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No. 9, Original 5

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

MOTION ON BEHALF OF THE UNITED STATES FOR LEAVE TO INTERVENE AND PETITION OF INTERVENTION

INDEX

CITATIONS

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MOTION ON BEHALF OF THE UNITED STATES FOR LEAVE TO INTERVENE

The Attorney General, on behalf of the United States, moves the Court for leave to intervene in the above-entitled cause, and for such purpose to file therein its petition, a copy of which is attached hereto.

As cause for this motion it is shown:

1. The North Platte River is a variable, non-navigable interstate stream which has its source in Colorado and flows through that State, Wyoming, and Nebraska. This suit was brought by Nebraska against Wyoming for the equitable apportionment of the waters of that River. The bill of complaint alleged, among other things, that the Secretary of

the Interior, acting under the Reclamation Act (June 17, 1902, c. 1093, 32 Stat. 388), and subject to the authority and with the permission of Wyoming, had constructed an irrigation project, known as the North Platte Project, whereby he had appropriated, in Wyoming, large quantities of the waters of the North Platte River, thereby depriving appropriators in Nebraska of the waters to which they were entitled, and that the Secretary of the Interior, under the authority and with the permission of Wyoming, was constructing an additional irrigation project, known as the Casper-Alcova Project,[1] whereby he would appropriate large additional quantities of the waters of the River in further violation of the rights of Nebraska appropriators. The bill prayed ascertainment of the equitable apportionment, as between Nebraska and Wyoming, of the waters of the North Platte River, and that a decree be entered to enforce observance by Wyoming, and all appropriators subject to its authority, of the rights of Nebraska as found. The contention of Nebraska in this suit, as clarified in hearings before the Special Master, is that the waters of the River should be apportioned between the States solely on the basis of priority of appropriation.

2. Wyoming moved to dismiss Nebraska's bill of complaint upon the ground, among others, that

[1] This project has since been re-named the Kendrick Project, and is referred to by that name hereinafter.

the Secretary of the Interior was an indispensable party. This Court denied the motion. *Nebraska* v. *Wyoming,* 295 U. S. 40. It said (p. 43) that the Secretary, acting by authority of the Reclamation Act, must, by Section 8 of that Act,[2] obtain permits and priorities for the use of water from Wyoming in the same manner as a private appropriator; that the Secretary's rights could rise no higher than those of Wyoming, and that Wyoming would stand in judgment for the Secretary as for any other appropriator in that State.

3. Thereafter Wyoming, by its answer, impleaded Colorado. Both Colorado and Wyoming, in their pleadings, joined in the request of Nebraska for the equitable apportionment among the States of the waters of the North Platte River. Neither Wyoming nor Colorado, however, accepts priority of appropriation as the sole basis for such apportionment.

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[2] That Section provides:

"That nothing in this Act shall be construed as affecting or intended 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 Act, 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 landowner, 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."

Apparently, the decree contemplated by each of the States would allocate to each State, on whatever basis is found to be equitable, a certain quantity of the waters of the River for the satisfaction, under the supervision of that State, of all rights of appropriation in that State, including those of the United States.

4. By the Reclamation Act the United States initiated a policy of constructing irrigation works to furnish water for the reclamation of irrigable portions of the arid public lands. The Act authorizes the United States, through the Secretary of the Interior, to undertake such works, and appropriates for their construction the receipts from the sales of public lands in certain States.[3] The lands to be irrigated from any particular project which is undertaken are to be disposed of in small tracts under the public land laws of the United States, as supplemented by the Reclamation Act, as the construction of the project progresses, each disposal to carry with it a perpetual right to water from the project. The terms of disposal are to be such that the cost of construction and maintenance will, ultimately, be borne by the purchasers. The Act also permits other owners of small tracts of land to acquire from the United States rights to be supplied with water from the project, by

[3] In addition, the Act of February 25, 1920, 41 Stat. 450, Sec. 35, appropriates for this purpose 70 per cent of past and 52½ per cent of future receipts from oil and gas developments on the public domain, other than in Alaska.

assuming the payment of charges to be fixed by the Secretary.

5. The United States, by authority of the Reclamation Act, acting through the Secretary of the Interior, has undertaken a reclamation project known as the North Platte Project. That Project includes about 251,000 acres of land, of which 182,000 acres are in Nebraska and 69,000 are in Wyoming. Water for the irrigation of all of this land is appropriated by the United States from the North Platte River and its tributaries, and is either stored in the Project's reservoirs, to be withdrawn as needed, or is applied directly to irrigation through the main and lateral canals of the Project. Of the lands included in the Project which are situated in Nebraska, about 166,000 acres are irrigated by water which the United States diverts from the River in Wyoming, and conveys across the State line into Nebraska.

The total cost of the irrigation works of the North Platte Project was approximately $22,200,000, of which $17,800,000 has not yet been recouped. The most important of those works are the Pathfinder Reservoir, in Wyoming, with a storage capacity of 1,070,000 acre feet; the Guernsey Reservoir, also in Wyoming, with a storage capacity of 70,000 acre feet; a diversion dam at Whalen, Wyoming; an extensive system of main and lateral canals in Wyoming and Nebraska; and two inland reservoirs in Nebraska, known as Lake Alice and

Lake Minatare, with a combined storage capacity of 77,000 acre feet.

Of the 251,000 acres of land included in the Project, about 151,000 acres were public lands when the Project was commenced, and were thereafter disposed of by the United States to settlers as provided by the Reclamation Act, the settlers acquiring a perpetual right, on the payment of certain charges, to waters from the project. The remaining 100,000 acres were privately owned when the Project was commenced, and the United States has entered into contracts with the owners of those lands whereby the United States has agreed to furnish them with water from the Project, and they have agreed to pay certain charges.

The North Platte Project includes, in addition to irrigation works, hydroelectric developments which cost about $1,000,000. Water for their operation is withdrawn from the direct flow of the North Platte River and its tributary, the Laramie River, and from storage in the Guernsey Reservoir. The United States derives an annual net revenue from the sale of the power of these plants, after depreciation, of between $100,000 and $150,000.

Besides its obligations to furnish waters sufficient for the irrigation of the 251,000 acres of land included in the Project, the United States, under the Act of February 21, 1911, known as the Warren Act (36 Stat. 925), has entered into contracts with private persons, who already possessed certain

water rights, whereby the United States has agreed to furnish these persons stipulated quantities of water, and they, in return, have agreed to pay stipulated charges therefor of which $362,000 remains unpaid. These contracts provide for the delivery of about 340,000 acre feet of water, of which 290,000 acre feet are for use in Nebraska, and the remainder in Wyoming. Of the total delivery, about 167,000 acre feet are storage waters from Pathfinder Reservoir, part are seepage and return flow water from the lands of the Project, and the remainder of the delivery is accomplished by utilization of direct flow rights of the contractors. The Secretary of the Interior, under authority of the Reclamation Act, has also sold rights, both perpetual and temporary, in the waters of the River to municipal and industrial concerns in the vicinity of the North Platte Project. These sales yield a substantial revenue to the United States.

In initiating and perfecting the appropriations of the waters of the North Platte River recounted in this paragraph, the United States substantially complied in each case with the law of the State where the diversion was made. In the case of diversions of waters in Wyoming for use in Nebraska, the United States complied with the law of Wyoming, and, as far as was possible, with the law of Nebraska also. In thus complying with State laws the United States did not, however, waive or in any way limit its own rights in the waters of the River.

6. The United States, by authority of the Reclamation Act, acting through the Secretary of the Interior, has undertaken a second reclamation project in the basin of the North Platte River, upstream from the North Platte Project, to be known as the Kendrick Project. This project will provide for the irrigation, by a direct flow appropriation of waters of the North Platte River, of approximately 66,000 acres of land, all in Wyoming. In addition, it will augment and regularize the water supply of the North Platte River, and will thereby furnish water for the irrigation of a substantial but indeterminate acreage of land in Wyoming and Nebraska.

The total construction cost of the irrigation works of the Project will be approximately $20,000,000, of which $9,200,000 has already been expended, and none of which has yet been recouped. Those works will consist of the Seminoe Dam and Reservoir, with a storage capacity of 909,000 acre feet; the Alcova Dam and Reservoir, with a storage capacity of 165,000 acre feet; and main and lateral canals. All of these works will be located in Wyoming.

In addition to these irrigation works, the Kendrick Project will include a hydroelectric development costing $5,000,000, which is now under construction at Seminoe Dam. Water for the operation of this plant will be withdrawn from the Seminoe Reservoir. From the sale of the power of this plant the United States expects to recoup more

than 75 per cent of its investnent in the Kendrick Project, and it expects to be reimbursed for the remainder of its investment by the sale of water rights.

The United States complied with the law of Wyoming in initiating appropriations of waters of the North Platte River for this Project, but without waiving or limiting its own rights in those waters, and the United States expects to continue to comply with that law in perfecting those appropriations.

7. The United States contends that its title to and rights in the waters of the North Platte River are not derived from Wyoming, or from any other State, but from the cessions to the United States by France, Spain, Mexico, and Texas of territories including the basin of that River; that all rights of Wyoming and of the other States, and of private appropriators, in the waters of that River, are in fact derived from the United States; that the United States owns, free of the sovereign control of Wyoming and of the other States, all of the waters of the North Platte River appropriated by the United States under the Reclamation Act and all of the waters of that River which have not yet been appropriated by the United States or by other appropriators; that the provision of Section 8 of the Reclamation Act that the Secretary of the Interior in administering the Act shall conform to State laws relating to the control, appropriation, use or distribution of water used in irrigation is

directory only, and not mandatory, and moreover is qualified by other provisions of the Reclamation Act; that in any event Section 8 does not, and could not so long as the waters appropriated pursuant to the Act remain the property of the United States, surrender the power of Congress to alter the direction to the Secretary, as in various respects Congress in fact has done, and to exercise pursuant to the Constitution full legislative power with respect to that property.

