon the location of the boundary between those States. The Court stated in that case (p. 494) that the decision in such a case "when pronounced, is conclusive upon the United States, as well as upon the states that are parties to the suit." This statement appears to have been based in part upon the fact that (p. 493) "there is no possible mode by which that decision can be reviewed or reexamined at the instance of the United States," and in part upon the considerations which require that a boundary once settled between the States concerned be not open to question by other parties. What is primarily significant here, however, is that the Court refused to proceed to a decree over the objection of the United States without according to it the rights of a party. The Court rejected the contention of the dissenting Justices (pp. 510, 522) that "Florida is, in the contemplation of a court of equity, competent to represent the interest of the United States, as an owner of land." It held (p. 494) that "justice certainly requires that they [the United States] should be heard be-

fore their rights are concluded by the judgment of the court," and accordingly the Court granted leave to the Attorney General on behalf of the United States to adduce evidence, cross-examine witnesses, and participate in argument.[2]

In *New York* v. *New Jersey, supra,* this court granted a motion on behalf of the United States for leave to intervene. With respect to the right of the United States to intervene, the Court (256 U. S. at 308) said:

> Having regard to the large powers of the Government over navigation and commerce, *its right to protect adjacent public property* and its officers and employees from damage and disease, and to the duty and authority of the Attorney General to control and conduct litigation to which the Government may be a party (Rev. Stats., §§ 359, 367), we cannot doubt that the intervention of the Government was proper in this case * * *. (Italics supplied.)

Compare *Arizona* v. *California,* 298 U. S. 558, 570, 572.

Completely ignoring *Florida* v. *Georgia,* or *New York* v. *New Jersey,* the litigant States rely entirely upon this Court's prior opinion (295 U. S. 40, 43)

[2] The Court did not accord to the United States the formal status of a party because it wished to avoid the then mooted question whether the United States could sue a State (17 How. at 492, 504 ff). This question having been determined in favor of the United States in *United States* v. *Texas,* 143 U. S. 621, the Court permitted the United States to intervene as a formal party in *Oklahoma* v. *Texas,* 256 U. S. 70, 84, and in *New York* v. *New Jersey, supra.*

holding that the States are competent in this proceeding to represent the Secretary of the Interior.[3] Nebraska urges (brief, pp. 10–11) that this Court, in referring to the Secretary and in disposing of a motion which referred to the Secretary, must be taken to have meant the United States. No such reading of the Court's opinion is admissible. So to treat the Court's ruling would extend the doctrine of representation beyond its rational and accepted foundation. Only if the States possess sovereign or quasi-sovereign authority over the use and disposition of property of the United States are they entitled to represent and to bind those interests, "irrespective of the assent or dissent" of the United States. The States under the Constitution have no such authority.

If the contentions of the States were to prevail upon this motion, "one of the great safeguards of the Union, provided in the Constitution, would in effect be annulled," as Chief Justice Taney pointed out in *Florida* v. *Georgia, supra,* at p. 494. The Constitution requires the States to obtain the consent of Congress before entering into any agreement or compact with one another. Were the waters of the North Platte River to be apportioned among the States by compact, the interests of the Federal Government—of the States as a whole—would therefore be protected. Those interests

[3] Nebraska is, of course, mistaken in asserting (brief, p. 10) that this decision is *res judicata* as against the United States.

ought similarly to be protected when apportionment is sought by judicial decree.

> For, if it be otherwise, the parties to the suit may, by admissions of facts and by agreements admitting or rejecting testimony, place a case before the Court which would necessarily be decided according to their wishes, and the interest and rights of the rest of the Union excluded from the consideration of the court. The states might thus, in the form of an action, accomplish what the constitution prohibits them from doing directly by compact. Nor is this intervention of the United States derogatory to the dignity of the litigating states or any impeachment of their good faith. It merely carries into effect a provision of the constitution, which was adopted by the states for their general safety; and, moreover, maintains that universal principle of justice and equity, which gives to every party, whose interest will be affected by the judgment, the right to be heard. (*Florida* v. *Georgia, supra,* at 495.)

