IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 9, Original

THE STATE OF NEBRASKA, COMPLAINANT,

vs.

THE STATE OF WYOMING, DEFENDANT,

and

THE STATE OF COLORADO, IMPLEADED DEFENDANT.

OBJECTIONS OF THE STATE OF COLORADO, IMPLEADED DEFENDANT, TO THE MOTION ON BEHALF OF THE UNITED STATES FOR LEAVE TO FILE ITS PETITION OF INTERVENTION; AND ARGUMENT IN SUPPORT OF OBJECTIONS.

BYRON G. ROGERS,
Attorney General of the State of Colorado;

SHRADER P. HOWELL,
Assistant Attorney General;
Attorneys for the State of Colorado, Impleaded Defendant.

RALPH L. CARR,
JEAN S. BREITENSTEIN,
Of Counsel.

THE BRADFORD-ROBINSON PTG. CO., DENVER

INDEX.

CITATIONS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 9, Original

THE STATE OF NEBRASKA, COMPLAINANT,

vs.

THE STATE OF WYOMING, DEFENDANT,

and

THE STATE OF COLORADO, IMPLEADED DEFENDANT.

OBJECTIONS OF THE STATE OF COLORADO, IMPLEADED DEFENDANT, TO THE MOTION ON BEHALF OF THE UNITED STATES FOR LEAVE TO FILE ITS PETITION OF INTERVENTION.

Comes now the State of Colorado, impleaded defendant herein, and objects to the granting of the motion of the United States for leave to intervene, and as grounds therefor says:

1. The United States has no rights on the North Platte River which entitle it to intervene. Whatever rights it has on that stream, it holds in its proprietary rather than governmental capacity, and such proprietary rights are subject to the laws of the respective states for the administration of water.

2. The United States is not entitled to intervene because of the construction by it of certain reclamation projects

on the North Platte River. On such reclamation projects the United States acts merely as a carrier of water, the appropriation rights being appurtenant to the land and owned by the individuals owning the land. Under its contracts with the settlers on reclamation projects the government merely holds a lien on the water. The fact that it holds such lien establishes that the farmer rather than the United States is the actual owner of the water. The settlers on the reclamation projects in each state are, under the decisions of this court, represented herein by their respective states.

3. The claim of the United States to the ownership of all the unappropriated water of the North Platte River does not furnish any ground for the intervention by the United States herein, because there is no pleading that there is in fact any unappropriated water in the North Platte River.

4. The United States does not hold any rights in the North Platte River free from the sovereign control of the states. The water of the non-navigable streams on the public domain of the arid land states has been and is by the express terms of the Desert Land Act dedicated to the use of the public. There is no showing that there is any water in the North Platte River which has not been appropriated and applied to beneficial use under the dedication made in the Desert Land Act. In accordance with the express terms of the Reclamation Act the Secretary of the Interior has complied with the state water laws in the development of the reclamation projects on the North Platte. The foregoing constitute a consent by the United States to the application of state water laws to the administration of the flow of the North Platte River.

5. This action is one for the equitable apportionment of the flow of the North Platte River between the states affected. It is not and may not be converted into an action for the adjudication of water priorities. A decree herein will merely apportion the flow of the stream between the states, and after such apportionment is made the water laws and water adjudication decrees of each state will apply to that portion of the water allotted to such state. The United States may not herein secure a decree which would place the water used on a reclamation project on any different basis than would apply to water used by any private appropriator.

6. The motion and the petition in intervention do not allege that any vested rights of the United States or of any appropriator on a reclamation project are endangered herein. Without such an allegation neither the motion nor the petition states sufficient grounds to entitle the United States to intervene.

7. The motion for leave to intervene comes too late and should not now be considered. The issues in this case are now made up. The taking of testimony before the Master has been going on for nearly two years. The United States has had notice of this case since its inception. The insertion of new issues which would prolong and complicate the taking of testimony and probably require the re-examination of many witnesses who have already testified should not be permitted.

8. While the State of Colorado has no direct concern in the claim of the United States that neither Wyoming nor Nebraska proposed to defend priority of diversions of water in Wyoming for use in Nebraska, it is submitted that the record (1260-1265, 1291-1296) indicates clearly the desire and intention of both Wyoming and Nebraska to protect and defend fully the rights of appropriators on United States reclamation projects.