More particularly, the United States contends: By the cessions from the above enumerated powers the United States became the owner of all lands and waters, or, more accurately, rights to the use of waters, within the ceded territories, with the exception of lands and water rights held in private ownership at the times of the cessions. The ownership of such usufructuary rights to the waters of the North Platte River and its tributaries did not pass to Nebraska, Wyoming, and Colorado upon their admission to the Union, but remained in the United States. The United States has never, by Act of Congress or otherwise, abdicated or ceded away its rights in the waters of the North Platte River, except that by acquiescence in local practices and by the Acts of July 26, 1866 (14 Stat. 253), July 9, 1870 (16 Stat. 218), and March 3, 1877 (19 Stat. 377), the United States established the rule that rights in the waters of the streams of the public domain (including the North Platte River) could be acquired by private persons by compliance with the State or Territorial laws prescribing how

rights in waters could be acquired. From time to time various private persons have, by complying with the laws of one of the litigant States, acquired from the United States rights to appropriate and use waters of the North Platte River. Each such right acquired by a private person diminished the amount of unappropriated waters in the stream, and, consequently, diminished the usufructuary right remaining in the United States, but the right to the use of all waters not appropriated remained in the United States. When the Reclamation Act was passed the United States was thus the owner of the usufructuary right in all the waters of the North Platte River which had not, at that time, been appropriated. The United States might simply have taken those waters and used them, without regard to the States or the State laws. But the Reclamation Act did not terminate the policy of Congress of allowing private persons to acquire rights in waters by compliance with State laws. Congress sought to harmonize the new policy inaugurated by that Act with the existing systems of State law. Particularly as a method of giving notice to persons who might subsequently desire to exercise the continuing privilege of private appropriation, Section 8 of the Reclamation Act directed the Secretary of the Interior to conform with State laws relating to the control, appropriation, use, or distribution of water used in irrigation. This provision was adopted as a matter of comity and is directory only and not mandatory. In any event,

it is at most a limitation upon the authority of the Secretary, which at any time may be modified or removed, and which from time to time has in fact been modified. Section 8 did not affect the title of the United States to the unappropriated waters of the interstate streams of the public domain. Since all of such waters still unappropriated and all waters which have been appropriated under the Reclamation Act for Federal reclamation projects remain the property of the United States, Congress did not and could not surrender its power to exercise full legislative authority, and the rights of ownership, with respect to such waters. Section 8 of the Reclamation Act expressly so provides. The last section thereof declares that "nothing herein shall in any way affect any right * * * of the Federal Government * * * to, or from any interstate stream or the waters thereof." The North Platte River is an interstate stream.

This interpretation of Section 8 is inconsistent with the language of this Court in its opinion holding that the Secretary of the Interior was not an indispensable party to this suit, unless that language be regarded as limited to the precise issue which was before the Court. This suit is for the equitable apportionment of the waters of the North Platte River. The Secretary of the Interior claims no interest in those waters, save on behalf of the United States. And the United States, not the Secretary, is the indispensable party to a suit for the determination of title to property claimed by the United States. *New Mexico* v. *Lane,* 243 U. S. 52;

Louisiana v. *Garfield*, 211 U. S. 70. But because the language in the former opinion, if regarded as applicable to the United States, is inconsistent with the contention here made with respect to the interpretation of Section 8, there is annexed hereto as an appendix a fuller statement of that contention, and, as necessary to an understanding of it, of the contention that the United States owns the unappropriated waters of the public domain, together with a brief argument in support of those contentions.

8. If the United States is correct in the above contentions, it follows, first, that Wyoming cannot stand in judgment for the United States in this suit and that the United States is, therefore, a necessary party, and, second, that the United States is entitled to have allocated to it, on final decree in this suit, free from the sovereign supervision or control of any State, so much of the waters of the North Platte River as the United States has validly appropriated, prior appropriations being respected. It further follows that the United States is the owner of any unappropriated waters of the North Platte River, although private individuals may hereafter acquire rights in such unappropriated waters by appropriation in compliance with State laws on the subject, unless and until Congress changes its policy in that respect.

9. These issues are of great consequence to the United States, both with respect to its reclamation projects in the North Platte River basin and with

respect to similar Federal reclamation projects throughout the arid sections of the country. It is important to the United States that it be allowed to represent its own interests in litigation like the present, instead of being required to rely upon the States. It is more important whether the United States, after it has substantially complied with State laws in initiating and perfecting an appropriation of waters, is subject to the sovereign supervision and control of the States in its use and distribution of those waters. Wyoming, for example, has challenged the right of the United States to apply waters to the irrigation of lands other than those to which the waters were first applied. Nebraska has challenged the right of the United States to use the return or seepage flow of waters which the United States has appropriated. Such return or seepage flow equals a substantial proportion of the water originally applied to irrigation,[4] and it is only by its use that the United States can fulfill all of its agreements to furnish waters. Again, the laws of both Wyoming and Nebraska provide that the use of water for irrigation is superior to its use for hydroelectric development, and that water rights acquired for the latter purpose may, on payment of just compensation, be taken by anyone for irrigation. While no power to condemn for irrigation waters which the United States uses for hydro-

[4] Measurements on one important unit of the North Platte Project have shown a return flow of 37 percent.

electric development has been asserted, such power would exist if the United States is subject to State control in its uses of waters. Similarly, the United States would be subject to State power to fix rates for electricity and for the transportation of waters. Finally, while it is doubtful whether there remains any substantial unappropriated flow of the North Platte River, there do exist large quantities of unappropriated waters in some of the streams in the arid part of the country, so that the question whether the States or the United States own the unappropriated waters of the non-navigable streams of the public domain is of serious importance to the United States and to many of the western States.

10. Disregarding the foregoing contentions and assuming that all rights of the United States to appropriate the waters of the North Platte River are derived from and are subject to the laws of Wyoming or the other litigant States, the United States should be allowed to intervene in this suit because there is substantial reason to believe that the diversions of the waters of the North Platte River which the United States makes at Whalen, Wyoming, for irrigation in both Wyoming and Nebraska, are not, as regards that portion of the waters used in Nebraska, being properly protected in these proceedings by either State. During the course of the hearings before the Special Master, the trend of certain testimony introduced by Nebraska caused counsel for Wyoming to ask that Nebraska state

whether it contended that Wyoming must defend the priority of diversions of waters in Wyoming for use in Nebraska, indicating plainly that Wyoming did not feel called upon to defend the priority of those diversions (R. 1260–1264).[5] Counsel for Nebraska replied that Nebraska took the position that Wyoming must defend the priority of diversions in Wyoming for use in Nebraska (R. 1291–1296). It is thus apparent that neither Wyoming nor Nebraska proposes to defend the priority of the diversions of waters in Wyoming for use in Nebraska. Although it is difficult to foretell exactly the precise prejudice which will result to the United States from this refusal of either State to defend the interstate appropriations of the United States, because it is impossible to foresee what form the final decree will take, or the legal basis on which it will rest, it seems highly probable that substantial prejudice will result to the United States. It seems likely, for example, from the position each of the States has taken thus far, that when the waters of the River are finally allocated between the States, each of them will refuse to allow the interstate diversions to be made out of that portion of the waters allocated to it. Since neither State will defend the priority of these interstate appropriations of the United States, the United States should be allowed to intervene to do

[5] There is a small private interstate diversion, in addition to those of the United States.

so, and to make sure that the final decree allocating the waters between the two States will require one of them to allow these appropriations to be made out of the portion of the waters allocated to it.

11. An additional reason why the United States should be allowed to intervene is the allegations which Wyoming and Colorado have made with respect to conduct of the United States. Wyoming has alleged in defense of the Kendrick (Casper-Alcova) Project, now under construction, that the United States promised Wyoming in 1904 to render irrigable certain lands in that State, that it was because of that promise that Wyoming granted to the United States a permit for the construction of the North Platte Project, which redounded primarily to the benefit of Nebraska, and that the construction of the Kendrick Project is but a belated fulfillment of its promise by the United States. (Amended and Supplemented Answer of Wyoming, pp. 25–26.) Colorado has specifically denied these allegations of Wyoming (Answer and Cross Bill of Colorado pp. 14–15), and has alleged that Colorado protested to the United States against the construction of the Kendrick Project unless a reasonable share of the waters of the North Platte River was guaranteed to Colorado, and that at that time Wyoming admitted that right of Colorado, which admission was a "basis" upon which the Project was undertaken (Id., p. 47). Colorado has also alleged that numerous projects for the diversion of waters of the North

Platte River would have been constructed in Colorado but for the refusals of the Secretary of the Interior to grant rights of way over public lands for the projects, such refusals being for the purpose of protecting the water supply for projects undertaken by the United States under the Reclamation Act (Id., p. 45). The United States should be represented in the trial of such issues as these, and its presence as a party would facilitate their determination.

12. Finally, it is submitted that even if the United States were in exactly the same position legally as a private appropriator of the waters of the North Platte River, the magnitude of the sums which the United States has invested in irrigation works in the River basin, and the vast number of people dependent upon those works, warrant the presence of the United States in this suit as a party. For the defense of such interests the United States should not be required to rely upon any State.

13. The United States, therefore, prays that it may be permitted to intervene in this case and Court, and may be permitted to take proofs, examine witnesses, and be heard in argument.

Respectfully submitted.

HOMER S. CUMMINGS,
Attorney General.

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THE STATE OF NEBRASKA, COMPLAINANT

v.

THE STATE OF WYOMING, DEFENDANT

and

THE STATE OF COLORADO, IMPLEADED DEFENDANT

PETITION OF INTERVENTION ON BEHALF OF THE UNITED STATES

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

Comes now the United States of America, by Homer S. Cummings, Attorney General, and by leave of the Court first had and obtained files this its petition of intervention in the above entitled cause, and alleges and shows as follows:

1. The North Platte River is a non-navigable stream. It rises in Colorado and flows through that State, Wyoming, and Nebraska.

2. France, Spain, and Mexico, by treaties with the United States in 1803, 1819, and 1848, respectively, and Texas by agreement with the United

States in 1850, ceded to the United States territories including the entire basin of the North Platte River.

3. By the aforesaid cessions the United States became the owner of all lands and waters, or, more accurately, the right to the use of all the waters, within the ceded territories, with the exception of lands and water rights which were privately owned at the times of the cessions. There were no, or very few and limited, private rights in the waters of the North Platte River at the times of the cessions.

4. The right of the United States to the use of the waters of the North Platte River did not pass to Nebraska, Wyoming, and Colorado upon their creation and admission to the Union, but remained in the United States.

5. The United States has never, by Act of Congress or otherwise, abdicated or ceded away its right to the use of the waters of the North Platte River except that by acquiescence in local practices and by the Acts of July 26, 1866 (14 Stat. 253), July 9, 1870 (16 Stat. 218), and March 3, 1877 (19 Stat. 377), the United States established the rule that rights to the use of waters of the streams of the public domain (including the North Platte River) could be acquired by private persons by compliance with State or Territorial laws prescribing how rights to the use of waters could be acquired.

6. From time to time private persons have, by complying with the laws of one of the litigant

States, acquired from the United States rights to appropriate and use certain quantities of the waters of the North Platte River. Each such right to the use of some quantity of the waters of the North Platte River acquired by a private person has diminished the amount of unappropriated water in the stream and, consequently, has diminished the right remaining in the United States, but the right to the use of all waters not subject to rights of appropriation so acquired remains in the United States.