3. EVEN IF THE STATES COULD OTHERWISE REPRESENT IN THE PRESENT PROCEEDING THE INTERESTS OF THE UNITED STATES, LEAVE TO INTERVENE SHOULD BE GRANTED BECAUSE, UPON THE FACTS PRESENTED, THOSE INTERESTS ARE NOT BEING AND CANNOT BE ADEQUATELY REPRESENTED BY THE STATES

The doctrine that a State may represent and bind interests with respect to which it has a sovereign or quasi-sovereign authority is not unqualified. This Court has recognized (*Minnesota* v. *Northern Securities Co.,* 184 U. S. 199, 246) that:

> Even a State, when it voluntarily becomes a claimant in a court of equity, cannot claim to represent both sides of the controversy.

In *Texas* v. *Interstate Commerce Commission,* 258 U. S. 158, an original bill by the State of Texas to enjoin the Railroad Labor Board from enforcing the provisions of Title III of the Transportation Act, 1920, was dismissed because carriers and their employees, citizens of Texas who had accepted the Act, were not parties. The Court said (p. 163):

> They are not parties to the bill; nor do any of those who are parties represent them. The Board does not claim to do so; and the attitude of the State is antagonistic to them. To take up and solve the controversy without their presence would be quite inadmissible, considering the exceptional nature of our original jurisdiction. *California* v. *Southern Pacific Co.,* 157 U. S. 229, 257; *Minnesota* v. *Northern Securities Co.,* 184 U. S. 199, 245.

See also *New Mexico* v. *Lane,* 243 U. S. 52.

We think that these cases are persuasive that in a suit of this character intervention ought to be allowed even if the complaint would not otherwise have to be dismissed, upon a showing that the parties before the Court cannot represent or are not adequately representing the petitioner's interest. In analogous situations in ordinary civil suits intervention is allowed as of right upon such a showing. Compare *Farmers' Loan & Trust Co.* v. *Northern Pacific R. Co.,* 66 Fed. 169 (C. C. E. D.

Wisc.); *Farmers' Loan & Trust Co.* v. *Cape Fear & Y. V. Ry. Co.*, 71 Fed. 38, 39 (C. C. E. D. N. C.); *Central Trust Co.* v. *Chicago R. I. & P. Ry. Co.*, 218 Fed. 336, 339 (C. C. A. 2d).

That the States are not adequately representing, and cannot so represent, the interests of the United States in this proceeding we think is established beyond controversy. Examination of Nebraska's bill will show, as before stated, that the gravamen of Nebraska's complaint is the diversion of water in Wyoming for the North Platte Reclamation Project and the threatened further diversion for the Kendrick Project. Unable to sue the United States and unwilling or unable to sue the Secretary of the Interior or the officials of the Bureau of Reclamation, Nebraska has proceeded against Wyoming upon the theory that it is responsible for permitting the diversions complained of. In the prior opinion (295 U. S. at 43) this Court assumed and stated that the interests of the Secretary of the Interior would be represented by Wyoming. As set forth in the motion of the United States (pp. 6–8), however, a large part of the questioned diversions in Wyoming is for use in Nebraska. In the hearing before the Master on November 14, 1936, Wyoming raised the question (R. 1263–1264):

> Is Wyoming going to be called upon to defend its own rights only,—that is the claims that Wyoming appropriators make to waters of this stream appropriated and used in Wyoming, or is it going to be called upon to de-

> fend such of Nebraska irrigators using the waters of these interstate diversions, diverting in these interstate canals in Wyoming and used in Nebraska, against a suit filed against them and the State of Wyoming, and actually against them by the State of Nebraska.

In its objections to the intervention of the United States (pp. 1, 2) Wyoming has asserted that

> Neither Wyoming nor Nebraska has refused or neglected to defend the appropriations made by the Secretary of the Interior or the rights of the water users under the Government projects.