9. In overruling the contention of Wyoming that the Secretary of the Interior was an indispensable party, this Court has determined (295 U. S. 40) all matters raised by the motion for leave to intervene. There may be no distinction between the Secretary of the Interior and the United States, because under the express terms of the reclamation act the Secretary of the Interior stands in the place of, and acts for, the United States.

Wherefore, the State of Colorado asks that the motion for leave to intervene be overruled.

BYRON G. ROGERS,
Attorney General;
SHRADER P. HOWELL,
Assistant Attorney General;
Attorneys for the State of Colorado, Impleaded Defendant.

RALPH L. CARR,
JEAN S. BREITENSTEIN,
Of Counsel.

BRIEF OF THE STATE OF COLORADO IN SUPPORT OF OBJECTIONS TO MOTION FOR LEAVE TO FILE PETITION IN INTERVENTION.

STATEMENT OF CASE.

The North Platte River is only one of a great number of non-navigable interstate streams arising in Colorado. It flows northward out of Colorado through Wyoming into Nebraska. The three States permit the waters of the stream to be diverted and used upon compliance with state laws. The Secretary of the Interior, by authority of the Reclamation Act, in compliance with the laws of Wyoming and Nebraska and under contracts with land owners, invested large sums of money whereby the Reclamation Service did store and carry waters from the North Platte River to said land owners who are the actual appropriators. The Secretary of the Interior secured a lien upon the water and land until repaid and asserted no ownership in the waters on behalf of the United States in its governmental capacity. When the amounts expended by the Secretary of the Interior are repaid, his interest and the interest of the United States are ended.

Many diversions were made on the North Platte River within the three States. Nebraska felt that the diversions within the States of Wyoming and Colorado exceeded the equitable share of each and instituted this suit. The pleadings show that the only issue is the equitable apportionment of the waters between the States. An attempt was made to join the Secretary of the Interior as a party, but this Court in 295 U. S. 40, 43 denied the motion. Now the Attorney General of the United States says that such conclusion is incorrect. (Page 59 of his brief).

The State of Nebraska sued the State of Wyoming; thereafter the State of Colorado was interpleaded. The Complainant requests this Court to divide the waters of the North Platte River and decree the equitable apportionment available to each State. Nebraska contends that each appropriator of water, regardless of the State where the appropriation is made, shall receive his water in the order of time each appropriation is made and when the evidence discloses

each appropriation, then this Court shall allocate to each State its share of the water and such allotment shall be the equitable apportionment belonging to each State. Wyoming and Colorado contend that this is not the true rule for determining the question of an equitable apportionment, and say that the peculiar facts and circumstances surrounding each case furnish the guide for such a determination.

While the issues joined are to determine the equitable apportionment to which each State is entitled, the United States desires to interplead and inject certain theories not necessary for a decision in the case. The Attorney General asks this Court to decide: (1) That the United States is the owner of all unappropriated waters of the North Platte River; (2) That those waters used in certain reclamation projects against which the Secretary of the Interior holds a lien are free from the sovereign supervision and control of any State; (3) That because of large sums of moneys invested by the United States, this Court should permit the United States to intervene; (4) That neither Nebraska or Wyoming is protecting the alleged rights of the United States to water used on federal reclamation projects.

This Court is thoroughly familiar with the history of the western portion of the United States, the manner in which it was acquired, the organization of the territories, and their later admission into the Union of the States. Likewise the story has been repeatedly told by able counsel in many precedent making cases before this Court of the manner in which the western settlers, confronted by arid conditions not existing in the East, laboriously constructed dams, reservoirs, canals and laterals to secure water both for the irrigation of their fields and for the development of their mines. Such application of the flow of the streams made it possible for countless communities to grow and flourish in the region once designated as the Great American Desert. To encourage and protect the development of enterprises for the use of water, all of the so-called arid states have adopted the appropriation system which recognizes the right of diversion of stream flow for beneficial use in the order of such diversion and use.

The constitutions of many of the western States, including Colorado (Art. XVI. Sec. 5), declare the waters of all natural streams to be the property of the public, subject to

appropriation for beneficial use. To carry such provisions into effect, complicated systems of water administration have been set up in these States. A typical system is that of Colorado. Under it, Courts of general jurisdiction adjudicate water priorities and enter decrees fixing the amount of water to which each appropriator is entitled and the relative number of his priority. Rights so acquired are recognized as property rights and are alienable the same as land. In times of low water junior rights must yield to senior rights. Water may be abandoned by failure to use beneficially and when abandoned returns to the stream for the benefit of those rights junior to the abandoned right.