7. The United States, by authority of the Reclamation Act (June 17, 1902, c. 1093, 32 Stat. 388), acting through the Secretary of the Interior, has undertaken a reclamation project in the basin of the North Platte River known as the North Platte Project. That Project embraces about 251,000 acres of land, of which 182,000 acres are in Nebraska and 69,000 are in Wyoming. Its irrigation works include the Pathfinder Reservoir, in Wyoming, with a storage capacity of 1,070,000 acre feet, the Guernsey Reservoir, also in Wyoming, with a storage capacity of 70,000 acre feet, a diversion dam at Whalen, Wyoming, an extensive system of main and lateral canals in Wyoming and Nebraska, and two inland reservoirs in Nebraska, known as Lake Alice and Lake Minatare, with a combined capacity of 77,000 acre feet. Water for the irrigation of all of the land in the Project is appropriated by the United States from the North Platte River

and its tributaries, and is either stored in the Project's reservoirs, to be withdrawn as needed, or is applied directly to irrigation through the main and lateral canals of the Project. Of the lands included in the Project which are situated in Nebraska, about 166,000 acres are irrigated by water which the United States diverts from the River in Wyoming, and conveys across the State line into Nebraska.

8. Of the 251,000 acres of land included in the North Platte Project, about 151,000 acres were public lands when the Project was commenced, and were thereafter disposed of by the United States to settlers as provided by the Reclamation Act, the settlers acquiring a perpetual right, on the payment of certain charges, to waters from the project. The remaining 100,000 acres were privately owned when the Project was commenced, and the United States has entered into contracts with the owners of those lands whereby the United States has agreed to furnish them with water from the Project, and they have agreed to pay certain charges.

9. The North Platte Project includes, in addition to irrigation works, hydroelectric developments at Lingle and Guernsey, Wyoming. The United States withdraws water for the operation of these plants from the direct flow of the North Platte River and its tributary, the Laramie River, and from storage in the Guernsey Reservoir.

10. The United States, under the Act of February 21, 1911, known as the Warren Act (36 Stat. 925), entered into contracts with private persons, who already possessed certain water rights, whereby the United States agreed to furnish these persons stipulated quantities of water, and they, in return, agreed to pay stipulated charges therefor. These contracts provide for the delivery of about 340,000 acre feet of water, of which 290,000 acre feet are for use in Nebraska and the remainder in Wyoming. Of the total delivery, about 167,000 acre feet are storage waters from Pathfinder Reservoir, part are seepage and return flow water from the lands of the North Platte Project, and the remainder of the delivery is accomplished by utilization of direct flow rights of the contractors. The Secretary of the Interior, under authority of the Reclamation Act, has also sold rights, both perpetual and temporary, in the waters of the River to municipal and industrial concerns in the vicinity of the North Platte Project.

11. In initiating and perfecting the appropriations of the waters of the North Platte River recounted in paragraphs 7, 9, and 10, the United States substantially complied in each case with the law of the State where the diversion was made. In the case of diversions of waters in Wyoming for use in Nebraska, the United States complied with the law of Wyoming, and, as far as was possible, with the law of Nebraska also. In thus complying with

State laws the United States did not waive or in any way limit its own usufructuary right in the waters of the North Platte River. The United States owns all rights of appropriation for the North Platte Project free from the sovereign control of Wyoming or of any other State, and the United States similarly owns all the unappropriated waters of the North Platte River.

12. The United States, by authority of the Reclamation Act, acting through the Secretary of the Interior, has undertaken a second reclamation project in the basin of the North Platte River, upstream from the North Platte Project, to be known as the Kendrick Project. For and by means of this Project the United States will appropriate from the direct flow of the North Platte River waters for the irrigation of approximately 66,000 acres of land, all of which is situated in Wyoming. In addition, the United States will appropriate from the North Platte River waters for storage in the reservoirs of the Kendrick Project. These reservoirs are the Seminoe Reservoir, with a storage capacity of 909,000 acre feet, and the Alcova Reservoir, with a storage capacity of 165,000 acre feet. They will be used to augment and regularize the flow of the North Platte River, and the Seminoe Dam and Reservoir will also be used for the development of electric power, by the sale of which the United States expects to recoup the major part of its investment in the Kendrick Project. Both res-

ervoirs are located in Wyoming and are now under construction.

13. The United States complied with the law of Wyoming in initiating its appropriations of waters of the North Platte River for the Kendrick Project, but without waiving or limiting its own rights in those waters, and the United States expects to continue to comply with that law in perfecting those appropriations. The United States owns those rights of appropriation free from the sovereign control of Wyoming.

14. This suit was brought by Nebraska against Wyoming for the equitable apportionment of the waters of the North Platte River. Nebraska contends that the sole basis for such equitable apportionment is priority of appropriation. Wyoming impleaded Colorado as a party defendant. Both Wyoming and Colorado have joined in the request for the equitable apportionment among the States of the waters of the North Platte River. But neither Wyoming nor Colorado accepts priority of appropriation as the sole basis for such apportionment.

15. Each of the litigant States asserts in this suit that the rights of the United States in the waters of the North Platte River are derived from one or the other of the litigant States, and each of the States assumes that the State or States from which the United States derives its rights in the waters of the North Platte River can and will stand

in judgment for the United States in this suit with respect to those rights.

16. In the hearings to date before the Special Master in this suit neither Wyoming nor Nebraska has assumed responsibility for the diversions of the waters of the North Platte River which, as alleged in paragraph 7 hereof, the United States makes in Wyoming for the irrigation of lands in Nebraska. Neither State has expressed any willingness to have the waters thus diverted included in the portion of the waters of the River which is to be allocated to it. Both States have refused to defend the priority of these diversions of the United States.

17. Each of the litigant States claims title, in its own right, to such portion of the unappropriated waters of the stream, if there are any, as may be allocable to it.

18. The United States therefore prays that there be allocated to it, free from the sovereign supervision or control of any State, so much of the waters of the North Platte River as the United States has appropriated as alleged herein, prior appropriations being respected; that it be decreed that the United States is the owner of any unappropriated waters of the North Platte River; and that the United States shall have such other and further relief in the premises as shall be found agreeable to equity and good conscience.

HOMER S. CUMMINGS,
Attorney General.

APPENDIX TO MOTION ON BEHALF OF THE UNITED STATES FOR LEAVE TO INTERVENE

I

THE RIGHTS OF THE UNITED STATES TO APPROPRIATE WATERS OF THE NORTH PLATTE RIVER ARE DERIVED FROM CESSIONS TO IT OF TERRITORIES EMBRACING THE BASIN OF THAT RIVER, AND NOT FROM WYOMING OR ANY OTHER STATE

1. *The United States, by the cessions to it of territories embracing the basin of the North Platte River, became the owner of all rights in the waters of that stream and its tributaries.*[1] France, Spain, and Mexico, by treaties with the United States in the years 1803, 1819, and 1848, respectively, and Texas by agreement with the United States in 1850, ceded to the United States territories which included the entire region drained by the North Platte River and its tributaries. By these cessions the United States acquired "the entire dominion and sovereignty, national and municipal, Federal and State," over the ceded territories, and became

[1] Because of its fugitive nature, the only property rights which exist in water in its natural state, under either the riparian rights or the appropriation doctrine, are rights of use, the corpus being susceptible of ownership only while in possession. See 1 Wiel, Water Rights in the Western States (3rd Ed.), pp. 752–755. When rights in waters are spoken of in this brief, usufructuary rights only are meant.

the owner of all property rights of any kind in the ceded territories, with the exception of such property rights as had passed into private ownership under one of the former governments. *Shively* v. *Bowlby,* 152 U. S. 1, 48, 58; *United States* v. *Winans,* 198 U. S. 371, 383; *Winters* v. *United States,* 207 U. S. 564, 577; 143 Fed. 740. There is, therefore, no question but that, following the cessions and before States were created from the ceded territories and admitted to the Union, the United States not only had sole political authority over the North Platte River, but was the owner of all rights of property (except such as had already passed into private ownership) in the waters of that stream. See 1 Kinney, Irrigation and Water Rights (2nd Ed.), p. 684, 690; 1 Farnham, Waters and Water Rights (1904), p. 48.

2. *The right to appropriate and use the waters of non-navigable streams did not pass to the States upon their creation and admission to the Union, but remained in the United States.* Each new State, upon its creation and admission to the Union, was automatically vested with the same political powers within its boundaries that the older States possessed within theirs, that is, with the political powers which had not been conferred upon the Federal Government by the Constitution, or reserved to the people themselves. But the property rights of the United States which were situated in the new State did not, as a general rule, pass to the State upon its creation, but remained in the United States. *Moore* v. *Smaw,* 17 Calif. 199, 217–222. The decisions of this Court may fairly be said to have settled conclusively that rights to appropriate and use the

waters of non-navigable streams are property rights which did not pass to the States by force of their creation and admission into the Union.

The common law both in this country and in England made a sharp distinction between navigable and non-navigable streams and lakes as to the nature of rights therein. According to that distinction the waters and beds of non-navigable streams and lakes are held to be the private property of riparian owners, subject to no proprietary interest of the Crown, in England, or of the States, in this country. See *Martin* v. *Waddell,* 16 Peters 367, 410–415; *Shively* v. *Bowlby,* 152 U. S. 1, 11–14. Title to the waters and beds of navigable streams, on the other hand, inheres in the Crown and in the States, because the primary uses of such streams and lakes—navigation and fishing—are rights of the general public. Political power attends this proprietary title in England, and likewise in this country, subject here, of course, to the power of the United States under the commerce clause and other provisions of the Constitution. Compare *Arizona* v. *California,* 283 U. S. 423, 451.

When this Court came to determine whether title to the beds of streams and lakes passed to new States upon their creation and admission to the Union or remained in the United States, it held that this distinction which the common law makes between navigable and non-navigable streams and lakes was decisive of the question. *Martin* v. *Waddell,* 16 Peters 367; *Pollard's Lessee* v. *Hagan,* 3 How. 212. It has become settled, accordingly, that title to the beds of navigable streams and lakes passes to the States upon their creation and admis-

sion to the Union,[2] while title to the beds of non-navigable streams and lakes remains in the United States.[3]

While the actual holdings of these decisions deal with the beds of streams and lakes, there is no difference in principle between title to the beds and title to the waters themselves, and the early opinions enunciating the distinction between rights in navigable and in non-navigable streams show clearly that the consequences of this distinction were thought to attach equally to the waters themselves and to the beds. See *e. g., Martin* v. *Waddell,* 16 Peters, 367, 411; *Pollard's Lessee* v. *Hagan,* 3 How. 212, 231; *McCready* v. *Virginia,* 94 U. S. 391, 394–395. In *Howell* v. *Johnson,* 89 Fed. 556, 559–560 (C. C. Mont.), it is said that title to the waters of navigable streams passed to the States upon their admission to the Union, but that title to the waters of non-navigable streams remained in the United States. Cf. *Lux* v. *Haggin,* 69 Calif. 255, 335–338, 10 Pac. 674; *Crawford Co.* v. *Hathaway,* 67 Neb. 325, 351, 93 N. W. 781; *Hough* v. *Porter,* 51 Ore. 318, 389, 98 Pac. 1083. In *California Oregon Power Co.* v. *Beaver Portland Cement Co.,* 295 U. S. 142, 163; *Ickes* v. *Fox,* 300 U. S. 82, 95; and *Brush* v. *Commissioner,* 300 U. S. 352, 367, the

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[2] *Pollard's Lessee* v. *Hagan*, 3 How. 212; *Shively* v. *Bowlby*, 152 U. S. 1; *Scott* v. *Lattig*, 227 U. S. 229, 242–243; *Borax, Ltd.* v. *Los Angeles*, 296 U. S. 10, 16.

