IN THE

Supreme Court of the United States

No. 6 Original

THE STATE OF NEBRASKA,
Complainant,
vs.
THE STATE OF WYOMING,
Defendant,
THE STATE OF COLORADO,
Impleaded Defendant,
UNITED STATES OF AMERICA,
Intervener.

ANSWER BRIEF OF DEFENDANT, STATE OF WYOMING

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INTRODUCTORY

This is a Brief by the defendant, State of Wyoming, in answer to the opening Briefs of the United States, the State of Nebraska and the State of Colorado. It is divided into three sections, the first comprising an answer to the United States Brief, the second an answer to that of Nebraska, and the third answering the State of Colorado. Exhibits of the respective parties will be designated, and references made to the record, as in our opening Brief, and references also will be made to an Appendix hereto attached.

SECTION I

ANSWER TO UNITED STATES BRIEF
SUMMARY OF THE ARGUMENT

Our argument, with reference to the claimed ownership by the United States of the water of the North Platte River, may be summarized as follows:

1. Waters of any natural stream are the property of the public, subject to sovereign control, and the United States or a state does not own the water, or rights to the use of water, or have any proprietary interest therein.

2. The United States exercised its sovereign powers by the passage of the acts of July 26, 1866, July 9, 1870 and March 3, 1877, and thereby confirmed private rights acquired in accordance with local customs, laws and the decisions of the Courts, and permitted the acquisition of rights by appropriation under local customs, laws and Court decisions.

3. Upon formation of the States carved out of the Territories, they succeeded to the sovereign powers of the United States.

4. The Reclamation Act confirms the previous Congressional enactments in providing that the States shall retain control over the appropriation, use and distribution of water used in irrigation, and providing further that rights to the use of water acquired under the provisions of the Act shall be appurtenant to the land irrigated.

5. If the States are not inherently invested with sovereign jurisdiction, the United States, by Congressional enactment, has provided State control.

6. An appropriator has only a usufructuary right and does not own the water.

7. Application to beneficial use is prerequisite to a perfected right by appropriation, and a carrier is not an appropriator.

8. The land owners, not the United States, own the appropriative rights.

9. Since the land owners own the appropriative rights, and the United States is only a carrier, no apportionment of water supply can properly be made to the United States, and apportionment should be made solely between the States.

THE ARGUMENT

In the first cause of action in the petition in intervention of the United States, prayer is made that the United States be decreed to be the "owner of the waters" of the North Platte River which it has reserved and also the owner of any unappropriated water. In the second cause of action the prayer is that the

United States be decreed to be the "owner of the rights to the use of the waters of the North Platte River which it acquired as alleged herein." In the Brief of the United States a clear distinction is not always made between the claimed ownership of water and of rights to the use of water. At page 31 the reference is to "proprietary rights," which it is claimed belong to the United States, but at a number of other places, such as pages 17, 101, 107 and 109 statements are made that the United States owns the water. We think it may be fairly assumed that the United States makes both claims.

This defendant agrees with the conclusions of the Master on this subject found at pages 165 to 177 of his Report. His statement, at page 175, that some rights must continue to exist in the United States as to unappropriated water, we interpret to mean only whatever rights of sovereignty the United States might have in the event of repeal of existing Federal statutes relating to appropriation of water.

Waters are Publici Juris and a Sovereign Does Not Own the Water or have any Proprietary Interest Therein

The corpus of the water in any natural water course is not owned by sovereign or subject. It is subject to sovereign control for the use and benefit of the public. The sovereign does not have any proprietary rights in the use of the water and its only "rights" are those which it may exercise as sovereign for the regulation and control for the public benefit. This is true as to the public domain.

Correct statement of the nature of water with respect to ownership is that contained in Kinney on Irrigation, 2d Ed., Sec. 772, as follows:

> "The rule under the Arid Region Doctrine of appropriation is similar to that under the common law of riparian rights with respect to the ownership of the water itself while it is still flowing in the stream. A water right is the property of the appropriator, only so long as it is based upon the actual use of the water for some beneficial purpose. Before diversion the appropriator acquires no title to the *corpus,* or 'the very body of the water,' while it is still flowing naturally in the stream.
>
> "The only rights which were granted by the United States under the Acts of Congress of 1866 and 1870 were 'rights to

the use of water.' No title to the *corpus* of the water itself was, or, in fact, could be, granted. Even the Government of the United States has no title to the water itself while it is naturally flowing, any more than it has to the air over the lands owned by it. The water may be in this country today, and tomorrow it may be in Mexico, Canada, or in the sea. 'For water is a movable, wandering thing,' and no man, State, or Nation can receive or give an absolute title to it while it is still flowing naturally in the streams or other bodies, and that too, regardless of any law upon the subject, whether it be the common law of riparian rights, the civil law, or the Arid Region Doctrine of appropriation for beneficial uses."

A water right is defined by Wiel in his work on "Water Rights," Vol. 1, 3d Ed., page 304, as follows:

"A water right is a usufruct in a stream, consisting in the right to have the water flow so that some portion of it (which portion the law limits in various ways) may be reduced to possession and be made the private property of an individual."

In the same text at page 304 Mr. Wiel says that:

"* * * it" (the water right) "is an incorporeal hereditament, solely usufructuary, not conferring ownership in the corpus of the water or in the channel of the stream."

In Farm Investment Company v. Carpenter, 9 Wyo. 110, 61 Pac. 258, we find the following:

"By the civil law the waters of all natural streams were publici juris, and according to Bracton that was the rule anciently in England. * * *

"The common law doctrine of riparian rights relating to the use of the water of natural streams and other natural bodies of water not prevailing, but the opposite thereof, and one inconsistent therewith, having been affirmed and asserted by custom, laws and decisions of courts, and the rule adopted permitting the acquisition of rights by appropriation, the waters affected thereby become perforce publici juris. It is therefore doubtful whether an express constitutional or statutory declaration is required in the first place to render them public. In a country where the doctrine of prior appropriation has at all times been recognized and maintained, an expression by constitution or statute that the waters subject to

appropriation are public, or the property of the public, would seem rather to declare and confirm a principle already existing, than to announce a new one. But, however this may be, we entertain no doubt of the power of the people in their organic law, when existing vested rights are not unconstitutionally interfered with, to declare the waters of all natural streams, and other natural bodies of water, to be the property of the public, or of the State. Nor do we doubt that the Legislature may make a like declaration, when, in that particular, unrestrained by the constitution.

"If any consent of the general government was primarily requisite to the inception of the rule of prior appropriation, that consent is to be found in several enactments by Congress, beginning with the act of July 26, 1866, and including the Desert Land Act of March 3, 1877. These acts have been too often quoted and are too well understood to require a restatement at this time at the expense of unduly extending this opinion." (9 Wyo. 136-137.)

In the above case the Court proceeds to state that in Arizona and Nevada the statutes declare the ownership of the public in the waters of natural streams, and that the constitution of Colorado declares that the unappropriated waters of the streams within the state are the property of the public. Continuing, the Court says:

"There is to be observed no appreciable distinction, under the doctrine of prior appropriation, between a declaration that the water is the property of the public, and that it is the property of the State.

"It is said in McCready v. Virginia, 94 U. S. 391, in discussing the subject of tide waters: 'In like manner the States own the tide waters themselves. * * * For this purpose, the State represents its people, and the ownership is that of the people in their united sovereignty.' See also Martin v. Waddell, 16 Pet., 410; Gould on Waters, Sec. 32; Kinney on Irrigation, Secs. 51, 53; Bell v. Gough, 23 N. J. L., 624. 'The Sovereign is trustee for the public.' 3 Kent's Com., 427; Miller v. Mendenhall (Minn.), 8 L. R. A., 89.

"The ownership of the State is for the benefit of the public or the people. By either phrase, 'property of the public' or 'property of the State,' the State, as representative of the

public or the people, is vested with jurisdiction and control in its sovereign capacity." (9 Wyo. 138, 139.)

It cannot be too much emphasized that "property of the state" means simply "property of the public," and that the meaning of either phrase is simply that the state, representing the people, *is vested with jurisdiction and control in its sovereign capacity.*

Referring again to the Wyoming constitutional declaration, which is:

"The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state." (Wyoming Constitution, Art. VIII., Sec. 1),

we find the following in Farm Investment Company v. Carpenter:

"The constiutional declaration was not intended to interfere with previously accrued rights to use the public waters of the State, and it does not conflict with such rights. It was, however, by all the constitutional expressions, undoubtedly intended that such rights, and all appropriations, should be regulated upon the basic principles therein enunciated. That the constitutional provision did not impair rights already accrued, is apparent not only from the accompanying provisions, but from the nature of such rights. Although an appropriator secures a right, which has been held with good reason to amount to a property right, he does not acquire a title to the running waters themselves, except, it may be, to such quantity as shall from time to time have been lawfully diverted, and after diversion may be running in his ditch or lateral. The title of the appropriator fastens not upon the water while flowing along its natural channel, but to the use of a limited amount thereof for beneficial purposes, in pursuance of an appropriation lawfully made and continued. The appropriation is made, in the first place, upon the basis of public ownership of the water, and is protected instead of impaired by the constitutional declaration." (9 Wyo. 139.)