This assertion can scarcely be intended to mean that Wyoming is defending or will defend the diversions of water in Wyoming for use in Nebraska. The quoted question by Wyoming by clear implication is a disclaimer of responsibility for such defense.[4] Nothing whatever is cited by Wyoming to indicate a contrary attitude. Nor is it clear that responsibility for the defense of the interstate diversions ought to fall upon Wyoming.

The responsibility, if any, for the defense of the interstate diversions must fall, therefore, upon Nebraska. We are unable to understand how Nebraska can put itself forward as competent to represent the interests dependent upon those

[4] Earlier (R. 1261) Wyoming's counsel had stated: "It seems to us to be obvious that Wyoming cannot be charged with alleged out-of-priority diversions made in Wyoming of water used in Nebraska * * *."

diversions. Nor do we construe its response to Wyoming's question (R. 1291–1296; printed in Nebraska's brief in support of its objections, pp. 34–39, and in Wyoming's brief, pp. 13–16) as showing that it will do so.

The diversions in question are used for irrigation of a huge area of 166,000 acres in Nebraska (Motion, p. 5). In addition, there are involved contracts by the United States under the Warren Act (36 Stat. 925) calling for the delivery of 290,000 acre feet of water for use in Nebraska (Motion, p. 7). Nebraska's bill of complaint rests in great part upon the contention that the appropriations of water now being made by the United States for the benefit of these two groups of water users constitute an infringement of the rights of other appropriators in Nebraska. We submit that the practical situation was accurately stated by counsel for Wyoming when he said (R. 1261):

> Now, it seems to us that under the circumstances this case has sort of resolved itself, to a major extent, into a controversy between certain appropriators in Nebraska and certain other appropriators in Nebraska.

It is true that Nebraska stated in its reply to Wyoming (R. 1296) that—

> * * * Wyoming does not need to defend the priority rights of any canal or ditch in Nebraska since Nebraska does not attack any such priorities * * *.

> Nebraska will also ask that in its decree this court should protect Nebraska appropriators under all canals diverting in Wyoming, in the rights to which their priorities entitle them, against future violations of the principle of priority by the State of Wyoming, and by Wyoming appropriators whether from the stream or under such canals.

We regret that these Delphic statements were not more fully discussed in the Motion and supporting brief. For clearly, even under the interpretation insisted upon by Nebraska (brief, pp. 8–9),[5] they do not remove the objections advanced by the United States to representation by Nebraska. Even assuming (what manifestly cannot be assumed) that, as Nebraska insists and Wyoming and Colorado dispute, this case should and ultimately will be decided solely on the basis of the relative priorities of all the appropriators on the River, Nebraska's allegiance to the principle of priority gives no assurance that the interests involved in the interstate diversions will actually receive the priorities to which they are entitled. For priority upon a river is a function of two variables: the date and extent of a particular claimant's appropriation and the date and extent of competing ap-

[5] The description of Nebraska water users on Federal reclamation projects as "Nebraska appropriators" is erroneous for the double reason that the water users are not the "appropriators" (see pp. 5–9, *supra*) and the appropriations are not made in Nebraska.

propriations. Even though Nebraska does not question the particular priority dates of the diversions for the benefit of the North Platte Project, those whose interests are dependent upon those diversions would find it fatal to yield to the protective embrace of Nebraska in the absence of assurance that Nebraska will rigorously scrutinize all competing claims of other appropriators to an earlier priority.