[3] *Hardin* v. *Shedd*, 190 U. S. 508; *Oklahoma* v. *Texas*, 258 U. S. 574, 594–595; *United States* v. *Utah*, 283 U. S. 64, 75; *United States* v. *Oregon*, 295 U. S. 1, 14. Cf. *Donnelly* v. *United States*, 228 U. S. 243, 263–264. The dictum to the contrary in *Kansas* v. *Colorado*, 206 U. S. 46, 93–94, was unsupported when enunciated and must be taken as overruled by subsequent decisions.

Court spoke of waters as a part of or belonging to the public domain of the United States.[4] Numerous other State and Federal decisions dealing with Acts of Congress to be discussed immediately hereafter recognize, as do the statutes themselves, that the title of the United States to the waters of the streams of the public domain country was unaffected by the creation and admission of new States. If these statutes and decisions permit any doubt, the doubt relates only to the title of the States in the waters of navigable streams and not to that of the United States in non-navigable waters.[5]

3. *The Acts of 1866, 1870, and 1877.* The basis and the present status of title to the waters of the public domain country turn primarily upon the effect of the various enactments of Congress dealing with those waters as disposable property of the United States.

Following the discovery of gold in 1848, there was a large influx of settlers into California and

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[4] Congress from the earliest times has recognized the difference that exists in the relation of the Federal Government to navigable and to non-navigable waters. The Act of May 18, 1796 (1 Stat. 468), authorizing the sale of lands of the United States in the Northwest Territory, provided: "That all navigable rivers, within the territory to be disposed of by virtue of this Act, shall be deemed to be, and remain, public highways; and that in all cases, where the opposite banks of any stream, not navigable, shall belong to different persons, the stream and the bed thereof shall become common to both."

[5] Many of the opinions fail to except from the title of the United States waters of navigable streams, although the cases in fact concern non-navigable streams.

adjacent regions. The United States had obtained those territories from Mexico only in that year, and for some years thereafter Congress made no provision whereby the title of the United States to the lands, minerals or waters of that region could be acquired. The settlers nevertheless took out the gold, set up mills for the reduction of ores, and engaged in agriculture. Water was necessary for mining, and, because the land was arid or semi-arid, for irrigation. The settlers took it from the streams. In the silence of Congress rules established by each community, and later sanctioned by State and Territorial courts and legislatures, regulated both mining and the appropriation and use of water. As to the latter, the rule was adopted that first in time was first in right. That was the origin of the appropriation system of water law.

The Homestead Act, passed in 1862, and the Pacific Railway Act, passed in 1864, enabled the settlers to acquire the Federal title to non-mineral lands. And by the Act of July 26, 1866 (14 Stat. 251), Congress finally acknowledged, as by affirmance of a tacit grant from the United States, the validity of such mining claims and water rights of the settlers as were recognized by local law. As regards water rights, that Act read (Section 9):

> That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; * * *.

This provision acknowledged, as against the United States, existing rights to appropriate waters on the streams of the public domain.[6] It did not, however, state explicitly whether rights of appropriation could thereafter be acquired. Nor did it state whether a grant by the United States of land bounding upon a stream carried with it riparian rights in the stream, and so prevented the acquisition thereafter of rights to appropriate the waters of the stream.[7]

The Act of 1866 was amended by the Act of July 9, 1870 (16 Stat. 217). Section 17 of the latter Act provided:

> * * * all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory.

This amendment, by the use of the words "as may have been acquired under or recognized by" the Act of 1866, made it clear that the Act of 1866 not only acknowledged existing rights to appropriate waters of the streams of the public domain, but permitted the future acquisition of such rights, where recognized by local law.

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[6] In this appendix the term "public domain" is used to refer to all lands owned by the United States.

[7] A grant of riparian rights in a stream would in any event affect only the subsequent acquisition of rights to appropriate waters upstream from the riparian rights; a downstream diversion could in no case injure the riparian rights.

The Act of March 3, 1877 (19 Stat. 377), known as the Desert Land Law, is the last general statute providing for the acquisition by private persons of rights to appropriate waters of the streams of the public domain. That Act authorizes the entry and reclamation of desert lands within named states and territories, the claimant's right to the use of waters to depend upon bona fide prior appropriation. Then comes the following proviso:

> * * * and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights.

It resulted from this provision, if it had not already so resulted, that a grant thereafter by the United States of riparian land carried with it riparian rights in the stream, and so prevented the acquisition thereafter of rights to appropriate the waters of the stream, only if riparian rights were recognized by the law of the State or Territory where the land was situated. This Court so held in *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142.[8]

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[8] Even in the absence of such a statutory provision it is a well established principle of the interpretation of federal grants that a grant of riparian lands by the United States conveys only such an interest in the stream as the law of the State where the land is situated attaches to riparian ownership. *Hardin* v. *Jordan*, 140 U. S. 371; *Hardin* v. *Shedd*, 190 U. S. 508; *Oklahoma* v. *Texas*, 258 U. S. 574.

4. *All rights to appropriate waters of the non-navigable streams of the public domain country are derived from the United States, either by tacit grants before 1866 or under the Acts of 1866, 1870, and 1877.* It is the contention of the United States that existing rights to appropriate and use the waters of the non-navigable streams of the public domain country are derived from the United States, either under the acts of 1866, 1870, and 1877, or by tacit grants in the era preceding those statutes; that these rights were granted by the United States, using local customs and State and Territorial laws as subordinate instrumentalities only. It is the further contention of the United States that title to all the water of the non-navigable streams of the public domain country which has not been granted away by the United States remains in the United States.

Under the Federal statutes and policy, rights to appropriate waters of the streams of the public domain have been open to acquisition only by compliance with the procedure prescribed by local law and custom.[9] As a result the question whether private rights of appropriation are derived from the United States or from the States and Territories has been and is of no practical importance.[10] It is important here only because of its bearing upon the questions whether the rights of the United States to appropriate waters of the North Platte River are

[9] Whether one appropriator has, under the State law, priority over another, does not present a federal question. *Telluride Power Transmission Co.* v. *Rio Grande W. Ry. Co.*, 175 U. S. 639.

[10] See Long, Irrigation (2d Ed.), p. 137.

derived from the States, and so are subject to State law, and whether title to any unappropriated waters of that stream is in the United States or in the States.

Because of this academic character, the question whether private rights of appropriation are derived from the United States or the States has attracted little attention in this Court. It is believed, however, that the decisions construing the Acts of 1866, 1870, and 1877 show quite clearly that this Court regards private rights of appropriation as derived from the United States under those Acts.

In *Atchison* v. *Peterson,* 20 Wall. 507, the earliest case under the Act of 1866, Mr. Justice Field, after stating the limitations imposed by the common law upon a riparian landowner's use of the waters of a stream, remarked (p. 512), "But the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship with respect to the waters of those streams." In other words, the United States as the sole owner of all rights in the waters of the streams could use or dispose of those waters as it pleased; it was not subject to the limitations which the common law imposed upon each riparian landowner for the benefit of the others.

The opinions in *Basey* v. *Gallagher,* 20 Wall. 670, and in *Sturr* v. *Beck,* 133 U. S. 541, read as a whole, likewise show that this Court regarded rights to appropriate the waters of the streams of the public domain as derived from grants by the United States through the instrumentality of local customs and laws. In the latter case, for instance,

the Court said (p. 552), "Thus, under the laws of Congress and the Territory, and under the applicable custom, priority of possession gave priority of right."

Gutierres v. *Albuquerque Land & Irrigation Co.*, 188 U. S. 545, is more explicit as to the Federal origin of private rights of appropriation. That was a suit by a corporation to enjoin interference with a survey for a diversion ditch. The defendant contended that the territorial act authorizing corporations to supply water for irrigation and other purposes was invalid because it assumed to dispose of the property of the United States without its consent. The Court recognized that ownership of the waters was in the United States but held that its consent to their appropriation had been given. It said (pp. 552–553):

> * * * we think, in view of the legislation of Congress on the subject of the appropriation of water on the public domain * * * the objection is devoid of merit * * *. By the act of March 3, 1877, c. 107, 19 Stat. 377, the right to appropriate such an amount of water as might be necessarily used for the purpose of irrigation and reclamation of desert land, part of the public domain, was granted, and it was further provided that * * * [the Court here quoted that portion of the Act of 1877 set out, p. 34.]

Further on in the opinion the Court speaks of Congressional legislation on the "disposal" of waters (p. 554), and refers to the Act of 1877 as dealing with "public waters" (p. 555).

The recent decision of this Court in *California-Oregon Power Co.* v. *Beaver Portland Cement Co.*,

295 U. S. 142, likewise recognized the federal origin of private rights of appropriation. The parties to that suit were owners of adjacent tracts of land in Oregon, the thread of a non-navigable stream being the boundary between the two tracts. The plaintiff, who deraigned title through a patent from the United States, sought to enjoin diversion of the waters of the stream, claiming injury to his riparian rights. The Court held that since the Oregon law did not recognize riparian rights, the plaintiff had none. It said that by the Act of 1877, which preceded the patent to the plaintiff, if not before, Congress severed the public lands from the non-navigable waters thereon, and provided that for the future riparian rights should attach to a grant of riparian land by the United States only if such rights were recognized by the law of the State where the land was situated. The Court stated (p. 162). "As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately." This decision was referred to with approval in *Ickes* v. *Fox,* 300 U. S. 82, 95, and in *Brush* v. *Commissioner,* 300 U. S. 352, 367.

The Acts of 1866, 1870, and 1877 themselves plainly purport to dispose of the rights of the United States in the waters of the public domain. The Act of 1866 dealt with both water and mining rights and it dealt with them alike. In both cases local laws and customs were to be used as instrumentalities for determining the extent and validity of the right to be given to the settler by the United States. See *Butte City Water Co.* v. *Baker,* 196 U. S. 119, 126.