To assure the successful operation of this system, a trained and organized administrative staff is essential. In Colorado there is at the head a State Engineer. Under him and in responsible charge of several sections into which the State is subdivided, are Division Engineers. These divisions, in turn, are divided into districts, in each of which there is a water Commissioner who directly supervises and controls the distribution of the stream flow by its diversion through the headgates of the individual ditches. Daily records are made of the flow of the streams and of the diversions into the multitude of ditches. The rivalry and jealousy which always exist among water users as to their respective rights require the utmost vigilance in the inspection and operation of the headgates through which stream flow is diverted. By statute it is made a criminal offense to interfere with the regulation of these headgates.

This system, while not perfect, works well in practice. It has been tested by years of operation and may best be judged by a consideration of the fact that under it the land of the sage brush and buffalo grass has become the land of the sugar beet and the potato, of wheat and corn, and of agriculture and industry.

It is astounding to learn that the United States, by the assertion of the theories advanced in its Petition of Intervention, would seek now to cripple and to change this system. Yet such would be the necessary effect of the adoption of these theories.

Colorado contends that when the United States enters into contracts by which it agrees to finance, construct and

operate such projects in return for the promises of individual land owners and water users to repay such finances, it does so on the same basis as a private individual engaged in the investment business. And by the same token it must comply with and be bound by the State laws governing the use of the water of natural streams. This is true under the Reclamation Act and particularly under the provisions of Section 8 thereof.

By consistent congressional enactments and by decisions of this Court the rights of the United States have in the past been considered on the basis of the principle for which Colorado argues. The adoption of the theories now urged by the representatives of the United States requires an abandonment of this principle.

Colorado occupies a position unique among the western States. More water has its source in the mountains of Colorado, and more streams flow across the Colorado borders into neighboring States than in any other of the so-called arid States. To protect the rights of its water appropriators, Colorado has been called upon to defend in this Court suits brought by Kansas and Wyoming in addition to the present litigation. In each of these cases the United States has sought to intervene and to secure recognition by this Court of the theories for which it now contends. In *Kansas v. Colorado*, 206 U. S. 46, the validity of these theories was unqualifiedly denied. Upon their reassertion in *Wyoming v. Colorado*, 259 U. S. 419, this Court did not even see fit to mention them in its opinion.

Colorado has further sought to protect and define its rights to the water of interstate streams by the execution of compacts with other states with the consent and approval of Congress. In three of these there was an equitable apportionment of the water of the streams affected, but in none of them, in giving its consent and approval, did Congress make any assertion on behalf of the United States either to the ownership of unappropriated waters or to the recognition of any right to water on a basis different from that of a private appropriator.

Colorado asserts that the only reason advanced by the United States in support of its motion to intervene in this

case, which has not heretofore been answered by this Court contrary to the position taken by the United States is that the expenditure of vast sums of money on reclamation projects requires the presence here of the United States as a party litigant. Surely we have not reached a point where the amount of money involved is a criterion of the legal rights of a litigant.

No reason exists either in fact or in fancy for taking away from the western states the right to administer the flow of their natural streams. It is a local problem best handled by local men who know local conditions. To centralize in Washington the supervision of these western streams is to weaken the fabric of our Union. Local self-government should be encouraged, not condemned.

I.

THE ASSERTION THAT THE UNITED STATES BY THE CESSIONS TO IT OF THE TERRITORY EMBRACED IN THE BASIN OF THE NORTH PLATTE BECAME THE OWNER OF THE WATERS OF THAT STREAM AFFORDS NO BASIS FOR THE CONTENTION THAT THE UNITED STATES OWNS ALL RIGHTS OF APPROPRIATION ON A FEDERAL RECLAMATION PROJECT FREE FROM THE SOVEREIGN CONTROL OF THE STATES.

The position of government counsel seems to be that because of the fact that the United States became the owner of the waters of nonnavigable streams following the cessions to it of the territory embracing the arid-land states, the United States owns appropriation rights of Federal Reclamation projects free from the sovereign control of the states. There is no legal or logical basis for such reasoning.

It is conceded in the appendix that (p. 27):

> "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."

This is in accordance with the recognized common law rule that water, a movable and wandering thing, admits only of a transient, usufructuary ownership (2 Blackstone Comm. p. 18; *Lux v. Haggin* (Cal.) 4. p. 919, 920; *Mitchell v. Warner,* 5 Conn. 497, 518).