Referring to the Wyoming statutory and constitutional declarations the Court in Willey v. Decker, 11 Wyo. 496, 73 Pac. 210, said:

"This court has stated that the statutory and constitutional declarations seemed rather to declare and confirm a principle already existing than to announce a new one, for the reason

that under the rule permitting the acquisition of rights by appropriation the waters become perforce publici juris. (Farm Inv. Co. v. Carpenter, 9 Wyo. 110.)" (11 Wyo. 533.)

In the same opinion we find the following:

"The obvious meaning and effect of the expression that the water is the property of the public is that it is the property of the people as a whole. Whatever title, therefore, is held in and to such water resides in the sovereign as representative of the people. The public ownership, if any distinction is material, is rather that of sovereign than proprietor. (Farm Inv. Co. v. Carpenter, supra.) That ownership, however, is subject to a particular trust or use, specially defined in the statutes and in the constitution. And that trust or use, in the absence of statute, is just as prominently and intrinsically attached to such public ownership." (11 Wyo. 534.)

From the opinion of this Court in California Oregon Power Company v. Beaver Portland Cement Company, 295 U. S. 142, 79 L. Ed. 1356, the following is quoted:

"Nothing we have said is meant to suggest that the act, as we construe it, has the effect of curtailing the power of the states affected to legislate in respect of waters and water rights as they deem wise in the public interest. What we hold is 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." (295 U. S. 163.)

Reference in the above quotation to the Act of 1877 is, of course, to the Desert Land Act of March 3, 1877, 19 Stat. 377, U. S. C. A. Title 43, Sec. 321.

A similar expression of this Court is found in Brush v. Commissioner, 300 U. S. 352, 81 L. Ed. 691, decided in 1937, wherein it is said:

"Many years ago, Congress, recognizing this difference, passed the Desert Land Act (March 3, 1877, chap. 107, 19 Stat. at L. 377, 43 U. S. C. A. Sec. 321), by which, among other things, the waters upon the public domain in the arid-land states and territories were dedicated to the use of the

public for irrigation and other purposes. Following this act, if not before, all nonnavigable waters then on and belonging to that part of the national domain became publici juris, subject to the plenary control of the arid-land states and territories with the right to determine to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain." (300 U. S. 367.)

It is to be observed that in the excerpts hereinabove quoted from the opinions of this Court it is not said that the waters were made publici juris by virtue of the Desert Land Act, but only that following this Act, *if not before,* they became so.

We have found no decision holding that the sovereign owns the water or has any proprietary rights therein solely by virtue of its governmental capacity, whether that sovereign be the United States or one of the several states. We know of no legislation of the United States, or of any state, authorizing, directing or permitting the sale of water or water rights enjoyed by virtue of its governmental nature by the sovereign, and we know of no instance in which any sale, disposal, transfer or conveyance of water or such water rights has been made by either the United States or any one of the several states. All of the legislation enacted by Congress and that of the respective states is addressed not to the sale, disposal, conveyance or transfer from the Federal or any state Government to private persons of water or water rights, but relates to the manner or means whereby an individual may acquire a usufructuary right.

The United States Exercised Its Sovereign Powers by the Passage of the Acts of July 26, 1866, July 9, 1870, and March 3, 1877

With respect to lands within the territories the United States was the sole sovereign. Upon this point it is said in Shively v. Bowlby, 152 U. S. 1, 38 L. Ed. 331:

> "By the Constitution, as is now well settled, the United States, having rightfully acquired the territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and state, over all the territories, so long as they remain in a territorial condition." (152 U. S. 48.)

Therefore, the only sovereign after the cessions to the United States of the territories comprising the litigant states until the

creation of these states, was the United States. As such sovereign, not only with reference to the territory embraced within the litigant states, but as to all territory, the United States exercised its sovereign power in the passage of the Acts of July 26, 1866, July 9, 1870, and March 3, 1877. These enactments, so far as pertinent here, are as follows:

Act of July 26, 1866, 14 Stat. 253, Title 43 U. S. C. A. Sec. 661:

"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; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

Act of July 9, 1870, 16 Stat. 217, Title 43 U. S. C. A. Sec. 661:

"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 this section."

Act of March 3, 1877, 19 Stat. 377, Title 43 U. S. C. A., Sec. 321:

"* * * That the right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; 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."

One of the earliest, if not the first, judicial interpretations to

be placed upon the Act of 1866 is that of this Court in Atchison v. Peterson, 20 Wall. 507, 22 L. Ed. 414, decided in 1874, in which it is held that the doctrine of right by prior appropriation was recognized by the Congressional Act of 1866. Within less than a month after the decision in Atchison v. Peterson came that in Basey v. Gallagher, 20 Wall. 670, 22 L. Ed. 452, from which the following is quoted:

> "In the late case of Atchison v. Peterson, ante, 414, we had occasion to consider the respective rights of miners to running waters on the mineral lands of the public domain; and we there held that by the custom which had obtained among miners in the Pacific States and Territories, the party who first subjected the water to use, or took the necessary steps for that purpose, was regarded, except as against the government, as the source of title in all controversies respecting it; that the doctrines of the common law declaratory of the rights of riparian proprietors were inapplicable, or applicable only to a limited extent, to the necessities of miners, and were inadequate to their protection; that the equality of right recognized by that law among all the proprietors upon the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream; that the government, by its silent acquiescence, had assented to and encouraged the occupation of the public lands for mining; and that he who first connected his labor with property thus situated and open to general exploration, did in natural justice acquire a better right to its use and enjoyment than others who had not given such labor; that the miners on the public lands throughout the Pacific States and Territories, by their customs, usages and regulations, had recognized the inherent justice of this principle, and the principle itself was at an early period recognized by legislation and enforced by the courts in those States and Territories, and was finally approved by the legislation of Congress in 1866. The views there expressed and the rulings made are equally applicable to the use of water on the public lands for the purpose of irrigation. No distinction is made in those States and Territories by the custom of miners or settlers, or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one." (20 Wall. 681.)

With reference to the Act of July 26, 1866, it is said in Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240, decided in 1879:

> "The object of the section was to give the sanction of the United States, the proprietor of the lands, to possessory rights, which had previously rested solely upon the local customs, laws and decisions of the courts, and to prevent such rights from being lost on a sale of the lands." (98 U. S. 456.)

In the same year (1879) decision was rendered in Broder v. Natoma Water and Mining Company, 101 U. S. 274, 25 L. Ed. 790, from which the following is quoted:

> "We are of the opinion that it is the established doctrine of this court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged and was bound to protect before the passage of the Act of 1866, and that the section of the Act which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one. This subject has so recently received our attention, and the grounds on which this construction rests are so well set forth in the following cases, that they will be relied on without further argument: Atchison v. Peterson, 20 Wall., 507, 22 L. Ed. 414; Basey v. Gallagher, 20 Wall., 670, 22 L. ed., 452; Forbes v. Gracey, 94 U. S. 762, 24 L. ed., 313; Jennison v. Kirk (ante 240)." (101 U. S. 276.)

In United States v. Rio Grande Dam & Irrigation Company, 174 U. S. 690, 43 L. Ed. 1136, decided in 1899, after reference to the Acts of 1866 and 1877, and after quoting from Broder v. Natoma Water and Mining Company, supra, the Court said:

> "Obviously by these acts, so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common-law rule as to continuous flow. * * * * And in reference to all these cases of purely local interest 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." (174 U. S. 706.)

In Gutierres v. Albuquerque Land & Irrigation Company, 188 U. S. 545, 47 L. Ed. 588, decided in 1903, in rejecting the contention that a territorial Act of the territory of New Mexico was invalid because it assumed to dispose of the property of the United States without its consent, the Court said:

"The argument in support of the first proposition proceeds upon the hypothesis that the waters affected by the statute are public waters, the property, not of the territory or of private individuals, but of the United States; that by the statute private individuals, or corporations, for their mere pecuniary profit, are permitted to acquire the unappropriated portion of such public waters, in violation of the right of the United States to control and dispose of its own property wheresoever situated. Assuming that the appellants are entitled to urge the objection referred to, we think, in view of the legislation of Congress on the subject of the appropriation of water on the public domain, particularly referred to in the opinion of this court in United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 704-706, 43 L. ed. 1142, 1143, 19 Sup. Ct. Rep. 770, the objection is devoid of merit. As stated in the opinion just referred to, by the act of July 26, 1866 (14 Stat. at L. 253, chap. 262, Sec. 9, Rev. Stat. Sec. 2339, U. S. Comp. Stat. 1901, p. 1437), Congress recognized, as respects the public domain, 'so far as the United States are concerned, the validity of the local customs, laws, and decisions of courts in respect to the appropriation of water.' By the act of March 3, 1877 (19 Stat. at L. 377, chap. 107, U. S. Comp. Stat. 1901, p. 1549), 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 '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.' " (188 U. S. 552.)

In discussing the Acts of July 26, 1866, July 9, 1870, and

March 3, 1877, this Court, in Wyoming v. Colorado, 259 U. S. 419, 66 L. Ed. 999, decided in 1922, cited with approval Atchison v. Peterson, Basey v. Gallagher and Broder v. Natoma Water and Mining Company, supra, and quoted as follows from United States v. Rio Grande Dam & Irrigation Company hereinabove cited:

> " ' Obviously by these acts, so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common-law rule as to continuous flow'; and again; 'The obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common-law rule, which permitted the appropriation of those waters for legitimate industries.' " (259 U. S. 462.)