The great majority of State and lower Federal court decisions which make any reference to the question either state or assume that all existing private rights to appropriate waters of the streams of the public domain country are derived from the United States, either by tacit consent prior to 1866, or under the Acts of 1866, 1870, and 1877. See e. g. *Union Mill and Min. Co.* v. *Ferris,* Fed. Cas. No. 14,371, 2 Saw. 176; *Howell* v. *Johnson,* 89 Fed. 556, 559–560; *Cruse* v. *McCauley,* 96 Fed. 369, 373–374; *Morris* v. *Bean,* 123 Fed. 618, 619; *Anderson* v. *Bassman,* 140 Fed. 14, 21; *Winters* v. *United States,* 143 Fed. 740, 747, aff'd 207 U. S. 564; *United States* v. *Conrad Inv. Co.,* 156 Fed. 123, 126–128; *Kidd* v. *Laird,* 15 Cal. 161, 181; *Osgood* v. *El Dorado Water & Deep Gravel Mining Co.,* 56 Cal. 571, 580; *Lux* v. *Haggin,* 69 Cal. 255, 336 ff., 10 Pac. 674; *Smith* v. *Hawkins,* 110 Cal. 122, 125, 42 Pac. 453; *Wood* v. *Etiwanda Water Co.,* 122 Cal. 152, 157–158, 54 Pac. 726; *Le Quime* v. *Chambers,* 15 Idaho 405, 410, 412–413, 98 Pac. 415; *Barkley* v. *Tieleke,* 2 Mont. 59, 64; *Cottonwood D. Co.* v. *Thom,* 39 Mont. 115, 118, 101 Pac. 825, 104 Pac. 281; *Vansickle* v. *Haines,* 7 Nev. 249, 260 ff.; *Jones* v. *Adams,* 19 Nev. 78, 86; *Crawford Co.* v. *Hathaway,* 67 Neb. 325, 356, 357, 363, 93 N. W. 781; *Hough* v. *Porter,* 51 Ore. 318, 389, 98 Pac. 1083; *Benton* v. *Johncox,* 17 Wash. 277, 289; *Kendall* v. *Joyce,* 48 Wash. 489, 493, 93 Pac. 1091. Cf. *Burley* v. *United States,* 179 Fed. 1, 12; *Smith* v. *Denniff,* 24 Mont. 20, 21, 22; *Story* v. *Woolverton,* 31 Mont. 346, 353, 354, 78 Pac. 589.[11]

[11] Some text writers assert unequivocally that private rights to appropriate waters of the streams of the public

Despite the fact that the Federal origin of all existing rights of appropriation in non-navigable streams (except rights antedating the cessions) is almost indisputable as a matter of history and of legal theory, and despite the fact that the title of the United States to the unappropriated waters of the non-navigable streams of the public domain country is equally clear, the statutes or constitutions of perhaps a dozen States declare that all unappropriated waters are the property of the State or of the public, and a few decisions in those States assert that rights of appropriation deraign not from the United States but from the State. That came about in this way: As we have seen, Congress, by the Act of 1877, if not earlier, established the rule that a grant by the United States of riparian lands did not carry with it riparian rights in the stream, so as to prevent the acquisition thereafter of rights of appropriation in the stream unless by the law of the State or Territory where the land

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domain country are derived from the United States. See Gould, Waters (3rd Ed.), pp. 473–474; 1 Kinney, Irrigation and Water Rights (2d Ed.), p. 1086; Pomeroy, Water Rights (2d Ed.), pp. 22, 32–35; 48–49, 51. Long states that the weight of authority supports this view. Long, Irrigation, pp. 135, 136. Wiel says that the State courts are about evenly divided upon the question. 1 Wiel, Water Rights, pp. 185, 137–144. Wiel reaches this conclusion by treating every holding that riparian rights do not exist in a particular State as a holding against the Federal origin of rights of appropriation, even though the opinion does not mention the latter question. That recognition of the Federal origin of rights of appropriation does not necessitate recognition of riparian rights is clear. *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142.

was located riparian rights attached to the ownership of riparian lands. *California Oregon Power Co.* v. *Beaver Portland Cement Co.,* 295 U. S. 142. The Federal statutes did not, however, cover the question whether a grant of riparian lands by the United States before 1877, or perhaps before 1866, carried with it riparian rights so as to prevent the acquisition thereafter of rights of appropriation. That a grant by the United States of riparian lands before 1866 did have that effect was squarely held by the Supreme Court of Nevada in *Vansickle* v. *Haines,* 7 Nev. 249, and by the Federal circuit court for Nevada in *Union Mill and Min. Co.* v. *Ferris,* Fed. Cas. No. 14,371, 2 Saw. 176. And these decisions held not only that a grant of riparian lands by the United States before 1866 prevented the acquisition after the grant of rights of appropriation, but that the grant defeated existing rights of appropriation. This latter conclusion the courts reached by holding that prior to the Act of 1866 the settler's rights of appropriation were valid only as against each other and not as against the United States or its grantees.

These decisions aroused intense popular resentment.[12] Under the pressure of that resentment[13] many of the newer western States, including Wyoming and Colorado, repudiated entirely the com-

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[12] See 1 Wiel, Water Rights, p. 96.

[13] See 1 Wiel, Water Rights, p. 96. Additional impetus not to recognize the Federal title was afforded by the ambiguity of the Acts of 1866, 1870, and 1877. The extent of the protection they accorded to the doctrine of appropriation long remained uncertain. See *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142, 153, 160–161.

mon law doctrine of riparian rights, and by statute or constitutional provision declared all waters within the State to be "the property of the public" or "the property of the State." [14] Since the adoption of these provisions the courts of some of these States have asserted that rights of appropriation are derived not from the United States but from the State,[15] while the courts of others have, at times at least, continued to recognize the Federal origin of such rights.[16]

The question whether the United States or the State is the source of title of rights of appropriation is no longer of any importance with respect to the rights of individual appropriators. The holding of *Vansickle* v. *Haines,* 7 Nev. 249, and of *Union Mill & Min. Co.* v. *Ferris,* Fed. Cas. No. 14,371, 2 Saw. 176, that the water rights of the settlers were not valid as against the United States or its grantees before the Act of 1866 has everywhere been repudiated; it has long been established that that Act merely recognized rights which had already grown up under the tacit consent and approval of the United States. See *Jennison* v. *Kirk,* 98 U. S. 453, 459; *Atchison* v. *Peterson,* 20 Wall. 507, 513; *Jones* v. *Adams,* 19 Nev. 78.

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[14] For a compilation of these provisions see 1 Wiel, Water Rights, p. 184. Up to that time the settlers themselves had not questioned that the United States was the source of their rights. See 1 Wiel, Water Rights, p. 86; Yale, Mining Claims and Water Rights, pp. 70, 84.

[15] See, e. g., *Willey* v. *Decker,* 11 Wyo. 496, 515, 533–534, 73 Pac. 210.

[16] Compare, for example, Idaho Civil Code (1901) § 2625, with *Le Quime* v. *Chambers,* 15 Idaho 405, 410, 415 (1908).

5. *The rejection by a State or Territory of the doctrine of riparian rights and the adoption of the doctrine of appropriation did not defeat the title of the United States to the unappropriated waters of the non-navigable streams of the public domain.* Since the rejection, on occasion, of the Federal title to the unappropriated waters of the public domain, and the assertion of State title, has come primarily from the legislatures and not from the courts, its theoretical bases are not well developed. One argument in favor of the State title, stated in *Farm Inv. Co.* v. *Carpenter,* 9 Wyo. 110, 61 Pac. 258, and in *Willey* v. *Decker,* 11 Wyo. 496, 73 Pac. 210, is that the rejection of the common law doctrine of riparian rights and the adoption of that of appropriation defeated the Federal title. The notion behind this argument seems to be that since the doctrine of riparian rights was never received in the State in question, under the familiar principle that only such parts of the common law are brought by settlers into new communities as are suited to the new conditions, the United States acquired no rights in the waters of the streams by virtue of its ownership of lands.[17] Two answers may be given to this.

The first is that while the doctrines of appropriation and riparian rights differ as to how water rights are to be acquired, they do not differ fundamentally as to the nature of those rights once they are acquired, but alike recognize such rights as rights of property, and, as had been shown, rights of property do not pass to the States upon their ad-

[17] See 1 Wiel, Water Rights, p. 186; Long, Irrigation, pp. 135–136.

mission to the Union, or to the people, but remain in the United States. Under the riparian rights system of law, rights in the waters of a stream attach to the ownership of lands adjacent to the stream, and all owners have equal rights in the waters, while under the appropriation system rights in waters can be acquired only by the actual diversion and use of the waters. But these two systems of law do not attach materially different legal incidents to water rights, once such rights have been acquired. Under both the riparian rights and the appropriation systems usufructuary rights in waters, as distinguished from ownership of the corpus of water, are real property. *Travelers Insurance Co.* v. *Childs,* 25 Colo. 360, 363; *Davis* v. *Randall,* 44 Colo. 488, 492; *Gardner* v. *Newburgh,* 2 Johns. Ch. 162, 165–166; 2 Kinney, Irrigation, pp. 1328–1332; Long, Irrigation, pp. 70–74; Washburn, Easements, 4th, Ed., pp. 316, 317. The uses to which waters can be put do not vary greatly between the two systems. *Paterson* v. *East Jersey Water Co.,* 74 N. J. Eq. 49, 75–77; Long, Irrigation, pp. 74–76; 1 Wiel, Water Rights, pp. 818–810; 2 Washburn, Real Property (6th Ed.), p. 324. See *Atchison* v. *Peterson,* 20 Wall. 507, 512; *Fergusson* v. *Shirreff,* 6 Dunlop, 1363, 1374 (Court of Sessions, Scotland); Kent's Commentaries, p. 439, side paging (quoted with approval in *Atchison* v. *Peterson* at p. 512); 1 Wiel, Water Rights, p. 904. As shown above, both the political power over and the rights of property in the waters of the streams of the public domain were vested in the United States during the period of territorial government, and

rights of property did not pass to the States upon their creation but remained in the United States. The rights which the United States now asserts in the waters of the North Platte River are property rights, just as much in the view of the appropriation system as in the view of the riparian rights system. The fact that the former system prescribes a different method than the latter whereby private individuals can acquire rights in waters does not mean that the title of the United States to the waters passed to the States.

The second answer to the contention that the adoption of the doctrine of appropriation defeated the title of the United States to the waters of the streams of the public domain is that States and Territories have no power to transfer to themselves property of the United States by the rejection of one rule of law and the adoption of another. *United States* v. *Oregon,* 295 U. S. 1, illustrates this principle. A statute of Oregon provided that upon the conveyance to private persons by the United States of lands bounding upon non-navigable lakes, title to the beds of the lakes vested in the State. This Court held that the statute was of no effect; title to the beds remained in the United States. It said (pp. 27–28):

> The laws of the United States alone control the disposition of title to its lands. The States are powerless to place any limitation or restriction on that control. * * * The construction of grants by the United States is a federal not a state question, * * * and involves the consideration of state questions only insofar as it may be determined

> as a matter of federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances.