Such being the nature of water, the claim of the United States to ownership is of an illusory character. Until the United States actually applies the water to some beneficial use, it has no true property right in the water. The water merely flows as it has been accustomed to flow until some one makes a use of it in some manner and by such action acquires a right thereto.

The only way in which the United States even claims to have put any of the water of the North Platte to use is through certain Federal reclamation projects on that stream. At the time of the initiation of such projects there were many private appropriations of water from that stream in accordance with the applicable laws of Colorado, Wyoming and Nebraska and in conformity with the dedication of such water to the use of the public by the Desert Land Act. Such private appropriations resulted in the creation of vested rights in the appropriators. These vested rights are protected by the Federal Constitution. They were secured with the definite consent (Desert Land Act and prior acts) and knowledge of the United States. Now the United States seeks to take those rights away.

The United States, which through the action of the Secretary of the Interior complied with the state water laws in initiating rights under its reclamation projects, states unqualifiedly that such rights "are free from the sovereign control" of the states. If this contention be accepted, then the appropriators on a Federal Reclamation project may take their water before any diversions are permitted by other appropriators. This can have no other effect than the taking from senior appropriators of water in which they have a vested interest. A more flagrant deprivation of a vested right in clear violation of the Federal Constitution cannot be imagined. An unconstitutional grab of the private, vested water rights of citizens of the western states by the central government cannot be countenanced if our Federal system is to survive.

But disregarding such aspects of the situation, the argument of government counsel is sound neither from a legal nor from a logical view point. Granting that at one time the United States did own the water of the nonnavigable streams of the arid-land states and that, notwithstanding the nature of water, its ownership was of such a character that it could dispose of that water as it saw fit, that fact does not mean that it possesses the same title today and therefore holds the water "free from the sovereign control" of the states.

The United States once owned the public domain. Under the homestead acts, the railroad land grant acts, and many similar congressional enactments, vast portions of the public domain have passed into private ownership. Surely the United States will not claim that because it once had title to land which has been acquired by private citizens, under the homestead laws, it now holds such land "free from the sovereign control" of the states. Yet, the assertion of such a proposition is no different in theory from that for which the United States contends in this case.

By the express terms of the Desert Land Act the water of the nonnavigable streams of the public domain was declared "free for the appropriation and use of the public." By compliance with the local water laws, private individuals acquired rights to the use of such water just as settlers acquired land under the homestead acts. And the titles so acquired are just as good and are entitled to the same respect as titles acquired under the homestead laws.

The arguments now advanced by government counsel are not new. They were presented in a more thorough and extensive manner in the first case of *Wyoming v. Colorado* (No. 5 Original, October Term, 1917), but this Court in deciding that cause did not even see fit to mention the matter. The claim of the United States of the right to intervene in *Kansas v. Colorado, supra,* was likewise denied.

The attitude of Congress has differed greatly from the attitude of the executive branch of our Federal government in dealing with western water rights. The legislative department has shown an understanding of western problems. Not only did Congress indicate its position when it passed the Desert Land Act dedicating the water of the nonnavigable streams to the use of the public but it has repeatedly and

consistently shown its position in the various acts giving consent to interstate compacts which had for their purpose the equitable apportionment between the states of the flow of an interstate stream. Considering only compacts in which Colorado is interested, Congress has given its consent to the following:

La Plata River Compact between Colorado and New Mexico (43 Stat. 796);

South Platte River Compact between Colorado and Nebraska (44 Stat. 195);

Colorado River Compact between Colorado, California, Nevada, New Mexico, Utah and Wyoming (45 Stat. 1057);

Rio Grande Compact between Colorado and New Mexico (45 Stat. 1502).

In none of these acts giving the consent required by the Federal Constitution has Congress made any claim on behalf of the United States to any part of the water of any streams "free from the sovereign control" of the states. By these compacts interstate stream flow has been equitably apportioned in accordance wtih the principle announced by this Court and in none has there been any apportionment to the United States. Thus there has been a clear indication by Congress that the dedication to public use by the Desert Land Act is complete and that each state holds its equitable share of the water for the use of its citizens.

There is pending before this Court (and undecided at the time of the writing of this brief) the case of *Hinderlider et al. v. La Plata etc.*, No. 437, October Term 1937. This case involved the construction and validity of a compact between Colorado and New Mexico apportioning the flow of the La Plata River between those two states. By the compact and by the consenting act of Congress, no water was apportioned to the United States. The situation on the La Plata is comparable to that on the North Platte except for the fact that no Federal reclamation project is located on the La Plata. In the *Hinderlider case* this Court, pursuant to the Act of August 24, 1937, 75th Congress, 1st Session, Chap. 754, certified to the Attorney General the fact that the case was pending. Yet the Attorney General expressly advised the Court that the United States did not care to intervene. If interven-

tion is proper on the North Platte, it was proper on the La Plata. If the United States owns the unappropriated waters of the North Platte, likewise it owns the unappropriated waters of the La Plata. Surely, we are not going to have one rule of law for one stream and another rule for another stream.