California Oregon Power Company v. Beaver Portland Cement Company, 295 U. S. 142, 79 L. Ed. 1356, was decided in 1935. From the opinion we quote the following:

> "For many years prior to the passage of the Act of July 26, 1866, chap. 262, Sec. 9, 14 Stat. at L. 251, 253, U. S. C. title 43, Sec. 661, the right to the use of waters for mining and other beneficial purposes in California and the arid region generally was fixed and regulated by local rules and customs. The first appropriator of water for a beneficial use was uniformly recognized as having the better right to the extent of his actual use. The common law with respect to riparian rights was not considered applicable, or, if so, only to a limited degree. Water was carried by means of ditches and flumes great distances for consumption by those engaged in mining and agriculture. Jennison v. Kirk, 98 U. S. 453, 457, 458, 25 L. ed. 240, 242, 243. The rule generally recognized throughout the states and territories of the arid region was that the acquisition of water by prior appropriation for a beneficial use was entitled to protection; and the rule applied whether the water was diverted for manufacturing, irrigation, or mining purposes. The rule was evidenced not alone by legislation and judicial decision, but by local and customary law and usage as well. Basey v. Gallagher, 20 Wall. 670, 683, 684, 22 L. ed. 452, 454, 455; Atchison v. Peterson, 20 Wall. 507, 512, 513, 22 L. ed. 414, 416.
>
> "This general policy was approved by the silent acquies-

cence of the federal government, until it received formal confirmation at the hands of Congress by the Act of 1866, supra. Atchison v. Peterson, supra. Section 9 of that act provides:

" '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; and the right of way for the construction of ditches and canals, for the purposes aforesaid is hereby acknowledged and confirmed: . . .'

"This provision was 'rather a voluntary *recognition of a pre-existing right of possession,* constituting a valid claim to its continued use, than the establishment of a new one.' Broder v. Natoma Water & Min. Co., 101 U. S. 274, 276, 25 L. ed. 790, 791; United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 690, 704, 705, 43 L. ed. 1136, 1142, 19 S. Ct. 770. And in order to make it clear that the grantees of the United States would take their lands charged with the existing servitude, the Act of July 9, 1870, chap. 235, Sec. 17, 16 Stat. at L. 217, 218, U. S. C. title 30, Sec. 52, amending the Act of 1866, provided that— '. . . 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.'

"The effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain. Jones v. Adams, 19 Nev. 78, 86, 6 P. 442, 3 Am. St. Rep. 788; Jacob v. Lorenz, 98 Cal. 332, 335, 336, 33 P. 119.

"If the acts of 1866 and 1870 did not constitute an entire abandonment of the common-law rule of running waters in so far as the public lands and subsequent grantees thereof were concerned, they foreshadowed the more positive decla-

rations of the Desert Land Act of (March3) 1877, which it is contended did bring about that result. That act allows the entry and reclamation of desert lands within the states of California, Oregon, and Nevada (to which Colorado was later added), and the then territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota, with a proviso to the effect that the right to the use of waters by the claimant shall depend upon bona fide prior appropriation, not to exceed the amount of waters actually appropriated and necessarily used for the purpose of irrigation and reclamation. Then follows the clause of the proviso with which we are here concerned:

> " '. . . 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.'

Chap. 107, 19 Stat. at L. 377, U. S. C. title 43, Sec. 321." (295 U. S. 154.)

"In the light of the foregoing considerations, the Desert Land Act was passed, and in their light it must now be construed. By its terms, not only all surplus water over and above such as might be appropriated and used by the desert-land entrymen, but 'the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable,' were to remain 'free for the appropriation and use of the public for irrigation, mining and manufacturing purposes.' If this language is to be given its natural meaning, and we see no reason why it should not, it effected a severence of all waters upon the public domain, not theretofore appropriated, from the land itself." (295 U. S. 158.)

In its decision in Brush v. Commissioner, 300 U. S. 352, 81 L. Ed. 691, decided in 1937, this Court referred to the difference between conditions in the arid land states and those in the east, and said that Congress, recognizing this difference, passed the Desert Land Act (March 3, 1877) by which the waters upon the public domain were dedicated to public use, and that following this Act, if not before, all non-navigable waters of the public

domain became publici juris subject to plenary control of the arid land states and territories.

Throughout these decisions of this Court, commencing with Atchison v. Peterson in 1874, and ending with Brush v. Commissioner determined in 1937, not the slightest doubt can be found as to the opinion of this Court concerning the Acts of 1866, 1870 and 1877. In every case it has been clearly and unequivocally found, determined and stated by the Court that these legislative enactments have had the effect of recognizing local laws, customs and decisions in the obtaining of rights to the use of water, and that as to the arid land states, the doctrine of riparian rights perforce has been supplanted by that of prior appropriation. Unquestionably the United States, in its sovereign capacity, had the right to legislate upon this subject. It has exercised that right and the latest pronouncement of Congress of 1877 has now been in effect 65 years, while the original enactment of 1866 has a history of an additional eleven years. During all this period of time this Court, in all its decisions, has clearly recognized the effect and validity of these enactments. Thousands of appropriative rights have been acquired by their authority.

Upon Formation of the States Carved Out of the Territories They Succeeded to the Sovereign Powers of the United States

As heretofore pointed out, and as stated by this Court in Shively v. Bowlby, 152 U. S. 1, 38 L. Ed. 331, complete sovereign power over the territories was vested in the United States. In the opinion in that case it is stated that the United States has entire dominion and sovereignty over all the territories as long as they remain in a territorial condition. When a state is created and admitted to the Union, by the very fact of such admission it is endowed with all the powers of the other states. The Tenth Amendment to the Constitution of the United States is as fully applicable to it as to any of its sister commonwealths theretofore incorporated in the Federal Union. Under that Amendment powers not delegated to the United States by the Constitutiton, nor prohibited by it to the states, are reserved to the states respectively, or to the people. Discussion of its effect in a case relating directly to the authority of the states to exercise sovereign powers pertaining to the control of waters, is found in Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, and its relation to the second paragraph of Sec. 3 of Art IV. of the Constitution,

providing that Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, is there considered. Referring to the latter constitutional provision, the Court said:

> "But clearly it does not grant to Congress any legislative control over the states, and must, so far as they are concerned be limited to authority over the property belonging to the United States within their limits." (206 U. S. 89.)

Discussing the Tenth Amendment, the Court in the same opinion, has this to say:

> "The powers affecting the internal affairs of the states not granted to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, and all powers of a national character which are not delegated to the national government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and, after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This article 10 is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning." (206 U. S. 90.)

Further discussion is found in the opinion as follows:

> "As to those lands within the limits of the states, at least of the Western states, the national government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property. We do not mean that its legislation can override state laws in respect to the general subject of reclamation. While arid lands are to be found mainly, if not only, in the Western and newer states, yet the powers of the national government within the limits of those states are the same (no greater and no less) than those within the limits of the original thirteen; and it would be strange if, in the absence of a definite grant

of power, the national government could enter the territory of the states along the Atlantic and legislate in respect to improving, by irrigation or otherwise, the lands within their borders." (206 U. S. 92.)

Further on in the same decision (Kansas v. Colorado) we find the following relative to powers of the state:

"It may determine for itself whether the common-law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any state." (206 U. S. 94.)

An additional conclusion is stated by the Court, as follows:

"But when the states of Kansas and Colorado were admitted into the Union they were admitted with the full powers of local sovereignty which belonged to other states (Pollard v. Hagan and Shively v. Bowlby, supra; Hardin v. Shedd, 190 U. S. 508, 519, 47 L. ed. 1156, 1157, 23 Sup. Ct. Rep. 685), and Colorado, by its legislation, has recognized the right of appropriating the flowing waters to the purposes of irrigation. Now the question arises between two states, one recognizing generally the common-law rule of riparian rights and the other prescribing the doctrine of the public ownership of flowing water. Neither state can legislate for, or impose its own policy upon the other." (206 U. S. 95.)

We have quoted liberally from the opinion in Kansas v. Colorado as the subject with which we are now concerned was there given most thorough consideration. We know of no departure in any later case in this Court from the principles there announced.

We refer again to the language of this Court in Brush v. Commissioner, 300 U. S. 352, 81 L. Ed. 691, where, after reference to the Desert Land Act, it is said:

"Following this act, if not before, all non-navigable waters then on and belonging to that part of the national domain became publici juris, subject to the plenary control of the arid-land states and territories with the right to determine to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain." (300 U. S. 367.)

Government counsel rely on Winters v. United States, 207 U. S. 564, 52 L. Ed. 340. In that case, suit was brought

to restrain appellants from obstructing the Milk River in the State of Montana, or in any manner preventing its waters from flowing to the Fort Belknap Indian reservation. This reservation was reserved and set apart by the United States as an Indian reservation prior to Montana's admission as a state. The Court held that there was a reservation of the waters of the Milk river by an agreement made in 1888 which was not repealed by the admission of Montana into the Union, and in the opinion we find the following:

> "Another contention of appellants is that if it be conceded that there was a reservation of the waters of Milk river by the agreement of 1888, yet the reservation was repealed by the admission of Montana into the Union, February 22, 1889 (25 Stat. at L. 676, chap. 180), 'upon an equal footing with the original states.' The language of counsel is that 'any reservation in the agreement with the Indians, expressed or implied, whereby the waters of Milk river were not to be subject to appropriation by the citizens and inhabitants of said state, was repealed by the act of admission.' But to establish the repeal counsel rely substantially upon the same argument that they advance against the intention of the agreement to reserve the waters. 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. United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 702, 43 L. ed. 1141, 19 Sup. Ct. Rep. 770; United States v. Winans, 198 U. S. 371, 49 L. ed. 1089, 25 Sup. Ct. Rep. 662." (207 U. S. 577.)