Similarly, in *United States* v. *Utah,* 283 U. S. 64, 75, the Court held that in determining the title to lands under waters a State statute declaring waters navigable is of no effect. "State laws cannot affect titles vested in the United States." And see *United States* v. *Rio Grande Irrigation Co.,* 174 U. S. 690, 703. Of the argument that the adoption of the doctrine of appropriation defeated the title of the United States to the waters, Long says (Long, Irrigation, p. 136):

> There is little direct judicial authority for this view, and it is certainly an extraordinary proposition that a state government, and a *fortiori* that a territorial government, has power to define the extent of the rights of the United States in respect to the public domain.

6. *The title of United States to the waters of the streams of the public domain was not divested by the admission of a State under a State Constitution declaring waters to be the property of the State.* A second argument sometimes urged against the Federal title to waters is that the United States, by admitting a State to the Union under a State Constitution declaring waters to be the property of the State or of the public, transferred its title to the State or to the public.[18] The provisions of the

[18] *Stockman* v. *Leddy*, 55 Colo. 24, 28, 29; *Farm Inv. Co.* v. *Carpenter*, 9 Wyo. 110, 135, 136, 61 Pac. 258.

Colorado and Wyoming Constitutions, and the procedure Congress followed in admitting those States, will indicate the nature of this contention.

The original (1876) Constitution of Colorado, Article XVI, Sec. 5, provided: "The water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the State, subject to appropriation as hereinafter provided." The original (1889) Constitution of Wyoming, Article VIII, Sec. 1, provided: "The water of all natural streams, springs, lakes, or other collection of still water, within the boundaries of the State, are hereby declared to be the property of the State."

By Act of March 3, 1875 (18 Stat. 474), Congress authorized the inhabitants of Colorado to form a State government and to adopt a State Constitution and provided that upon the adoption of a State Constitution the President should, without further action by Congress, proclaim the admission of the State to the Union. Upon the adoption of the State Constitution, the President issued such a proclamation (19 Stat. 665). The Wyoming State Constitution was adopted by the people of the State without express Congressional authorization, and the State was thereafter admitted and its Constitution "accepted, ratified, and confirmed" by Act of Congress (26 Stat. 222).

It will thus be seen that while the Wyoming Constitution was before Congress when it admitted that State, the Act for the admission of Colorado was passed before any State constitution had been

adopted. But it seems surprising to contend in either case that Congress granted to the State the waters of the public domain. What Congress did was simply to create the States and nothing more. If Congress grants property to a State at the time of its admission, as it generally does, it does so by specific provision of an act of Congress. In *Coyle* v. *Oklahoma,* 221 U. S. 559, 568, this Court, speaking of a State constitution which, like that of Wyoming, was before Congress when the State was admitted, said:

> A constitution thus supervised by Congress would, after all, be a constitution of a State, and as such subject to alteration and amendment by the State after admission. Its force would be that of a state constitution, and not that of an act of Congress.

The principle that public grants are to be construed against the grantee, and that nothing passes by implication, obtains as to grants by the United States to a State or a Territory. *Rice* v. *Railroad Co.,* 1 Black 358, 380–381; *United States* v. *Michigan,* 190 U. S. 379, 401. See *United States* v. *Rio Grande Irrigation Co.,* 174 U. S. 690, 703. Cf. *Oklahoma* v. *Barnsdall Refineries, Inc.,* 296 U. S. 521, 526.

Kinney finds the provisions of State constitutions wholly incompetent to defeat the Federal title to waters. 1 Kinney, Irrigation, p. 660.

7. *The Act of 1877 was not an irrevocable grant by the United States to the States or the people of waters of the streams of the public domain.* The contention that the United States has surrendered to the States, or to the people, its rights in the un-

appropriated waters of the public domain country must rest primarily upon the following provision, already quoted (p. 34, *supra*), of the Desert Land Law of 1877:

> * * * and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights.

The basis for the contention is certain expressions of this Court in *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142, 163–164. The Court there said that:

> * * * following the Act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris,* subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain.

Similar expressions were used *arguendo* in *Ickes* v. *Fox*, 300 U. S. 82, 95; and in *Brush* v. *Commissioner*, 300 U. S. 352, 367. In the former it is said that the Act of 1877 "reserved" the waters for the use of the public under the laws of the States; in the latter it is said that the Act "dedicated" the waters to the use of the public. See also *Hough* v. *Porter,* 51 Ore. 318.

It seems clear that these statements mean only that by the Act of 1877 the waters of the public domain were unrestrictedly made available for individual acquisition by compliance with the laws of the various States. They do not mean that Congress by that Act conveyed the waters to the States or in any manner relinquished its ownership of them prior to their acquisition by individuals in the manner provided. No such question was before the Court. Were the statements thus construed, they would announce a proposition which in principle could not be defended, and which would be contrary to prior decisions of the Court and inconsistent with the understanding of Congress as disclosed in legislation subsequent to the Act of 1877.

The Court's opinion in the *California Oregon Power Company* case is clear that prior to the Act of 1877 the United States owned unappropriated waters of the public domain. Concerning the provision in question of that Act, it said (295 U. S. at 158):

> If this language is to be given its natural meaning, and we see no reason why it should not, it effected a severance of all waters upon the public domain theretofore appropriated, from the land itself.

Recognizing that the waters of the public domain thus severed belonged to the United States, and recognizing that the purpose of the severance was to promote the development of the desert lands, no just reason can be advanced for attributing to Congress an intention to part with ownership of the waters except as by individual acquisition of rights of appropriation the development of the desert

lands was actually furthered. The principle that grants by the United States to the States are to be strictly construed (see cases cited, *supra,* p. 48) is controlling here, just as it is with respect to the contention based on the State constitutions.

The *California Oregon* opinion does not support a contention that the Act of 1877 was an irrevocable grant of the rights of the United States in the unappropriated waters of the non-navigable streams. In *United States* v. *Rio Grande Irrigation Co.,* 174 U. S. 690, this Court had expressly held that the Act was not such a grant. That was a suit by the United States to enjoin a proposed diversion of the waters of the Rio Grande. Although the point of diversion was in the non-navigable portions of the River, the Court assumed for purposes of decision that the diversion would impair the navigability of the lower reaches of the River. The defendant contended that the diversion was authorized by the Act of 1866 and by the Desert Land Law. The Court expressed doubt whether these statutes were meant to authorize appropriations which would interfere with navigation, but held that in any event the case was controlled by a later statute forbidding the obstruction of navigation. The Court said (p. 707), "As this is a later declaration of Congress, so far as it modifies any privileges or rights conferred by prior statutes it must be held controlling, at least as to any rights attempted to be created since its passage * * *." Thus the Court held that the Desert Land Law was not an irrevocable abdication by Congress of all rights in the non-navigable waters of the public domain, but merely a continuing authorization to individuals to acquire rights in

such waters, subject to modification or repeal by Congress at any time.

This conclusion is also implicit in the holding of the Court in *Winters* v. *United States,* 207 U. S. 564. There the United States sued to restrain diversions of the waters of a non-navigable stream which formed one boundary of an Indian reservation. The lands comprising the reservation had, by agreement between the Indians and the United States in 1888, been set apart for the Indians out of a larger tract which they had formerly occupied. The United States contended that all of the waters of the stream in question were needed for domestic use and irrigation upon the reservation, and that the waters were, therefore, impliedly reserved for those purposes by the creation of the reservation. The defendants denied this, and asserted that the waters were open to appropriation under the laws of the United States and Montana, and that they had complied with those laws. The defendants further contended that, assuming that there was an implied reservation of the waters, yet the reservation was repealed by the admission of Montana to the Union. The Court held for the United States on both issues, and it said (p. 577): "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be," citing *United States* v. *Rio Grande Irrigation Co., supra.* See also *United States* v. *Utah Power and Light Co.,* 209 Fed. 554, 560.

Congress has never regarded the Desert Land Law as an irrevocable cession to the States and Territories of the waters of the public domain, but,

on the contrary, has, since that Act as before, assumed to control the disposition and use of these waters. See, *e. g.,* the Acts of June 3, 1878 (20 Stat. 89); March 3, 1891 (26 Stat. 1095, Sec. 18); June 4, 1897 (30 Stat. 11, 34); and June 11, 1906 (34 Stat. 234).

8. *Kansas v. Colorado, 206 U. S. 46, is not an authority against the position here taken by the United States.* That was a suit brought by Kansas to enjoin Colorado from permitting the appropriation, within its boundaries, of the waters of the Arkansas River, for irrigation. The United States intervened in that case and argued that because the policies of Kansas and Colorado respecting the use of the waters of the Arkansas were conflicting, and because neither State was competent to regulate that use outside of its own borders, the entire power of regulation must be held to reside in the United States. Such a Federal power was said to be essential to secure the reclamation of arid lands—not lands of the United States alone, but arid lands generally. It was claimed as an inherent power of sovereignty, a sort of national police power springing from the needs of the situation. The Court rejected this argument as inconsistent with the principle that the Federal government is one of enumerated powers. The opinion, of course, concedes the power of the United States to control the disposition of its public domain The general proprietary interest of the United States in non-navigable waters was not in issue.[19]

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[19] That the decision in *Kansas* v. *Colorado* deals only with the political power of the Federal government, and does

One statement made in *Kansas* v. *Colorado* (p. 94) and carried over into the opinion of this Court in *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142, 164, might be taken to indicate that this Court did not fully appreciate the consequences of the fact that the United States was, following the cessions, the owner of practically all the lands and waters of the West. That is the statement that each State had to be left free to choose for itself between the doctrine of riparian rights and that of appropriation; and that the United States could not force either doctrine on any State. The United States was, following the cessions, the owner of all lands in the West, and of all the waters of non-navigable streams, except such lands and waters as had theretofore passed into private ownership. When the United States came to dispose of its lands and waters it could have conveyed its interests in the latter either as common law riparian rights attached to riparian land or as rights of appropriation. This Court so declared in the *California Oregon Power Co.* case. It said (p. 162): "As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately." It is not perceived how the assertion that the United States could not impose on Oregon either the doctrine of riparian rights or that of appropriation can stand beside this statement, unless it be regarded as limited to the waters

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not challenge its ownership of the waters of the public domain, see 1 Wiel, Water Rights, pp. 218–219; 1 Kinney, Irrigation, pp. 633, 692.

of navigable streams. In *Wyoming* v. *Colorado,* 259 U. S. 419, 465, the Court specifically reserved the question whether the United States could, by reason of its public land holdings, impose riparian rights or appropriation on the Western States.