Government counsel will no doubt urge that the United States has a special interest on the North Platte because of the reclamation projects thereon and that this special interest justifies intervention here. But such special interest is of a purely financial nature, i. e., investments in dams, reservoirs, canals and ditches.

The mere expenditure of money, whether it be for an irrigation reservoir or an automobile factory, does not of itself justify either the United States of America, or its humblest citizen, to intervene in any cause. The only consideration of importance to the United States is whether or not in this case there will be any taking of its property, any deprivation of vested rights. The United States does not plead either in its motion or in its petition that any such taking is threatened in this case. Indeed it could hardly do so with good face, for, of course, this Court will protect all property rights, be they those of the United States or those of a farmer on relief.

II.

THE QUESTIONS RAISED BY THE MOTION FOR LEAVE TO INTERVENE HAVE ALREADY BEEN DECIDED ADVERSELY TO THE PETITIONER IN THIS CAUSE.

The only theory upon which the intervention of the United States in this litigation may be justified is that the United States has some right which is greater than and superior to the rights of other appropriators on the stream. As our Federal Government is one of delegated powers, the United States has no inherent sovereignty or national police power which authorizes it to regulate or administer the water of an interstate stream such as the North Platte (*Kansas v. Colorado*, 206 U. S. 46). Hence, the rights of the United States whatever they may be are derived solely from its

ownership of the public domain and such rights are no greater and no less than those of any private land owner. Moreover, in the Federal Reclamation projects on the North Platte, as indeed on all irrigation streams in the arid west, the United States acts merely as a carrier of water. The actual appropriators are the individuals who actually apply the water to a beneficial use (*Ickes v. Fox,* 300 U. S. 82, 95).

This Court has heretofore ruled on the motion of Wyoming to dismiss the bill of complaint of Nebraska in this case. One ground advanced in support of the request to dismiss was that the Secretary of Interior was an indispensable party. This Court said (295 U. S. 40, 43):

> "The motion asserts that the Secretary of the Interior is an indispensable party. The bill alleges, and we know as matter of law, that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits 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 in judgment for him as for any other appropriator in that state. He is not a necessary party."

Under the authority of this decision the Motion for Leave to Intervene must be denied.

On pages 57 to 60 of the Appendix to their motion government counsel seek to escape the effect of the above quoted statement by the assertion that (1) the rights to the water were never owned by Wyoming and hence are not derived from, and cannot be protected by, Wyoming, and, (2) the waters which the United States has appropriated for reclamation purposes it "holds free of the sovereign control of the states." The first proposition we shall discuss later. Suffice it now to say that the Reclamation Act requires compliance with the state laws in the making of appropriations and that on the reclamation projects in question the appropriation laws of Wyoming were followed.

The second proposition, i. e., that the United States

holds waters which it has appropriated for reclamation purposes "free of the sovereign control of any state" is terrifying in its consequences. Taken literally it means that agents of the United States can come into a Western state and assume control of the natural streams. Obviously it is impossible to so divide a stream that the United States and a State can both regulate and administer stream flow at the same time. There cannot be two courts adjudicating the priorities on the stream, nor can there be two sets of officials enforcing such priorities. The contention of government counsel seems to be that the United States may take water from the stream at such times and in such amounts as it may see fit, regardless of state water laws. If the state laws and the state priority decrees are recognized, then of course there is a submission to the "sovereign control of the states" and the Federal right cannot be free therefrom.

Congress was indeed wise in providing in the Desert Land Act (19 Stat. 377) that:

> "* * * all surplus water * * * * * * * shall remain and he held free for the appropriation and use of the public * * *."

In passing the Reclamation Act (32 Stat. 388) Congress was only being consistent when it required:

> "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 * * *."

Thus there has been an express recognition by Congress of the state laws governing the appropriation and use of water and a direction to the Secretary of Interior to comply with such laws.

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

public domain. The laws relative to the appropriation and use of water are mere regulations under the police power. Granting for the sake of argument that the United States might remove unappropriated waters from the operation of state water laws, still it may not hold or grant to others the right to hold appropriated water "free of the sovereign control of the states." Such action would unquestionably result in the unconstitutional deprivation of vested rights.