This case involved the exercise of the sovereign power of the United States when the lands affected were territorial and before states had been formed and admitted to the Union. The contracts, treaties and reservations of the United States were held to be effective, fully confirming our theory that the United States was the sole sovereign as to territorial areas. We do not perceive how it can be contended that the United States did not have the power to make reservations or agreements concerning the disposal of running water on territorial lands as it was the only sovereignty. That such power ceased upon the creation and admission of a state, due to the reservation to the states of the powers not delegated to the United States under the Tenth Amendment, would seem to be equally obvious.

It is our theory that an inherent attribute of state sovereignty is the sovereign control over running waters, and we think it unnecessary to establish the jurisdiction of the state to rely upon the facts surrounding admission to the Union. However, when Wyoming was admitted its constitution had been adopted. The constitution of Wyoming adopted in 1889 contained Sec. 1 of Art. VIII., which provides:

> "The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state."

By an Act of Congress of July 10, 1890, Wyoming was admitted to the Union (26 Stat. 222), and therein it was provided that the constitution, as adopted by the people of the territory of Wyoming, was "accepted, ratified and confirmed." Therefore, when Congress admitted Wyoming as a state, it acted with full flnowledge of the Wyoming constitutional provision declaring water to be the property of the state, which, as we have hereinabove pointed out, is equivalent to a declaration of ownership by the public. Had there been any doubt in the mind of anyone concerned at that time regarding the right of a state to exercise control over waters within its borders, certainly a territory having adopted a constitution containing such a declaration as above quoted would not have been admitted to the Union with such provision in its fundamental law. Apropos of this situation, Chief Justice Potter, in Farm Investment Company v. Carpenter, 9 Wyo. 110, 61 Pac. 258, said:

> "So far as any proprietary rights of the United States are concerned, the question would seem to be settled in favor of the effectiveness of the declaration, by the act of admission, which embraces the following provision: 'And that the constitution which the people of Wyoming have formed for themselves, be, and the same is hereby, accepted, ratified, and confirmed.' McCormick v. Western Union Tel. Co., 79 Fed., 449. In that case the circuit court of appeals for the 8th circuit of the United States, held that under a similar provision in the act of Congress, admitting Utah, all the provisions of the Utah constitution were invested with all authority conferred by any act of Congress." (9 Wyo. 135, 136.)

Upon plainest principles of equity and fair dealing it would hardly seem that the United States can now question Wyoming's

right to control of water within its borders when more than 50 years ago the Congress of the United States admitted Wyoming to statehood and accepted, ratified, and confirmed its constitution containing a clear and unequivocal statement that the water is the property of the state. Supporting this principle is the decision of this Court in Virginia v. West Virginia, 11 Wall. 39, 20 L. Ed. 67.

That there may be no misunderstanding of our position, we do not contend that the act of admission, or the incidents relating thereto comprise any grant, transfer or conveyance of either water or proprietary rights in water from the United States to the state. The right of the state to sovereign control over the waters within its borders is inherent in the fact of statehood itself. The United States did not own the water or proprietary rights therein and its control was an attribute of sovereignty. This sovereign power of the United States was replaced by that of the state. The Constitution and the decisions of this Court give no warrant for the assumption of a double sovereignty. The power of the United States and that of the state, each in its own domain, is exclusive.

Additionally, in the case of admission of Wyoming to the Union, the United States gave express recognition to Wyoming's right to exercise full and complete sovereign power over the waters within its jurisdiction when Congress, in the act of admission, accepted, ratified and confirmed the Wyoming Constitution containing the declaration that the water is the property of the state.

The Reclamation Act

Section 8 of the Reclamation Act of June 17, 1902, 32 Stat. 390, U. S. C. A. Title 43, sections 383, 372, 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, the measure, and the limit of the right."

This enactment is completely confirmatory of the sovereign control of the states.

The reference therein to the Federal Government and interstate streams is explained in Wyoming v. Colorado, 259 U. S. 419, 66 L. Ed. 999, where, after italicizing that portion of the section, it is stated:

> "The words which we have italicized constitute the only instance, so far as we are advised, in which the legislation of Congress relating to the appropriation of water in the arid land region has contained any distinct mention of interstate streams. The explanation of this exceptional mention is to be found in the pendency in this court at that time of the case of Kansas v. Colorado, wherein the relative rights of the two states, the United States, certain Kansas riparians and certain Colorado appropriators and users in and to the waters of the Arkansas river, an interstate stream, were thought to be involved. Congress was solicitous that all questions respecting interstate streams thought to be involved in that litigation should be left to judicial determination unaffected by the act,—in other words, that the matter be left just as it was before. The words aptly reflect that purpose." (259 U. S. 463.)

In Gutierres v. Albuquerque Land & Irrigation Company, 188 U. S. 545, 47 L. Ed. 588, decided in 1903, within a few months after passage of the Reclamation Act, after reference to the Acts of July 26, 1866, March 3, 1877, and March 3, 1891, the Court said:

> "It may be observed that the purport of the previous acts is reflexively illustrated by the act of June 17, 1902 (32 Stat. at L. 388). That act appropriated the receipts from the sale and disposal of the public lands in certain states and territories to the construction of irrigation works for the reclamation of arid lands." (188 U. S. 554.)

After quoting Section 8 of the Reclamation Act, the Court proceeded to say:

"It would necessarily seem to follow from the legislation referred to that the statute which we have been considering is not inconsistent with the legislation of Congress on the subject of the disposal of waters flowing over the public domain of the United States." (188 U. S. 554.)

The Act of 1891 to which reference is hereinabove made, is a statute granting right-of-way to canal and ditch companies for irrigation purposes, containing the proviso that:

"The privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective states or territories." (Act of March 3, 1891, 26 Stat. 1101, Title 43 U. S. C. A. Sec. 946.)

This Act of 1891 is another recognition by Congress of state control.

The language of the Court in Gutierres v. Albuquerque Land & Irrigation Company hereinabove set forth is quoted with approval in Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, at pages 92 and 93 of 206 U. S.

The language of Section 8 of the Reclamation Act is entirely clear in its recognition of state control. Territorial control is also recognized, no doubt upon the theory that under the Act of July 1, 1866, Congress had provided that the possessors and owners of vested rights recognized and acknowledged "by the local customs, laws and the decisions of the Courts" should be protected.

The Reclamation Act is the latest expression of the Congress of the United States. It is entirely consistent with, and supports fully, all previous congressional enactments, such as the Acts of 1866, 1870, 1877 and 1891. It is also fully confirmative of the decisions of this Court relating to the prior enactments covering the period from Atchison v. Peterson (22 L. Ed. 414), decided in 1874, to United States v. Rio Grande Dam & Irrigation Company (43 L. Ed. 1136), decided in 1899. When the Reclamation Act was adopted these previous enactments had received construction by this Court over this period of twenty-five years, and their full import and effect were known through the decisions in Atchison v. Peterson, Basey v. Gallagher, Jennison v. Kirk, Broder v. Natoma, and United States v. Rio Grande Dam & Irrigation Company. With this judicial history before it, Congress was certain-

ly familiar with the effect of the previous enactments when the Reclamation Act was passed, and acted knowingly in providing that the Secretary of the Interior should proceed in conformity with state laws, and that the Act should not be construed as affecting or intended to affect, or in any way to interfere with the laws of any state or territory relating to the control of water.

Entirely consistent throughout are the enactments of Congress and the decisions of this Court in recognition or adoption by the former, and affirmance by the latter, of the doctrine that waters are publici juris; that rights to their use may be acquired under control and regulation of the Government in its sovereign capacity, and that the Federal Government, since enactment of the Act of 1866, has consistently and uninterruptedly followed the course of confiding such sovereign control to local customs, laws and decisions of the Courts, and that the state, as an inherent attribute of its sovereignty, has had and exercised jurisdiction and control over the use of water.

If the States Are Not Inherently Invested With Sovereign Jurisdiction, the United States, by Congressional Enactment, Has Provided State Control

We have proceeded to show that the states, as an inherent attribute of sovereignty, have sovereign jurisdiction and control over the waters within their borders. If this should not be true, the result is not changed.

By its first enactment on the subject July 26, 1866, the Congress provided that rights to the use of water acquired by priority of possession and which "are recognized and acknowledged by the local customs, laws and the decisions of the Courts" should be protected (Act of July 26, 1866, 14 Stat. 253, Title 43 U. S. C. A. 661). In its next pronouncement on the subject Congress provided that all patents granted or preemption or homesteads allowed should be subject to any vested and accrued water rights acquired or recognized under the terms of the previous statute (Act of July 9, 1870, 16 Stat. 217, Title 43 U. S. C. A. 661). In the Desert Land Act (March 3, 1877, 19 Stat. 377, Title 43 U. S. C. A. Sec. 321), it is affirmatively declared that all surplus water above actual appropriation and use on desert lands, "together with the water of all likes, 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." In the Reclamation Act (June 17, 1902, Sec. 8) it is provided there shall be no interference by anything therein provided with the laws of any state or territory relating to the control, appropriation, use or distribution of water.