Such assurance Nebraska plainly cannot give. Her case is rested upon allegations of earlier priorities in the easternmore parts of her territory. The extent of those appropriations—involving numerous and difficult questions of abandonment and beneficial use—is sharply contested. Nebraska cannot represent both sides of these controversies. It would be futile (compare brief for Nebraska, pp. 9–10) for the United States to request Nebraska to introduce evidence or make argument in support of a position which she is estopped by her pleadings to adopt. Nor is there any indication that Nebraska would be willing energetically to present the United States' view of such questions even if otherwise free to do so. On the contrary, she continues to brand as "out-of-priority diversions" the very interests in question—even in the same breath with which she protests her readiness and competence to defend them (brief, pp. 34–39). This description by Nebraska, in a proceeding in which she asks an adjudication of all individual priorities on the River (Bill of Complaint, pp. 25, 32–33), makes

manifest the prejudice to the United States which will result if Nebraska is permitted to defend the interests so condemned.

It is impossible at this stage of the proceeding to foresee all of the conflicts which may arise of the character of that just considered. Within the compass of this brief, it is impossible even to discuss all those conflicts which may readily be foreseen. A single further illustration must suffice. Nebraska has challenged the right of the United States to use the return or seepage flow of waters which the United States has appropriated. *United States* v. *Tilley, State Engineer,* No. 99, Equity (D. Neb., North Platte Division). The amount of such return or seepage flow in Nebraska is very large and the United States is dependent upon it for fulfillment of obligations for the delivery of water which it has assumed. If the United States is not entitled to use such water, it will be available in Nebraska to satisfy the demands of private appropriators in that State. Wyoming in consequence will be required to allow a lesser amount of water than otherwise to pass down the channel of the stream for the satisfaction of such private appropriations in Nebraska. It is evident, therefore, that Wyoming has no interest in opposing the position of Nebraska concerning the utilization of return or seepage flow water upon Nebraska lands. It would seem to be irrefutable that the interests of the United States with respect to this critical question will not be adequately represented unless it is permitted itself to represent them.

II

The United States is Entitled to Intervene to Protect Its Interest in Any Unappropriated Waters of the North Platte River

The interest of the United States in the unappropriated waters of the North Platte River stands on a somewhat different footing, as a basis for intervention, than its interest in the waters which have been appropriated for Federal reclamation projects. The States do not claim that they have been representing, or that they will represent, the interest of the United States in the unappropriated waters. They deny outright—not merely in the alternative—the existence of such an interest. Clearly, therefore, the motion for leave to file the petition of intervention should be granted (1) if the United States possesses the interest claimed (or if the Court should wish to postpone until the final decree a determination of that question) and (2) if that interest would be prejudiced should the cause proceed to final decree in the absence of the United States.

1. THE CONTENTIONS OF THE STATES THAT THE UNITED STATES DOES NOT OWN THE UNAPPROPRIATED WATERS OF THE RIVER ARE UNTENABLE

The States in their objections to the motion of the United States assert that they, and not the United States, are the owners of any unappropriated waters in the North Platte River. This question is fully discussed by the United States in the

Appendix to its Motion, pages 27–55, and need not be recanvassed. It need only be pointed out that the States concede, as they must, that the United States was originally the owner of the unappropriated waters on the public domain. They are, therefore, compelled to show that those waters have been granted at some specific time or otherwise transferred by the United States to the States. Chief reliance appears to be placed upon the provisions of the Desert Land Law of March 3, 1877, as constituting such a grant (Wyoming, p. 3; Colorado, pp. 2, 15–19; cf. Nebraska, pp. 15–19). Clearly those provisions ought not to be so construed. The States have scarcely attempted to answer the showing of the United States (Appendix, pp. 48–53), which it is earnestly submitted cannot be answered, that settled rules of public property would be violated if such a declaration of public policy were read as an affirmative conveyance to the States of the vast interests of the United States in the unappropriated waters of the public domain. No purpose of the Desert Land Law could have been served by such a transfer of the basic ownership of those waters. The subsequent course of Congressional legislation (to which the States do not refer), prescribing for those waters in numerous respects a special rule of Federal policy, demonstrate that no such transfer was intended. The circumstance that Congress has chosen in the main to pursue a policy of harmonizing its own law with existing State laws relating to water rights already

vested in private ownership is irrelevant with respect to its intention as to the locus of the basic ownership of unappropriated waters. A policy of comity clearly ought not to be penalized by interpreting conformity acts as an implied conveyance.