The United States as long as it remains the proprietor can unquestionably prescribe the manner in which its property may be secured by others. But after it has dedicated such water to the public and has by Congressional action prescribed that the manner of acquiring title thereto shall be according to State laws and customs, then the United States may not revoke such dedication or assert the right to determine the method of acquiring rights thereto.

The United States has no power under the Constitution to set up any system for the regulation or administration of an interstate stream.

III.

THE UNITED STATES HAS DEDICATED THE NON-NAVIGABLE WATERS ON THE PUBLIC DOMAIN TO THE PUBLIC FOR USE UNDER THE LAWS OF THE STATES.

The pertinent provisions of the Acts of 1866 (14 Stat. 251), 1870 (16 Stat. 217), and 1877 (19 Stat. 377) have been quoted in the brief of the United States. The last of these is of controlling importance. After providing that a claimant's right to the use of water depends upon *bona fide* prior appropriation, it is expressly stated that:

> "* * * 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."

Three late decisions of this Court treat the above quoted provision of the Desert Land Act as being a dedication of

the waters to the public for appropriation and use under State laws. In *California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U. S. 142, the power company asserted that under the patent issued to its predecessor in title by the United States it possessed the common law rights of a riparian proprietor in a nonnavigable Oregon stream. The decision of this Court was to the contrary in an opinion which carefully reviewed the pertinent Congressional acts and prior decisions. The Court held that the effect of the Desert Land Act was to sever the water from the land and that a grantee in a patent would only take (295 U. S. 162):

> "the legal title to the land conveyed, and such title and only such title, to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the state of their location."

In unmistakable language the Court said that the nonnavigable waters on the public domain became "*publici juris,* subject to the plenary control" of the states. We quote from the decision (pp. 163-164):

> "What we hold is that following the act of 1877, if not before, all nonnavigable waters then a part of the public domain became *publici juris,* subject to the plenary control of the designated states * * * 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."

In further analyzing the effect of the Desert Land Act, the Court said (p. 164):

> "It (the Desert Land Act) simply recognizes and gives sanction in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation."

Ickes v. Fox, 300 U. S. 82, was an action to enjoin the Secretary of the Interior from enforcing an order which decreased the amount of water to which a farmer on a Reclamation project would be entitled by reason of his failure to pay a higher charge than that which his contract with the

United States specified. A motion to dismiss was filed by the Secretary on the ground that the United States was an indispensable party. This Court upheld the judgment overruling such motion. In the decision it was pointed out (p. 93) that the government did not become the owner of the water rights, because those rights by act of Congress were made "appurtenant to the land irrigated." Section 8 of the Reclamation Act (32 Stat. 388, 389) upon which this ruling is based reads thus:

> "the right to the use of water acquired under the provisions of the reclamation law shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure and the limit of the right."

In discussing the ownership by the United States of the water, this Court said:

> "Although the government diverted, stored and distributed the water, the contention of petitioner that thereby ownership of the water or water rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works. * * * The government was and remained simply a carrier and distributor of the water * * *, with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works. As security therefore, it was provided that the government should have a lien upon the lands and the water rights appurtenant thereto—a provision which in itself imports that the water rights belong to another than the lienor, that is to say, to the landowner."

The decision then takes up the Desert Land Act and defines the effect thereof in the following language:

> "Acquisition of the government title to a parcel of land was not to carry with it a water right; but all non-

navigable waters were reserved for the use of the public under the laws of the various arid-land states."

The case of *Brush v. Commissioner of Internal Revenue,* 300 U. S. 352, involved the liability of an employee of the bureau of water supply of the City of New York for Federal income tax. In considering whether the operation of municipal water works was governmental in character and to illustrate (p. 366) "the public interest in the use of water and the governmental power to deal with it," the Court said (p. 367):

> "Many years ago, Congress * * * passed the Desert Land Act * * * by which, among other things, the water upon the public domain in the arid-land states and territories were dedicated to the use of the public for irrigation and other purposes."

Thus the latest announcement of this Court on the subject states positively that by the Desert Land Act the United States "dedicated" the water of the nonnavigable streams on the public domain to the use of the public.