While the United States has, for the most part, left to the States the choice between riparian rights and appropriation, especially in the west, it has not always done so. The Act of June 11, 1906 (34 Stat. 233, 234), provides that patents of lands in the Black Hills Forest Reserve shall not vest riparian rights in the patentees and that the waters of that reserve shall remain open to appropriation.[20] Many years before Congress provided that patents of lands in the Northwest Territory should carry riparian rights in non-navigable streams. Act of May 18, 1796 (1 Stat. 464, 468).[21] This Court has always assumed without question that that provision was valid and controlling. See *Railroad Co.* v. *Schurmeir,* 7 Wall. 272, 288–289; *Hardin* v. *Shedd,* 190 U. S. 508, 509; *Scott* v. *Lattig,* 227 U. S. 229, 242.[22]

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[20] In 1877 the legislature of California had petitioned Congress to enact such a provision for the public domain generally. Cal. Stats. 1877, p. 1070.

[21] This provision is carried over into R. S. § 2476 and there stated without the limitation to the region formerly comprising the Northwest Territory.

[22] "* * * if the United States should undertake to adopt a federal code of water rights for the public lands, it can hardly be doubted that it might adopt the common-law doctrine of riparian rights in respect to waters on its own lands, notwithstanding state laws to the contrary." Long, Irrigation, pp. 136–137.

II

SECTION 8 OF THE RECLAMATION ACT DOES NOT SUBJECT WATERS APPROPRIATED FOR FEDERAL RECLAMATION PROJECTS TO THE SOVEREIGN CONTROL OF THE STATES OR IMPAIR THE TITLE OF THE UNITED STATES TO THE UNAPPROPRIATED WATERS OF NON-NAVIGABLE STREAMS

The Reclamation Act of June 17, 1902 (32 Stat. 388), inaugurated a new policy by which the United States itself undertook the reclamation of its arid public lands by irrigation, although private enterprise or State action (under the Carey Act, 28 Stat. 422) was not precluded. When the Reclamation Act was passed, most of the arid public lands susceptible of irrigation by small scale irrigation works had been acquired and reclaimed by private persons by the appropriation and use of waters of the streams of the public domain. Certain of the remaining arid public lands were, however, susceptible of irrigation by large scale and expensive works, and in order to render such lands marketable the United States, by the Reclamation Act, determined to undertake such works.

The Reclamation Act authorizes the United States, through the Secretary of the Interior, to undertake the construction of irrigation works "for the storage, diversion, and development of waters" for the reclamation of irrigable portions of the arid public lands, and appropriates for such construction the receipts from the sales of public lands in certain States. (Later, additional funds were appropriated.) The lands which are to be irrigated from any particular project which is undertaken are to be disposed of in small tracts as the construction of the project progresses, each disposal to carry with it a perpetual right to water from the

project. The terms of disposal are to be such that the cost of construction and maintenance will, ultimately, be borne by the purchasers. The Act also permits other owners of small tracts of land to acquire rights to be supplied with water from the project, by assuming the payment of charges to be fixed by the Secretary.

Section 8 of the Reclamation Act provides:

> That nothing in this Act shall be construed as affecting or intended 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 Act, 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 landowner, 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.

In the present suit, Wyoming moved to dismiss the bill of complaint of Nebraska upon the ground, among others, that the Secretary of the Interior was an indispensable party. In its opinion denying the motion this Court said (295 U. S. at 43):

> The bill alleges, and we know as matter of law [citing Section 8 of the Reclamation Act], that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain per-

> mits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator or an irrigation district formed under the state law. *His rights can rise no higher than those of Wyoming, and an adjudication of the defendant's rights will necessarily bind him. Wyoming will stand judgment for him as for any other appropriator in that state.* He is not a necessary party.

There was no basis in law for Wyoming's suggestion that the Secretary of the Interior was an indispensable, or even a proper, party to the proceeding. The water rights here in question are those of the United States, not of the Secretary. It is well settled that in litigation involving the validity or extent of rights of appropriation for federal reclamation projects, the United States, not the Secretary, is the party in interest. *Ide* v. *United States,* 263 U. S. 497, 506; *West Side Irrigating Co.* v. *United States,* 246 Fed. 212, 217 (C. C. A. 9th); *United States* v. *Union Gap Irrigation Co.,* 209 Fed. 274, 276 (E. D. Wash.). Compare *United States* v. *Bennett,* 207 Fed. 524 (C. C. A. 9th); *United States* v. *Union Gap Irrigation Dist.,* 39 F. (2d) 46 (C. C. A. 9th); *Ramshorn Ditch Co.* v. *United States,* 269 Fed. 80 (C. C. A. 8th); *United States* v. *Haga,* 276 Fed. 41 (D. Idaho); *Pioneer Irrigation Dist.* v. *American Ditch Assn.,* 50 Idaho 732, 749, 1 P. (2d) 196.

The language of the Court in denying Wyoming's motion and in particular the italicized sentences, seem, however, to imply that neither the United States nor the Secretary was a necessary or appropriate party to the proceeding, and that

this was so for the reason that the rights of the United States in the waters of the North Platte River were derived from, and therefore could be protected by, the State of Wyoming. Such a conclusion, it is submitted, is incorrect.

It has been demonstrated that, prior to the Reclamation Act, the United States owned—and had owned since before the admission of Wyoming, Nebraska, and Colorado into the Union—the unappropriated waters of non-navigable streams in those States. The States had never had any proprietary rights in those waters. Nor had they any political powers, independent of the United States, with respect to rights in such waters or to the mode of their acquisition by private individuals. With the permission of the Federal Government, and as its agents and instrumentalities, the States had prescribed the procedure whereby individuals could acquire such rights. And once rights of user had vested in individuals, those rights became subject to the police power of the States. But the States had never, in their own right, title to the waters of the non-navigable streams. As to waters unappropriated in 1902, they had neither any proprietary interest nor any independent political power.

Nothing in the Reclamation Act of 1902 operated to change this basic legal situation. Section 8 of this Act constitutes neither a recognition of preexisting proprietary rights of the States in the waters of non-navigable streams (assuming that a mistaken recognition could have any binding force) nor an affirmative grant or cession of such rights to the States. Since the rights of the United States

in the then unappropriated waters of the North Platte were not extinguished by Section 8, the United States is clearly entitled to intervene in this proceeding. The waters which it has since appropriated for reclamation purposes it holds free of the sovereign control of the States. It is the absolute owner, moreover, of any waters of the North Platte River, if such there be, which are still unappropriated for any purpose. In both respects the United States has proprietary and governmental interests distinct from those of a private appropriator. Wyoming cannot, therefore, under the test laid down in the prior opinion, "stand in judgment" for the United States "as for any other appropriator" (295 U. S. at 43) in litigation in which both the nature and scope of water rights appropriated for Federal reclamation projects and title to and political control over any unappropriated waters of the River are to be adjudged. The United States accordingly is an indispensable party to the proceeding.

1. Analysis of the provisions of Section 8 will demonstrate, we think, beyond controversy, that it does not constitute a grant or cession to the States of the vast interests of the United States in the unappropriated waters of non-navigable streams upon the public domain. A contrary construction would mean that Congress intended to abdicate the rights of the United States in those waters by the very act in which it authorized the expenditure of millions of dollars for their development and use. Such a conclusion is not consonant with reason. It is forbidden by the settled doctrine that such a grant cannot be effected save by unambiguous language (see p. 48, *supra*). The very terms

of Section 8, other provisions of the statute, and subsequent legislation of Congress all demonstrate that no such grant was intended.

The first part of Section 8 provides:

> That 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 * * *.

As to the effect of this declaration, there can be no question. It is simply a recognition of existing water rights—rights which had been acquired under the Acts of 1866, 1870, and 1877—and a preservation of the systems of water law which had grown up in the various States under those Acts. The purpose of the Reclamation Act was to make possible the utilization and development of public lands which would not be developed by private initiative. But Congress did not intend by that Act to abandon, or to embarrass the continued operation of, its previous policy of encouraging the development of arid public lands by individual action.

Question, if any, centers upon the effect of the second part of Section 8. This provides that:

> * * * the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws [of the States and territories] * * *.

No case requiring the construction of this direction to the Secretary has yet come before the Court. It is the contention of the United States that the provision is directory only, and not mandatory—that it does not subject Federal reclamation proj-

ects to the administrative supervision of State authorities. See p. 69 *et seq., infra.* But whether this contention be correct or incorrect, clearly the provision at most is only a limitation imposed by Congress upon the authority of the Secretary in the administration of the Act. As such, it is revocable. The provision manifestly does not constitute a grant of title to the States to the waters to be used in Federal reclamation projects, or to any other waters. Since the United States retained its title to those waters, Congress could not disable itself from exercising in the future legislative power with respect thereto. The conformity provision cannot possibly be construed, therefore, as subjecting Federal reclamation projects to the indefeasible and sovereign control of the States, free from any future action by Congress.

That Section 8 was not intended to constitute an irrevocable abandonment of either Federal proprietary rights or Federal governmental powers is conclusively shown by its next succeeding provision:

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

The North Platte is an interstate stream. The express declaration that the Act shall not affect any right of the Federal Government in the waters of such a stream is of controlling force. In *Wyoming* v. *Colorado,* 259 U. S. 419, 463, the Court stated that the occasion for this provision was to avoid prejudicing the contention then being put forward in *Kansas* v. *Colorado,* 206 U. S. 46, that the United

States possessed implied regulatory powers over all the waters of interstate streams. Since the intention of Congress "that the matter be left just as it was before" (259 U. S. at 463) was stated without limitation, it is, of course, equally applicable to all questions of the proprietary rights and of the regulatory powers of the United States. Being uncertain as to the legal status of such waters, Congress sought to avoid making any unwitting change in that status. Incontrovertibly Congress intended no such far-reaching change as an irrevocable cession to the States of proprietary rights to all the water resources of the Federal Government upon the public domain.

The final proviso of Section 8 is a further demonstration of the intention of Congress that federal proprietary rights in, and hence regulatory control over, waters appropriated for reclamation projects should be preserved. That proviso declares that rights to the use of water acquired under the provisions of the Act shall be appurtenant to the land irrigated. If those rights were to be obtained from the States, and so subject to State control, Congress could not prescribe whether or not they were to be appurtenant to the land irrigated. In 1902 a water right acquired by appropriation and beneficial use in irrigation was not usually appurtenant to the land irrigated. (See 1 Wiel, *Water Rights,* p. 586 ff.) And Congress fully realized that this provision of the Act was a departure from the laws of many of the States. (See House Report No. 1468, 57th Cong., 1st Sess., p. 8; Cong. Rec., 57th Cong., 1st Sess., Vol. 35, Part 7, p. 6679). It is to be noted also that Section 5 of the Reclamation Act, in provid-

ing for the sale of water rights by the United States, states that "no such right shall permanently attach until all payments therefor are made." Obviously Congress intended that title to the water right should remain in the United States until the final payment was made. But under the laws of many of the States the United States would have no title; rights by appropriation become vested only by beneficial use. These provisions not only show a retention of Federal control over and title to reclamation waters in the specific respects dealt with, but are totally inconsistent with a construction of Section 8 as a permanent abandonment of Federal control in all other respects. Compare *Mower* v. *Bond,* 8 F. (2d) 518.