Nowhere can be found any legislative declaration by the Congress of the United States purporting or attempting to modify its decisions, three times specifically announced, to leave the acquisition of rights to the use of water to control of the states. We do not perceive how this consistent policy of Congress can be ignored.

Should we be in error in our opinion as to the relationship between the Federal Government and ownership or use of water on the territorial domain or within the states now carved out of the territories, our conclusion that the states presently control the use of water and the acquisition of rights to such use, is nevertheless correct. No matter what the extent of ownership or control which the United States had originally, and irrespective of any ownership or control that it may still have (although we are convinced it has none), the United States, through Congress as provided in the second sentence of Sec. 3, Art. IV. of the Constitution, has made needful rules and regulations respecting water and its use. We know of no argument that can be made that the United States cannot provide that such rules and regulations shall be those prevailing in the area affected and there recognized by the local customs, laws and decisions of Courts, or the laws of any state or territory, instead of a set of rules and regulations independently provided by Congressional enactment.

We do not in any sense retreat from our position that as a matter of law each state inherently has the right to exercise jurisdiction over the waters within its borders, but we do say that whatever measure of control the United States ever had, or ever was or is entitled to, no matter in what respect or to what extent, Congress has legislated on the subject and has clearly and unequivocally, by its several pronouncements, confided complete control of the waters to the respective states.

An Appropriator Does Not Own the Water, But Has Only a Usufructuary Right

In the Act of 1866 reference is made to "rights to the use of water," and in that of 1870 it is said that all patents granted, or preemption or homesteads allowed "shall be subject to any vested

and accrued water rights," and in the Desert Land Act of March 3, 1877, the proviso is that "the right to the use of water" shall depend upon a bona fide prior appropriation. In the Reclamation Act reference is made to the "control, appropriation, use or distribution of water used in irrigation, or any vested right" acquired under the laws of any state or territory. Nowhere in Congressional enactments is any reference made to the ownership of water.

In Sec. 122-421, Wyo. Rev. Stat. of 1931, it is provided that:

> "Rights to the use of water shall be limited and restricted to so much thereof as may be necessarily used for irrigation or other beneficial purposes * * *."

and it is provided that in case beneficial use shall not be made for the period of any five successive years, the rights shall be considered abandoned.

In the Nebraska statute, sec. 81-6309, Neb. Comp. Stat. of 1929, it is provided that all appropriations must be for some beneficial or useful purpose, and that when the appropriator ceases to use the right for such purpose for the period of three years, it shall be declared canceled or annulled. The whole theory of appropriative rights is that the appropriator acquires the right to use such portion of the supply as is within his appropriation and as is applied to beneficial use, and that if he fails to exercise the right and beneficially apply the water, the appropriation is lost. The supply usable under such appropriation then becomes publici juris, subject to appropriation and use by another.

This Court in Schodde v. Twin Falls Land & Water Company, 224 U. S. 107, 56 L. Ed. 686, adopted the findings and conclusions of the trial Court and quoted therefrom. The trial Court, as shown by the opinion of this Court, referred to Basey v. Gallagher, 20 Wall. 670, 22 L. Ed. 452, and then said:

> "In Fitzpatrick v. Montgomery, 20 Mont. 181, 187, 63 Am. St. Rep. 622, 50 Pac. 416, 417, the supreme court of the State of Montana, after referring to what has been just quoted from Basey v. Gallagher, said: 'While any person is permitted to appropriate water for a useful purpose, it must be used with some regard for the rights of the public. The use of water in this state is declared by the Constitution to be a public use. Const. art. 3, Sec. 15. It is easy to see that, if persons, by appropriating waters of the streams of the

state, became the absolute owners of the waters, without restriction in the use and disposition thereof, such appropriation and unconditional ownership would result in such a monoply as to work disastrous consequences to the people of the state. The tendency and spirit of legislation and adjudication of the northwestern states and territories have been to prevent such a monoply of the waters of this large section of the country, dependent so largely for prosperity upon an equitable, and, as far as practical, free, use of water by appropriations.' " (224 U. S. 121.)

The following is quoted from Allen v. Petrick, 69 Mont. 373, 222 Pac. 451:

"The appropriator does not own the water. Creek v. Bozeman Waterworks Co., 15 Mont. 121, 38 Pac. 459; Anderson v. Cook, 25 Mont. 330, 64 Pac. 873, 65 Pac. 113. He has a right of ownership in its use only." (222 Pac. 452.)

The following clear statement of the law is quoted from State v. Sixth Judicial District Court, 53 Nev. 343, 1 Pac. (2d) 105:

"Under a long line of decisions in this and other western states no title can be acquired to the public waters of the state by capture or otherwise, but only a usufructuary right can be obtained therein." (1 Pac. (2d) 107.)

In Murphy v. Kerr, 296 Fed. 536, referring to Wiel on Water Rights, it is said:

"The water right is an incorporeal hereditament in the flow and use of the stream as a natural resource." (296 Fed. 541.)

The nature of the right and the relationship of the appropriator to the ownership of water is clearly stated in Farm Investment Company v. Carpenter, 9 Wyo. 110, 61 Pac. 258, as follows:

"Although an appropriator secures a right, which has been held with good reason to amount to a property right, he does not acquire a title to the running waters themselves, except, it may be, to such quantity as shall from time to time have been lawfully diverted, and after diversion may be running in his ditch or lateral." (9 Wyo. 139.)

In the opinion in Johnson, et al. v. The Little Horse Creek

Irrigating Company, 13 Wyo. 208, 79 Pac. 22, we find the following:

> "What the appropriator may sell is his water right; that is all he has to sell. That is all that would pass by deed of the land as an appurtenance. The water in the stream is not his property; but his right to use that water based upon his prior appropriation for beneficial purposes is a property right, and as such is capable of transfer." (13 Wyo. 227.)

Application to Beneficial Use Is Prerequisite to Perfected Right by Appropriation and a Carrier Is Not an Appropriator

> "The appropriation of water consists in the taking or diversion of it from some natural stream or other source of water supply, in accordance with law, with the intent to apply it to some beneficial use or purpose, and consummated, within a reasonable time, by the actual application of all of the water to the use designed, or to some other useful purpose." (Kinney on Irrigation and Water Rights, 2d Ed., Sec. 707.)

The following is quoted from the opinion in Gates v. Settlers' Milling, Canal & Reservoir Co., 19 Okla. 83, 91 Pac. 856:

> "It seems the settled law in the states where irrigation problems have been dealt with that, in order to acquire a vested right in the use of water for such purposes from the public streams, three things must concur: There must be the construction of ditches or channels for carrying the water; the water must be diverted into the artificial channels, and carried through them to the place to be used; and it must be actually applied to beneficial uses, and he has the best right who is first in time." (61 Pac. 858.)

We quote the following from the opinion in Beers v. Sharpe, 44 Ore. 386, 75 Pac. 717:

> "The rule is settled in this state that to constitute a valid appropriation of water there must be (1) an intent to apply it to some beneficial use, existing at the time or contemplated in the future; (2) a diversion thereof from a natural stream; and (3) an application of it within a reasonable time to some useful industry." (75 Pac. 720.)

In the opinion of the Court of Appeals for the District of

Columbia in Ickes v. Fox, 85 Fed. (2d) 294, we find the following:

"It is settled irrigation law that mere diversion and storage of water does not constitute an appropriation. Before there can be an appropriation the water must be applied to a beneficial use. Highland Ditch Company v. Union Reservoir Company, 53 Colo. 483, 127 P. 1025. In Pioneer Irrigation D. Co. v. Board of Commissioners (D. C.) 236 F. 790, the court, considering constitutional and statutory provisions similar to those of the state of Washington, held that under the Constitution and statute relating to water rights, as construed by he Supreme Court of the State, no property right can be acquired in the use of water until it is applied to a beneficial use. The owner of the carrying ditch gets no title or right to the use of the water and has no property in it subject to disposal, but such property right of disposal is in him who applies the water to beneficial use.

"It is clear, therefore, that the United States under the proceedings provided in the Reclamation Act acquires no title to the water. It is merely a carrier and distributor of the water, and the only title acquired which consists only of a right of use is in the appropriator who applies the water to a beneficial use." (85 Fed. (2d) 298.)

The rule is clearly announced in the Colorado case of Highland Ditch Co. v. Union Reservoir Co., 53 Colo. 483, 127 Pac. 1025, as follows:

"It is unnecessary to enter into a discussion of the evidence further than to state that possibly, excepting a portion of the volume awarded, it appears that appellee has never applied the water stored in its reservoir to the irrigation of lands. Diversion and storage are not sufficient to constitute an appropriation. In addition, the water so diverted and stored must be beneficially applied; that is, in this instance, it must have been applied to lands for the purposes of irrigation. Woods v. Sargent, 43 Colo. 268, 95 Pac. 932; Ft. Morgan Land & Canal Co. v. South Platte D. Co., 18 Colo. 1, 30 Pac. 1032, 36 Am. St. Rep. 259; Thomas v. Guiraud, 6 Colo. 530; Farmers' High Line C. & R. Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028, 4 L. R. A. 767; Sieber v. Frink, 7 Colo. 148, 2 Pac. 901; Wheeler v. Northern Colorado Irr. Co., 10 Colo. 582, 17 Pac. 487, 3 Am. St. Rep. 603." (127 Pac. 1025.)