Government counsel seek to escape the effect of these decisions by arguing that the Desert Land Act was not an irrevocable grant and they cite in support of their contention the case of *U. S. v. Rio Grande Irrigation Co.,* 174 U. S. 690. There the United States sought to enjoin the construction of a dam and the appropriation of water on the Rio Grande. In defense it was alleged that the water laws of the territory of New Mexico had been fully complied with. This Court remanded the cause with instructions for an inquiry as to whether the acts sought to be enjoined would diminish the navigability of the stream. An apt discussion of the effect of this decision is contained in the opinion of this Court in the case of *California Oregon Power Co. v. Beaver Portland Cement Co., supra,* from which we quote (295 U. S. 142, 164):

> "Two limitations of state power were suggested (in the Rio Grande decision): First, in the absence of any specific authority from Congress, that a state could not by its legislation destroy the right of the United States as the owner of lands bordering on a stream to the continued flow, so far, at least, as might be necessary for the beneficial use of government property; and, second,

that its power was limited by that of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. With these exceptions, the court, however, thought * * * that by the acts of 1866 and 1877 'Congress recognized and assented to the appropriation of water in contravention of the common-law rule as to continuous flow' and that 'the obvious purpose of congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common-law rule, which permitted the appropriation of those waters for legitimate industries.' "

In the case at bar there is no claim of any violation of the navigability of a stream.

IV.

THE THEORIES ADVANCED IN SUPPORT OF THE MOTION FOR LEAVE TO INTERVENE AMOUNT IN EFFECT TO AN EXECUTIVE REPEAL OF AN ACT OF CONGRESS.

The United States contends in its motion that the unappropriated waters of the North Platte may be diverted and used on reclamation projects located on the stream without compliance with the State laws.

We have heretofore pointed out that the Desert Land Act of 1877 dedicates to the use of the public the waters of the non-navigable streams on the public domain. We have further pointed out that the Reclamation Act of 1902 directs the Secretary of the Interior to comply with state water laws on all reclamation projects. The assertion that by reason of the ownership by the United States of the unappropriated waters, such unappropriated waters may be diverted and applied to use on Federal Reclamation Projects is directly contrary to the unequivocal provision of the two aforementioned acts. By the Desert Land Act all waters of the non-navigable streams on the public domain which includes of course all unappropriated waters is dedicated to the use of the public. If this water is applied and used on reclamation projects, then it is not for the use of the public but of the settlers on such projects. The reclamation act specifically

requires compliance with State water laws. If this unappropriated water may be used on reclamation projects, there is no compliance with the State law.

Citation of authority is not required in support of the proposition that no executive department of the United States Government may repeal or annul an Act of Congress.

V.

THE QUESTION OF THE OWNERSHIP OF THE UNAPPROPRIATED WATER OF THE NORTH PLATTE RIVER IS UNIMPORTANT.

The greater portion of the appendix to the motion of the United States is devoted to argument in support of the contention that the United States is entitled to intervene because it owns all the unappropriated water of the North Platte.

This contention is of no avail unless it is shown that there is some unappropriated water in the North Platte. It is pleaded neither in the motion nor in the petition in intervention that there is in fact such unappropriated water flowing in the stream. In fact the United States admits that there is none when it says in its motion (p. 15):

> "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 western States."

The fact that there may be unappropriated water in other streams is of no concern here. This litigation involves only the North Platte. This Court does not determine controversies which are purely conjectural in nature. Until it appears in this particular case that there is an issue over unappropriated water in this particular stream, the United States will not be permitted to predicate its asserted right to intervene upon the ownership of water which does not exist.

VI.

THE APPROPRIATORS ON UNITED STATES RECLAMATION PROJECTS ARE REPRESENTED IN SUITS IN THIS COURT BY THE STATES IN WHICH THEIR LANDS ARE SITUATED.

We have shown that under the Reclamation Act, the United States is not the owner of the water rights for those rights are by the Act (32 Stat. 388, 390) made "appurtenant to the land irrigated," and that the United States is "simply a carrier or distributor of the water." (*Ickes v. Fox, supra* p. 93).

The guiding principle to be applied in determining interstate water disputes is that of equitable apportionment. In *New Jersey v. New York*, 283 U. S. 336, 342, the rule is thus unqualifiedly stated:

> "* * * the different traditions and practices in different parts of the country may lead to varying results but the effort always is to secure an equitable apportionment without quibbling over formulas."

To the same effect are:

Kansas v. Colorado, 206 U. S. 46, 100;
Wyoming v. Colorado, 259 U. S. 419, 464;
Connecticut v. Massachusetts, 282 U. S. 660, 670;
Wyoming v. Colorado, 286 U. S. 494, 507.