2. THE UNITED STATES IS ENTITLED TO INTERVENE IN THIS PROCEEDING TO PROTECT ITS INTEREST IN THE UNAPPROPRIATED WATERS OF THE RIVER

(a) Nebraska urges that even if the United States is the owner of any unappropriated waters in the North Platte, such ownership is not a basis for intervention in this case (Nebraska, pp. 22, 28). "At least while this Act of Congress remains in force," it is urged, "these waters are subject to appropriation and are therefore not absolutely owned by the United States." A more perfect *non sequitur* is not readily imagined. Until the waters are in fact appropriated they are of course "absolutely owned" by the United States. It is only because the United States does own them that it can, by the Act of 1877, hold them open to acquisition by individuals, and the fact that waters of the United States can, by its permission, be acquired by private interests by compliance with State law, does not mean that, prior to such acquisition, the States, and not the United States, are the proper parties to litigation respecting the waters. The States do not suggest that Section 8 of the National Reclamation Act lends any support to a contention that the States are the appropriate representatives

or defenders of the rights of the United States in the unappropriated waters. Such a suggestion could not be maintained. See Appendix, pp. 60–66.

(b) Wyoming (brief, p. 8) and Colorado (brief, pp. 2, 20) contend that, conceding that the United States owns the unappropriated waters of the River, if any, it is not on that account entitled to intervene because it has not definitely alleged that there are any unappropriated waters in the River. The contention is no less inadmissible than that of Nebraska just discussed.

All three of the litigant States seek a decree dividing among them, on the basis of equitable apportionment, the flow of the North Platte River. None of the States has suggested, or now suggests, that this apportionment is to be limited to so much of the flow of the River as has been appropriated. Evidence as to appropriations has been introduced on the theory that priority of appropriation is a factor bearing upon equitable apportionment, but there is no indication that the scope of the suit is to be limited to waters which are shown to have been appropriated. In fact, the Answer and Cross Bill of Colorado (pp. 46–49) attacks the water right claimed by the United States for the Kendrick Project, and asks that the waters claimed for that Project be treated as "surplus" waters and that the right of Colorado in those waters be recognized. It is thus clear that, if at the conclusion of this litigation it is determined that there are waters in the

River as yet unappropriated, the States will seek to have those waters apportioned among them in the same way as the appropriated waters, and thus to defeat the policy of Congress, expressed in the Desert Land Law, to leave such waters available for appropriations in any State in which private individuals may be able to put them to beneficial use.

It is said that nevertheless the United States cannot intervene to assert its claim to the unappropriated waters because the United States has not alleged that there are any such waters but has merely asserted that it owns such waters if there are any, and has prayed only that it be deemed to be the owner "of any unappropriated waters."

It is plain why the United States has not asserted the definite existence of unappropriated waters. Whether there are unappropriated waters can be decided only when there have been determined the extent and validity of all rights of appropriation in the River. Such a determination will eventually be made, for purposes of this case, by the Master. But until it is made the United States cannot possibly know the extent and validity of all existing rights of appropriation. No rule of pleading requires the United States to claim definite knowledge about a factor which is plainly not only beyond its knowledge but beyond the possibility of its ascertainment, except by the progress of this litigation. It is plain that the United States is not to be required to await the ascertainment in

this litigation of the validity and extent of existing appropriations, and the consequent revelation whether there are unappropriated waters, before it intervenes in the suit to assert its claim to unappropriated waters. Rather the United States is entitled to participate itself in the determination whether there are unappropriated waters. Cf. *Barnes* v. *Alexander,* 232 U. S. 117, 122–123.