We quote the following from the opinion in Prosole v. Steamboat Canal Company, 37 Nev. 154, 140 Pac. 720:

> "* * *, there is no right created by the mere diversion of water from a public water course. This act of itself carries with it no right; but, when the act of diversion is coupled with the act of application to beneficial purpose, the appropriation is accomplished." (140 Pac. 722.)

In the simplest form of relationship between the appropriator and the state the former diverts the water from the stream upon his land and diversion and beneficial use are accomplished by the same person. However, it has long been recognized that an individual or group of individuals owning land and desiring to apply water thereto might be financially incapable of constructing the necessary works, especially if reservoir control is required. Consequently, the statutes of the western states have quite uniformly provided for the creation of corporations or the mutual association of water users for the purpose of either constructing the necessary works for the diversion of water, or for the operation of same, or for both. Result is that on many projects a corporation, irrigation district, or mutual association owns and operates facilities for the storage and distribution, or for the distribution alone of the supply to the landowners. These corporations and associations may be generally designated as "carriers." Relationship between the carrier and the sovereign on the one hand, and between the carrier and the user or appropriator on the other, has been considered in numerous Court decisions, and it is generally held that the carrier is the agent of the appropriator entrusted with the duty of either storing and diverting, or of simply diverting the supply and conducting it to the lands of the ures. That the carrier is not an appropriator is uniformly the rule.

In Slosser v. Salt River Val. Canal Co., 7 Ariz. 376, 65 Pac. 332, we find the following:

> "The great cost of constructing dams and canals, and the maintenance of these when constructed, and the advantages in the way of conservation and saving of water which result on the erection and maintenance of large and permanent dams and canals, preclude the policy of restricting the ownership and control of such dams and ditches to actual appropriators. The difficulties arising from the ownership and con-

trol of such means of diversion by one or more individuals as tenants in common are such as to make it necessary, almost, that corporations be organized, for this purpose. Such corporations have been organized, and their rights to the ownership and control of their property have been recognized, in all the arid states and territories. * * * A corporation thus organized for the purpose of furnishing water for agricultural purposes, to be used by others in privity of contract with it, *becomes the mere agent of the latter*, and under the statute, may divert from a public stream water which the latter may acquire and use for purposes of irrigation. The measure of its right so to do is the needs and requirements of those owners or possessors of arable and irrigable lands with whom, by contract, it stands in relation as agent. The doctrine of agency, therefore, unless we concede to such corporations a right not enjoyed by other inhabitants under the statute, must be invoked, in order to confer upon them any right to the diversion of water from a public stream."

In Murphy v. Kerr, 296 Fed. 536, the Court said:

"In the larger systems it has been the practice for an irrigation company to construct diversion dams, canals, ditches, reservoirs, and other physical works for the irrigation of bodies of land, and to sell the land to be irrigated to farmers and to enter into contracts with the purchasers thereof to maintain the physical works, and to divert, store and deliver, or where storage is not used to divert and deliver to the owner of the water right at the land, the water for beneficial use thereon. The property right in the irrigation works is in the irrigation company, and the water right is appurtenant to the land and belongs to the owner thereof. In other cases the owners of the lands supplied by an irrigation system organize a ditch company in which the stock is owned by the water users. The title to the irrigation works is in the ditch company. It contracts with the landowners to divert, store and carry water as above to their lands for beneficial use thereon. Under such an arrangement also the water right is appurtenant to the land and belongs to the owner thereof, while the property right in the irrigation works is in the ditch company.

"The owner of the irrigation works then becomes an intermediary agent of the owner of the land and water right and

diverts and carries the water from the natural stream to the land. It is the carrier of the water. Albuquerque Land & Irrigation Co. v. Gutierrez, 10 N. M. 177, 251, 61 Pac. 357; Snow v. Abalos, 18 N. M. 681, 696, 140 Pac. 1044; San Joaquin & King's River C. & I. Co. v. Stanislaus County (C. C.) 191 Fed. 875, 894, 895; Wyatt v. Larimer & Weld Irrigation Co., 18 Colo. 298, 33 Pac. 144, 36 Am. St. Rep. 280; Gould v. Maricopa Canal Co., 8 Ariz. 429, 76 Pac. 598, 600; Wheeler v. Northern Colo Irr. Co., 10 Colo. 582, 17 Pac. 487, 490, 491, 3 Am. St. Rep. 603; Farmers' Canal Co. v. Frank, 72 Neb. 136, 100 N. W. 286." (296 Fed. 545.)

After citing a number of Colorado cases, the Court in Pioneer Irrigation Company v. Board of Commissioners, 236 Fed. 790, said:

"If I rightly understand these cases, they hold: (1) the owner of the carrying ditch in making the diversion from the natural stream acts solely as the agent or trustee for him who applies the water to a beneficial use, (2) gets no title in or right to the use of the water and has no property in it subject to disposal, and (3) he who applies the water thus diverted to beneficial use acquires a property right in the use of the water thus applied which he, and he only, can sell, dispose of and convey by deed separate and apart from the land to which it has been applied or with the land to which it has been applied. The last proposition is made more certain by Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. 313, 25 Am. St. Rep. 245; Irrigation Co. v. Res. Co., 25 Colo. 144, 148, 53 Pac. 318, 71 Am. St. Rep. 123.

"No property right can be acquired in the use of water until it has been applied to a beneficial use. Thomas v. Guiraud, 6 Colo. 530; Coffin v. Ditch Co., 6 Colo. 443; Highland Co. v. Union Co., 53 Colo, 483, 485, 127 Pac. 1025." (236 Fed. 792.)

That a permit for the diversion of water or for storage and diversion may be obtained by a carrier, and that prior to the disposal to the landowners of the service to be rendered, the car rier has a "right" is not denied. This is far from saying, however, that the carrier may, or does become the appropriator. In intervener's brief the Wyoming cases of Wyoming Central Irrigation Co. v. Farlow, 19 Wyo. 68, 114 Pac. 635, and Lakeview Canal Co. v. Hardesty Mfg. Co., 31 Wyo. 182, 224 Pac. 853, are

cited as authority for the proposition that the canal company is the appropriator. In the former case it was held that the company had rights and property which were taxable, and that the rights and interests in the canal were not appurtenant to the land to be served and were separately taxable. The Court said:

> "In this state all property not exempt by law is taxable, and ditches or other water systems owned by individuals or corporations and not appurtenant to land owned by such individual or corporation are not among the exemptions." (19 Wyo. 80.)

In Lakeview Canal. Co. v. Hardesty it was held that the canal company had rights which were subject to a mechanic's lien. It is stated in the opinion that the company intended to sell perpetual rights to the settlers upon the lands, but it was not said that these were appropriative rights, and it is clear from the entire opinion that what was being sold was rights to the delivery of water; that is, a sale of service. The Court did say that the canal company has some interest in the water rights to which a lien may attach, but it said there are three kinds of rights: (1) the ditch right, (2) the water right, and (3) the right in, incident to, or in connection with the land.

The question insofar as this case is concerned is completely set at rest by the decision of this Court in Ickes v. Fox, 300 U. S. 82, 81 L. Ed. 525. The following is quoted from the opinion:

> "So far as these respondents are concerned, 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;' and by a Washington statute, in force at least since 1917, were 'to be and remain appurtenant to the land.' Moveover, by the contract with the government, it was the land owners who were 'to *initiate* rights to the use of water,' which rights were to be and 'continue to be forever appurtenant to designated lands owned by such shareholders.'
> * * *
>
> "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. Compare Murphy v. Kerr (D. C.) 296 F. 536, 544, 545. The government was and remained simply a carrier and distributor of the water (ibid.), 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 land owner." (300 U. S. 93.)

As to the position of the Government in this case the Reclamation Act must be considered, as the United States is here exercising rights under that enactment. Sec. 8 contains the proviso:

"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, the measure, and the limit of the right."

Whatever might be the rule elsewhere or under different circumstances, the Government here cannot claim to be the owner of the water right in the face of the positive declaration of Sec. 8 of the Reclamation Act. We regard the opinion in Ickes v. Fox as conclusive.

The Land Owners, Not the United State, Own the Appropriative Rights

The Wyoming certificates of appropriation for the lands under the Inter-state, Ft. Laramie and Northport canals were issued to and are owned by the land owners. Following general principles of law and the Wyoming statute that a water right is appurtenant to the land for which acquired, and the command of the Reclamation Act, the State of Wyoming did not, and has not issued to the United State any certificate of appropriation for lands irrigated in the North Platte project.

An application for a permit to acquire the right to the beneficial use of the public water of the State of Wyoming may be made in accordance with the requirements of Sec. 122-404, Wyo. Rev. Stat. of 1931, but an adjudication of a water right can be

made only when an appropriation has been perfected by the application of water to beneficial use. (See Sec. 122-409, W. R. S. 1931, and amendment by Chap. 21, Session Laws of Wyoming, 1941, and Sec. 122-418, W. R. S. 1931, and amendment by Chap. 72, Session Laws of Wyoming, 1937). The State Board of Control, if satisfied that the appropriation has been perfected in accordance with the permit, shall issue a certificate of appropriation (Sec. 122-418, supra), which shall be of the same character as that described in Sec. 122-118, Wyo. Rev. Stat., 1931.