If the United States on a federal reclamation project "owns all rights of appropriation * * * free from the sovereign control of Wyoming or any other State" (United States Petition in Intervention, p. 24), then the principle of equitable apportionment is nullified so far as the arid-land States are concerned.

It is a necessary corrolary of the rule of equitable apportionment that in an interstate suit over the division of the flow of a stream, each State represents all of its citizens whose rights stand or fall with the rights of the State. In *Kansas v. Colorado,* 206 U. S. 46, this Court disposed of contentions made by individual appropriators in this manner. (p. 85):

> "While several of the defendant corporations have

answered, it is unnecessary to specially consider their defenses, for, if the case against Colorado fails, it fails also as against them."

Again in *Wyoming v. Colorado,* 286 U. S. 494, 508, it was said:

> "But it is said that water claims other than the tunnel appropriation could not be and were not, affected by the decree, because the claimants were not parties to the suit or represented therein. In this the nature of the suit is misconceived. It was one between states, each acting as a quasi-sovereign and representative of the interests and rights of her people in a controversy with the other. Counsel for Colorado insisted in their brief in that suit that the controversy was 'not between private parties' but 'between the two sovereignties of Wyoming and Colorado;' and this Court in its opinion assented to that view, but observed that the controversy was one of immediate and deep concern to both states and that the interests of each were indissolubly linked with those of her appropriators. 259 U. S. 468. Decisions in other cases also warrant the conclusion that the water claimants in Colorado, and those in Wyoming, were represented by their respective States and are bound by the decree."

In overruling Wyoming's contention that the Secretary of the Interior was an indispensable party to this suit, this Court said (295 U. S. 40, 43):

> "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 in judgment for him as for any other appropriator in that state."

If the doctrine of equitable apportionment is to be retained, and Colorado asserts that for the proper functioning of our federal system it must be, then the appropriators on federal reclamation projects have no rights which are greater than, or superior to, the rights of any other appropriators. The state represents all appropriators. On these reclamation projects the United States merely carries and distributes the water. It acts in a proprietary rather than a

governmental capacity and as a water carrier its rights depend on the rights of the appropriators, who, as we have shown, are represented by their States.

While Colorado's position is probably distinguishable from the positions of Wyoming and Nebraska with respect to the government's claim that neither of the two lower states is properly protecting the interests of the United States in respect to diversions in Wyoming for use on Reclamation projects in Nebraska, nevertheless the questions involve Colorado sufficiently to justify its consideration here.

It seems clear from what is contained in its motion that the United States is here attempting to induce this Court to do something which, by the acts of Congress in respect thereto and by Court interpretations thereof, has been left entirely within the jurisdiction of the States, namely, the adjudication of the relative rights of individual appropriators.

The motion says on page 16:

> "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 water allocated to it."

This statement, we submit, is an admission which is twofold in its effect, First, That the water to which it so strenuously claims title is not the water of the United States at all, but is really the property of the litigating states and as such is to be allocated between them by this Court; and Second, That the United States or its reclamation project farmers can ultimately secure title to water only under the States and through the instrumentality of State laws.

The inconsistency between its assertions of ownership of water appropriated for Reclamation projects "free from the sovereign control of any state", as well as of all unappropriated water by reason of its proprietary ownership of the public domain, and these admissions that water users under such projects may be deprived of water because the States may refuse to recognize their claims furnishes a complete answer to every argument contained in the Motion for Leave to Intervene and the Brief in support thereof.

CONCLUSION.

The United States has been satisfied in the past to accept the interpretations given to the Desert Land Act by this Court. The executive departments have complied with state laws in asserting rights to water for reclamation projects; the legislative branch has repeatedly consented to the execution of Interstate Compacts which have equitably apportioned the flow of western rivers, without asserting any ownership in said waters on behalf of the United States; this Court has repeatedly announced the same doctrine of equitable ownership in the states in litigated cases, and has refused to permit intervention by the United States based on claims of ownership of, or authority over the administration, of the water.

We say finally that this Court has disposed of this same question in all its essentials once before, and that there is no basis for the motion for leave to intervene.

Respectfully submitted,

BYRON G. ROGERS,
Attorney General of the State of Colorado;

SHRADER P. HOWELL,
Assistant Attorney General of the State of Colorado;
Attorneys for the State of Colorado, Impleaded Defendant.

RALPH L. CARR,
JEAN S. BREITENSTEIN,
Of Counsel.