The situation of the United States in this suit as respects its claim to the unappropriated waters is similar to that of a claimant to a fund which is before a court for distribution. In such cases it is well settled that intervention will be allowed as of right. *Credits Commutation Co.* v. *United States,* 177 U. S. 311, 315–316; *Minot* v. *Mastin,* 95 Fed. 734, 739 (C. C. A. 8); *Central Trust Co.* v. *Chicago R. I. & P. Co.,* 218 Fed. 336, 339 (C. C. A. 2). See Moore and Levi, *Federal Intervention* (1936) 45 Yale L. J. 565, 572–583; Wham, *Intervention in Federal Equity Cases* (1931) 17 A. B. A. J. 160, 161.

III

The Contentions of the United States Herein Raise No Question of Impairment of Vested Rights of Appropriation Nor of Interference With the Present Operation of Existing State and Federal Law

At a conference between representatives of the United States and the Attorneys General of the three litigant States, following the filing by the

United States of its motion and accompanying petition, the representatives of the States evidenced certain misapprehensions of the position taken by the United States. To assist in clarifying the issues involved, the Acting Solicitor General, by letter dated April 14, 1938, addressed to the Attorneys General of the three States, accordingly tendered a partial restatement of the position of the United States, in the course of which the Government undertook to "state its position as it has here been restated and explained in any reply brief it may file in the Supreme Court * * *." In fulfillment of that undertaking, the relevant parts of this letter are here set forth:

"1. The United States has asserted in its motion and petition that it owns the waters of the North Platte River which it has appropriated for its reclamation projects free from the 'sovereign supervision or control' of the States. By that the United States means that the States have no independent 'sovereign' control over the use by the United States of those waters, but only such control as Congress has conferred upon them. It means that in the instances in which the Secretary is obliged to comply with State law or is subject to State administrative control in his conduct of the reclamation projects of the United States he is so obliged or so subject by reason of Section 8 of the Reclamation Act, or some other act of Congress,

and not by reason of the inherent force of State law or authority alone. The United States recognizes, of course, that Section 8 of the Reclamation Act provides that the Secretary, in carrying out that Act, shall comply with State law. All that the United States contends is that the obligation upon the Secretary to follow State law comes from this provision or from other federal statutes, and not from the force of State law alone. As is explicitly stated on page 69 of the Appendix, the United States is not seeking to have the Supreme Court pass at this time upon the question whether the provision of Section 8 that the Secretary shall comply with State law is directory or mandatory.

"2. The United States does not assert any power over or right to interfere with vested rights of appropriation. In its prayer for relief the United States asks 'that there be allocated to it * * * so much of the waters of the North Platte River as the United States has appropriated as alleged herein, prior appropriations being respected * * *.' On page 66 of the Appendix the United States has stated:

> Water rights acquired by private individuals pursuant to the Acts of 1866, 1870, and 1877 are rights of perfect ownership as against the United States; and immediately upon their acquisition, State regulatory authority attaches to them.

As is thus shown, the United States fully recognizes that its rights to appropriate waters for its reclamation projects are subordinate to prior rights of appropriation of private individuals, and that its rights cannot be so exercised as to interfere with such prior rights. Nor does the United States claim any power to interfere with any diversion of waters by private individuals, except through resort to the courts, even when such diversion is believed by the United States to be in violation of its rights.

"3. The United States recognizes that if it becomes a party to this suit its water rights will be subject to disposition by decree of the Court, and will be subject to reduction thereby if the Court determines that equitable apportionment of the waters of the River so requires. If, for example, the Court should decree an apportionment based solely on priority of appropriation, the United States acknowledges that its water rights would, proportionately with those of private individuals, be subject to diminution to whatever extent was necessary to accord recognition to the rights of prior appropriators, wherever located. The United States does not mean by this to suggest that priority of appropriation should necessarily be determinative in this case; it means only that its rights will be subject to adjudication according to whatever factors may be held in this particular case to comprise equitable apportionment."

CONCLUSION

It is respectfully submitted that the motion on behalf of the United States for leave to intervene should be granted.

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