Copies of the order record of the Wyoming State Board of Control for the adjudication of rights for lands embraced in the Pathfinder Irrigation District (Interstate canal), for those in the Goshen Irrigation District (Wyoming lands under the Ft. Laramie canal), and for those comprised in the Northport Irrigation District, are respectively N-571, W-7 and N-576. Each of these orders contains the names of the respective land owners, a description of the lands owned by each, and the quantity of each of the respective appropriations. In each of the orders it is provided that certificates of appropriation be issued to the respective appropriators in accordance with the table showing the names, land descriptions, and other data. Certificates were issued in accordance with the orders of the Board, of which N-572, W-8 and N-577 are sample copies of those issued in the Pathfinder, Goshen and Northport Districts, respectively. Each of these certificates is issued to a named land owner, describes the lands to which the right is appurtenant, and specifies the amount of the appropriation. Certificates similar to those of which N-572, W-8 and N-577 are copies, were issued to each of the land owners named in the respective Board of Control orders (pp. 14983, 15364, 15011, 15012). A copy of N-577, one of the certificates issued in the Northport District, appears in the Appendix hereto, page 1.

Lands supplied under Warren Act contracts of the Hill Irrigation District and the Lingle Water Users Association are described in the order record of the Wyoming Board of Control, copy of which is W-15, and W-27 and W-28 are photostatic copies of certificates of appropriation in the respective districts. Other certificates were issued to each of the land owners named in the Board of Control order similar to W-27 and W-28 (pp. 15610-11).

Action of the Wyoming officials in issuing these certificates to the land owners not only complied with the mandatory require-

ments of Wyoming statutes, but likewise conformed to the positive direction of the Reclamation Act that the right to the use of water shall be appurtenant to the land irrigated (Sec. 8, Act of June 17, 1902, Title 43 U. S. C. A. 372).

The attendant property values accruing to the owners of the land from the issuance of these certificates is disclosed by the testimony of Harnan, an employee of the Goshen Irrigation District, who said that lands in that district unirrigated were of the value of $2.00 per acre, while irrigated land is worth from $30.00 to $100.00 per acre (pp. 15372-73), and that such value of the irrigated lands is exclusive of construction assessments (p. 15377). No doubt similar increase in value has occurred in the other districts. These values would be largely, if not wholly, destroyed by taking away the appurtenant water rights.

We know of no way by which the appropriators may be deprived of these valuable property rights and their transfer to the United States accomplished. Individual property rights are as jealously guarded and fully protected by the Constitution and its amendments as the powers of the Government itself.

The facts of the case disclose that the individuals owning the lands irrigated under the Government project have the appropriative rights. The United States has the right to impound and deliver water to these irrigators and, as clearly held by this Court in Ickes v. Fox, 300 U. S. 82, 81 L. Ed. 525, the water rights are the property of the land owners and the Government is a carrier and distributor of the water.

Conclusion as to Government Claims of Ownership

Strong reliance is placed on state statutes which, it is contended, confirm the ownership of water rights by the United States (U. S. Brief, pp. 146 to 154). Sections 122-713 and 122-723 Wyoming Revised Statutes, 1931, are cited (U. S. Brief, pp. 149, 150). The first of these deals only with the right of the Board of Commissioners of an Irrigation District to contract with the United States for a water supply under any act of Congress permitting such contract. Obviously, this statute was enacted to give legislative sanction to the consummation of contracts between Irrigation Districts and the United States for the delivery of supplies from Government reservoirs constructed under the Reclamation Act. Section 122-723 referred to supra, provides it shall be competent for the Court to order charges to

be paid by an Irrigation District for the construction or sale of irrigation works and water rights in accordance with the provisions of the act of Congress of December 5, 1924. This Congressional enactment is generally known as the "Fact Finders Act" and pertinent provisions thereof relating to payment of construction charges are contained in 43 Stat. 702, Sections 473 and 474 of Title 43 U. S. C. A. The purpose of the Wyoming statutes, considered in connection with the Congressional act of December 5, 1924, clearly discloses that the reference to "water rights" comprehends nothing more than the right to the delivery of water by the United States as a carrier, under the provisions of the Reclamation Act and payment therefor of the construction charges which are assessed against the land owners.

The case of Scherck v. Nichols, 55 Wyo. 4, 95 Pac. (2d) 74, is cited in the United States Brief, page 165, as authority for the proposition that one, other than the owner of the land, may make a valid water appropriation. Examination of the opinion in this case will disclose that the holding of the Court is confined to the proposition that a right may be initiated by a stranger but can only be perfected by the application of water to the land, and when perfected the right becomes appurtenant to the land and the property of the land owner. No other conclusion as to the ultimate attachment of the right to the land can be reached under the positive declaration of Section 122-401 Wyoming Revised Statutes, 1931, that water rights can not be detached from the lands, place or purpose for which they are acquired. And we are here dealing with appropriative rights under the Reclamation Law, and in section 8 thereof, it is expressly provided that the right to the use of water shall be appurtenant to the land irrigated (32 Stat. 390, 43 U. S. C. A. 372).

The argument is made that the decisions in Ide v. United States, 263 U. S. 497, and other cases involving the right of the United States to recapture and use return flow (U. S. Brief, pp. 114-122), recognize the United States as the owner of the water rights and are contrary to the decision of this Court in Ickes v. Fox, 300 U. S. 82. We think it clear from these decisions that the extent of recognition is only that of the right of the United States to collect and distribute water to the irrigators—in other words, to perform its functions as a carrier and distributor. In that connection we point out that in the recent case of United States v. Tilley, 124 Fed. (2d) 850, involving similar questions, it was clearly held that the Canal Company, having a contract for

carriage of the water, could not by its action deprive the land owners of any part of their appropriative rights (124 Fed. (2d) 857).

Counsel for United States explain as "historical happenstance" (U. S. Brief, pp. 16, 93), the fact that under their theory in this case the western states, where irrigation is practiced, would not have the same sovereignty as the eastern ones. According to the decision of this Court in Kansas v. Colorado, 206 U. S. 46, such inequality is not to be tolerated. There it is said that the western states of Kansas and Colorado were admitted to the Union with the full powers of local sovereignty which belonged to other states; that while arid lands are to be found mainly, if not only, in the western and newer states, yet the powers of the national government within the limits of those states are the same (no greater and no less) than those within the limits of the original thirteen; and that one cardinal rule underlying all the relations of the States to each other is that of equality of right (206 U. S. 95, 92, 97). Where is the line of demarcation to be drawn, segregating those states of the west, having restricted powers, from their more favored sister commonwealths of the east?

Large expenditures have been made by the United States for the North Platte and Kendrick Projects. However, the entire cost of construction and maintnance will be borne by the water-users (U. S. Brief p. 97). It is doubtful if the investment of the United States approaches that of the land owners in the improvement of their farms, and the subjugation of raw land to the cultivation of crops

Since Irrigation Districts have been formed which operate the distribution systems under contracts with the United States, there is no direct relationship between the appropriator and the Government. Copies of these contracts for the Gering-Fort Laramie, Pathfinder, Northport and Goshen Districts are respectively Nebraska exhibits 567, 570 and 574, and Wyoming exhibit W-11-A. In each of these contracts it is provided that the care, operation and maintenance of the distribution system is transferred to the District (see par. 5 of N-567; par. 34 of N-570; par. 26 of N-574; par. 33 of W-11-A). In each of the contracts provision is contained that water is to be turned out of the reservoirs as ordered by the district (see N-567, par. 27; N-570, par. 58; N-574, par. 46; W-11-A, par. 50). In the contracts it is also provided that the distribution of storage water, after release

from the Pathfinder reservoir into the river, will be in charge of the proper state officers or other officers charged by law with the distribution of stored water from the North Platte River (See N-570, par. 31; N-574, par 24; W-11-A, par. 30). As pointed out by counsel for the United States (U. S. Brief, pp. 174, 175), these contracts do not deal with storage and natural flow separately. That they do not is an argument in favor of the Wyoming plan of mass allocation.

We find the following at pages 39 and 40 of intervener's Brief:

> "Thus various private rights in this non-navigable water, the very rights lying behind the States' equities in this litigation, have been created over the years one by one through the means of appropriation in accordance with custom and territorial law or, more recently, state law, as specifically permitted and provided by Congress in the Act of July 26, 1866, c. 262, 14 Stat. 251, which is implemented by the Act of July 9, 1870, c. 235, 16 Stat. 217, and the Desert Land Law of March 3, 1877, c. 107, 19 Stat. 377. The validity of those private rights and the authority of the States to control their exercise since their acquisition, the United States does not dispute, nor does it dispute the fact that unappropriated water in the stream over and above the amounts reserved or appropriated for the Government projects remains subject to private acquisition by appropriation under the statutes cited."

Giving these admissions their full effect, there remains only the question of what "rights" the United States might have in the event of the repeal of the Congressional Acts of July 26, 1866, July 9, 1870 and March 3, 1877. Until such repeal occurs we agree with the conclusion of the Master, (M.R. pp. 11, 175) that the question is academic.