By amendments to the Reclamation Act Congress has repeatedly negatived any intention that activity under that Act should proceed only in accordance with State law. This legislation is clearly inconsistent with a construction of Section 8 as an abdication of federal rights and would be in considerable part inoperative if the section were so construed.[23]

The Act of April 16, 1906 (34 Stat. 116), authorizes the Secretary of the Interior to lease the surplus power or power privilege developed on a project. The Act of February 25, 1920 (41 Stat. 451), authorizes the Secretary, in connection with his operations under the reclamation law, to enter into contracts to supply water for other purposes than irrigation upon such conditions and terms as he may deem proper. In neither of these acts did

[23] Legislation is to be interpreted in the light of subsequent legislation upon the same subject. See *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309.

Congress show any concern for the laws of the various States prescribing the priority of various uses of waters. Both Wyoming and Nebraska provide that water rights used for power development can be condemned by anyone for use for irrigation. Wyo. Rev. Stat. (1931), 122–402; Nebraska Constitution, Article XV, Sec. 6.

The Act of February 21, 1911 (36 Stat. 925), provides that when a project constructed under the Reclamation Act has excess storage and carrying capacity, the Secretary may contract with private individuals for the storage and carriage of waters, at charges to be fixed by the Secretary. The Wyoming law vests in the State power to fix charges for such services. Wyo. Rev. Stat. (1931), 122–421.

Section 8 of the Reclamation Act, as before stated, made water rights appurtenant to the land irrigated. Certain lands to which water rights thus became appurtenant were later found to be unproductive. The Act of May 25, 1926 (44 Stat. 636), Sec. 41, provided that water rights formerly appurtenant to such lands should be disposed of by the United States under the reclamation law.[24]

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[24] In this same section disposal of waters under the reclamation law was subjected to two further provisions fixing Federal rules governing the disposal. They read as follows: "*Provided*, That the water users on the projects shall have a preference right to the use of the water: *And provided further*, That any surplus water temporarily available may be furnished upon a rental basis for use on lands excluded from the project under this section, on terms and conditions to be approved by the Secretary of the Interior."

See also the Act of June 24, 1936 (49 Stat. 1907), Sec. 2. In this act for the relief of a project in California Congress

The Wyoming law provides that direct flow rights cannot be detached from the lands for which they were acquired without loss of priority. Wyo. Rev. Stat. (1931), 122–401. Here again, Congress did not mean that the Federal activity was to be subject to State control.

2. If Congress did not in the Reclamation Act grant to the States proprietary rights in the then unappropriated waters of non-navigable streams so as to subject those waters to permanent control by the States, it is clear that State authority has not attached at any later time.

Plainly neither Wyoming nor the other States owns or possesses sovereign authority over any waters of the North Platte River which are still unappropriated. Whether there remain any such waters it will not be possible to say until the termination of this litigation; but if there are, title thereto is in the United States. With respect to that interest, no State can stand in judgment for the United States.

Nor have the States acquired either title to or sovereign authority over waters which from time to time have been appropriated for Federal reclamation projects. 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. Rights acquired by private individuals in

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provided that, "The released water rights theretofore appurtenant to such permanently unproductive lands shall be transferred to other productive lands, as said Secretary may designate and under such regulations as he may prescribe."

waters appropriated by the United States for reclamation purposes are, however, of a different character.[25] As this Court said in *Ide* v. *United States,* 263 U. S. 497, 506:

> * * * the water is not sold. In disposing of the lands in small parcels, the plaintiff [the United States] invests each purchaser with a right to have enough water supplied from the project canals to irrigate his land, but it does not give up all control over the water or to do more than pass to the purchaser a right to use the water so far as may be necessary in properly cultivating his land. Beyond this all rights incident to the appropriation are retained by the plaintiff.

Under the Reclamation Act the United States itself is regarded as the appropriator for the purposes both of State and Federal law. Even with respect to waters which the United States is under contract to deliver to landowners the United States thus retains a title—akin to that of a trustee—which never becomes subject to independent State regulatory control. It retains likewise regulatory powers necessary to carry out the purposes of the Reclamation Act. This is manifest from the pro-

[25] No private rights of any sort have been acquired with respect to a large proportion of the waters which the United States has appropriated for the North Platte Project. The Reclamation Act, Sec. 5, provides that a landowner shall not acquire a vested water right until he has made all payments provided for by his contract with the Secretary. And a considerable part of the waters of the North Platte Project are used by the United States itself for purposes other than irrigation. No private rights at all as yet exist in the waters which the United States has appropriated for the Kendrick Project.

visions of the Reclamation Act and of subsequent legislation, which have just been considered; it is confirmed also by the decisions holding that the United States is the appropriate party to bring suit to protect the water rights of a Federal reclamation project.[26] See cases cited *supra,* p. 58. The litigant States in their pleadings and briefs have treated the United States as the appropriator of waters for the North Platte and Kendrick projects. See Bill of Complaint of Nebraska, pp. 21, 28–29; Amended and Supplemental Answer of Wyoming, pp. 12–13, 17–19; Answer and Cross Bill of Colorado, p. 30; Argument of Wyoming on Motion to Strike, pp. 4–5; Brief of Nebraska in Answer to Wyoming's Brief on Motion to Dismiss, p. 19.

3. It has been shown that the Secretary of the Interior, in so far as he is obliged to conform to State law in administering the Reclamation Act, is so obliged by virtue of the direction of Congress in Section 8 of that Act, and not by sovereign force of the State law itself. In a substantial number of

[26] *Ickes* v. *Fox*, 300 U. S. 82, is not to the contrary. In that case the Court held that the United States was not an indispensable party to a suit by the owner of lands in a reclamation project to enjoin the Secretary of the Interior from enforcing an order which, by reducing the plaintiff's supply of water, would have deprived him of what were alleged, and for purposes of decision assumed, to be vested water rights. The decision holds that the landowner had property rights in the waters which might be protected in equity against tortious interference by a government officer. It does not consider the nature of the interest of the United States in the waters, as the appropriator and owner of the basic water right, and it has no bearing in any suit in which the United States is defending that interest.

respects, as has been shown (pp. 63–66, *supra*), Congress has, in effect, instructed the Secretary to disregard State law. That any compulsion upon the Secretary to comply with State law rests solely upon Section 8 and not upon independent State power, and so may be removed, is determinative of the motion before the Court. For it follows therefrom that the United States when it acts under the Reclamation Act is not in the position of a private appropriator, and that its interests can not be represented by a State in this litigation as can those of a private appropriator.

The question whether, as heretofore assumed, the Secretary of the Interior is absolutely obliged by Section 8 of the Reclamation Act to conform his action to State law, and to subject himself to State administrative supervision in all respects save those in which the Reclamation Act and subsequent legislation specifically authorize a different action, is not presented by the present motion. No attempt accordingly will be made to discuss it *in extenso*. It is important, however, that a summary statement of the Government's views should be made, since while the Government does not now ask the Court affirmatively to accept those views a denial of the present motion might embarrass their advancement in the future.

Section 8 may be interpreted as making the validity of the Secretary's action (except as otherwise expressly provided) dependent in an absolute sense upon its conformity with State law or as prescribing only a rule of administrative conduct—a departure from which would not entitle third persons or the State to treat his action as nugatory. In the

first view, Section 8 subjects Federal reclamation projects to the detailed government of State law and State administrative officials; in the second, it seeks only to secure harmony of State and Federal law whenever possible, and cooperation of State and Federal officials. We think that the latter view is correct; that the provision of Section 8 is directory only, and not mandatory. So few conflicts have actually arisen in the administration of the reclamation law that neither administrative rulings nor judicial decisions have thus far resolved this question. We think it correct to state, however, that the construction adopted by the Government reflects more faithfully than any other the existing understanding and practice both of the Bureau of Reclamation and of State legislators and administrators.

The question here raised has obvious bearing upon the duty of Federal officers to comply with State supervision over the details of erection and maintenance of Federal reclamation projects and upon the duty of State officers to exercise such supervision.[27] A survey of other possible points of conflict between State and Federal law would extend this discussion unduly, and would necessarily be largely speculative. A single illustration, how-

[27] A number of State statutes specifically except irrigation works constructed under contract with the United States from inspection and supervision by local engineering officials. See Wyo. Laws, 1903, c. 69, § 4; Colo. Laws, 1917, p. 308, § 12; Utah Laws, 1921, c. 73, § 22; Idaho Code Ann., 1932, § 42–1805. See, generally, Chapter 18 of Title 42 of the Idaho Code, entitled "Cooperation with Federal Government;" and Chapter 23 of Title 41.

ever, may serve to show the nature and implications of the problem.

Conformity with State procedure for initiating and perfecting appropriations is one of the most obviously desirable means of harmonizing Federal reclamation activity with State law. The Reclamation Act did not revoke the privilege accorded to private persons by the Acts of 1866, 1870, and 1877 of acquiring rights to the waters of the public domain by following the procedure prescribed by State laws, and compliance with those laws by the Secretary would serve as a convenient method of giving notice to private appropriators. Congress had that in mind when it enacted Section 8. See House Report No. 1468, 57th Cong., 1st Sess., p. 7. Clearly Congress meant by Section 8 that the Secretary should comply with State law in the making of appropriations in so far as it was practicable for him to do so. The Secretary has done that. But there is no reason to suppose that State law was intended to be of determinative authority as to the validity of the appropriation—that the reference to State law is more than directory. Usually the State water codes fix a period after the filing of notice of appropriation within which the water must be put to beneficial use in order to perfect the appropriation; failure thus to perfect an appropriation entails loss of priority. In the case of Federal projects of great magnitude, it may be impossible in some cases to accomplish actual utilization of the water within the period prescribed by State law. While many States have enacted special laws extending the time for Federal reclamation projects, Congress cannot have intended that in

the absence of such laws a Federal project involving expenditures of millions of dollars might be rendered abortive. It was precisely because of the necessity for projects of a magnitude unknown to previous State experience that the Reclamation Act was passed.

That State law is not of absolute authority in the determination of such questions would seem to follow as a corollary from the fact that its application is secondary and results only from the revocable reference of the Federal statute.

In conclusion, it may be pointed out that while the United States has vital need of the waters of the streams of the public domain for the reclamation of its arid lands, those waters would, on the other hand, be of little practical value to the States, since the States are, generally speaking, unable and unwilling to finance projects of the magnitude necessary for the effective use of the waters still unappropriated, and since the lands in need of irrigation are not owned by the States but by the United States.

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