Some unpublished decisions are cited in intervener's Brief, pp 132, 133, as sustaining the Government's claims. Whatever these decisions may be, they can not serve to overcome the positive and unmistakable language of this Court. We accept at their full face value the many pronouncements of this Court in the cases which we have cited, all of which uniformly and consistently support the proposition that the State, and not the United States, has control over the use for irrigation of the waters within its borders.

ANSWER TO PARAGRAPHS II TO XVII, PAGES 177 TO 226 OF INTERVENER'S BRIEF

United States Brief, Paragraph II

It is contended that a limitation should be placed upon reservoir use on tributaries between Pathfinder and Guernsey. It is not claimed such a limitation is necessary to protect the natural flow supply, but only that the supply for winter diversions to the inland reservoirs may be impaired. In that connection, the use of the LaPrele Project is discussed and seems to be mainly relied upon as foundation of the Government's claim. Testimony concerning this project was introduced at pages 18647 to 18692 of the Record, and long thereafter Barry Dibble, a witness for the United States, testified that diversions of 73,000 acre feet could be made to the inland reservoirs during the winter season. (For Mr. Dibble's testimony at pages 28696 to 28698 of the Record, see appendix to Wyoming Brief herein filed, pages 78 and 79.) The Government witness did not qualify his testimony in any respect and the evidence of the United States therefore fails to furnish any basis for limitation upon storage in the Pathfinder to Guernsey area.

As pointed out by the Master (M.R. pp. 145-146), there is no evidence as to what contribution, if any, tributaries in the area make to the winter diversion supply of the reservoirs, or as to what additional storage projects may be feasible. In the United States Brief, it is said only that there is "possibility" of future additional storage, and that the extent of present reservoir storage capacity cannot be determined from the record (U.S. Brief, pp. 180, 181). Admittedly, there is no definite evidence upon which to base any limitation upon reservoir use in the section. If such limitation, as is proposed, has merit, testimony should have been supplied by the United States as its proper foundation.

United States Brief, Paragraph 111

In Paragraph III of the United States Brief, pages 183 to 193 inclusive, it is claimed some different disposition ought to be made than that recommended by the Master concerning apportionment of natural flow in the Whalen-Tri-State Dam section. We adhere to the solution of the case proposed in our Brief heretofore filed, and respectfully suggest that the mass

allocation we propose obviates the difficulties suggested in the United States Brief. If, however, the natural flow in the Whalen-Tri-State Dam section is to be apportioned, the proposed division of 25 per cent to Wyoming and 75 per cent to Nebraska seems the only reasonable basis of allocation. The entanglements incident to some more elaborate system will bear little fruit as far as the equity of the situation is concerned.

Any apportionment to the United States would be contrary to the decisions of this Court in Ickes v. Fox, 300 U. S. 82, and upon the motion to dismiss this cause, 295 U. S. 40. The conclusion of the Master that no apportionment should be made to the United States (M.R. p. 176), is in full accord with these decisions.

As an alternative to the percentage allocation, United States suggests an interstate priority schedule for the Whalen-Tri-State Dam section (U. S. Brief pp. 186-193). We believe the objections to interstate priority administration as given by the Master at page 149 of his Report are unanswerable. Impossibility of fixing limitation upon individual appropriators seems an insurmountable obstacle to any such plan.

Hinderlider v. La Plata River Company, 304 U. S. 92, is cited as authority to sustain such interstate priority administration. We think a study of the opinion gives exactly the opposite reflection. What this Court held was that when the equitable share of water of the State of Colorado was determined, no appropriator of that state could claim any right greater than the equitable share which was allotted. No attempt was made in the compact under consideration to apportion any supply to any individual appropriator.

It is said in the United States Brief, (p. 187), that a priority schedule might properly be imposed because each State administers the stream on a priority basis, in any event. The rule of priority does prevail in Wyoming and also in Nebraska, but Wyoming does not administer the segment of the stream between Whalen and the Nemraska state line on a priority basis separate and apart from the remainder of the stream above Whalen. Each state should be left entirely free to administer the supply allotted to it. In the words of the Master, there should be full freedom of intrastate administration (M.R. p. 149). Wyoming should not be compelled to administer the 42 miles between Whalen and Tri-State Dam as an independent

unit, separate and apart from the area above. It should not only have the right, but under present statutes, its administrative officials will have the duty of administering on a priority basis to all natural flow appropriators, including those above Whalen as well as those below.

United States Brief, Paragraphs IV to XVII, Inclusive

In Paragraph IV, pages 193 to 197 of its Brief, Intervener contends storage water should be defined in the Decree as water released from reservoirs for use on lands having storage contracts, in addition to the water which is discharged through the reservoirs to meet the natural flow requirements of any canal as recognized or prescribed in the Decree. In its present condition the recommended Decree specifies only the requirments of the Nebraska State Line canals. The demand of any natural flow appropriator in Wyoming below Pathfinder is not defined. Consequently, the suggested definition can not be used. The attempted definition, and the fears of Government counsel which impel them to urge that the definition be made, argue strongly for the mass allocation which Wyoming proposes.

It is next contended by Intervener, that Wyoming and Colorado should be required to maintain records of the irrigation and storage of water in the areas above Pathfinder. (Paragraph V, Pages 198-200.) As we understand the Master's recommendations, limiting use in these areas to certatin designated acreages is for the purpose of maintaining the status quo and preventing additional depletion which would result from increased use. For illustration, at page 135, of his report, the Master says that in the Wyoming area above Pathfinder equitable apportionment does not require any limitation upon present uses. The recommendations interpreted in the light of the reasons therefor, would seem to make unnecessary the keeping of such records as are suggested. In any event, the United States takes a census of irrigated lands every ten years, and we think that Intervener will not be uninformed as to the amount of lands irrigated.

As to paragraph VI, pages 200 to 201 of Intervener's Brief, we are in accord and have proposed an addition to paragraph 2 of the Master's recommendations showing exclusion therefrom of Seminoe Reservoir.

Paragraph VII of Intervener's Brief, pages 202 to 207, urges

limitation upon Nebraska as to the use of natural flow in the Whalen-Tri-State Dam section and below Tri-State dam. The complete remedy for this situation is that proposed in the Decree recommended by Wyoming, wherein Nebraska would be enjoined from diverting more than a specified quantity of water in the Whalen-Tri-State Dam section, and from obtaining conveyance past Tri-State Dam of any water in excess of that needed for diversion in the section. Our proposal appears in paragraph 4 of our proposed Decree, page 83 of our opening Brief, with explanation at pages 85 to 90. The argument of counsel for Intervener in this connection fully supports our position, and it appears to us that the terms of the Decree which we have offered, provide the only satisfactory solution.

We are in agreement with Intervener in advocating that the Decree should not prohibit joint operation of the Government reservoirs, as is argued by counsel for Intervener in paragraph VIII of the United States Brief, pages 207 to 209. It does not appear, however, that any readjustment of contracts is necessary for joint operation, as if the irrigators receive such supplies as they are entitled to under the rule of beneficial use, no one will be injured. We do not say there must be joint operation—only that it should not be prohibited by the Decree. Under the solution proposed by Wyoming the reservoirs may be operated in accordance with their respective priorities, but we do not believe joint operation should be prohibited.

We are in agreement with the United States concerning paragraph 5 of the Master's recommendations for decree, dealing with the use of return flow from the Kendrick Project, and discussed in paragraph IX of the Intervener's Brief, pages 209 to 215. Our discussion on the subject appears in our opening Brief, pages 77 to 80 inclusive.

As to paragraph X of Intervener's Brief, page 216, contending for specific provision in the Decree that it does not affect the distribution of storage water, this Defendant takes an exactly contrary position, believing that apportionment between the states cannot be made of only a portion of the supply, and that storage water must be divided. We have discussed this subject in our opening Brief under the heading "Apportionment of Storage Water," pages 47 to 57 inclusive.

As to possible importation into the basin from other watersheds, discussed in paragraph XI, pages 217 and 218, of Intervener's Brief, we think it a matter of rather academic import at

this time, but have no disagreement with the position taken by the United States.

In Paragraph XII of Intervener's Brief, page 218, it is proposed that the Decree shall prohibit the use of storage water by those not entitled thereto by contract. Storage water and natural flow are commingled in the Whalen-Tri-State Dam area It is all water and no one can determine which is which. We think the evidence clearly demonstrates the impossibility of making a segregation, even as a bookkeeping process, a subject which we have discussed under the heading "Segregation of Natural Flow and Storage," pages 40 to 47 of our Brief heretofore filed.

We are in general agreement with the contentions made by Intervener in paragraph XIII, pages 219 to 220, of the United States Brief, where the contention is made that the decree must be complete. The subject has received our attention in our Brief heretofore filed under the heading "A Complete Equitable Apportionment Should Be Made," pages 80 to 82.

Under the solution of the case proposed by this Defendant, and believing that the Court must deal in seasonal quantities in making an apportionment between Wyoming and Nebraska, we find the contentions of the Intervener in paragraph XIV of its Brief, pages 220 and 221, as to delivery rate of storage water in Wyoming, without importance in a proper disposition of the case. We do say, however, that if one cubic foot per second of natural flow is adequate for each 70 acres, no larger amount of storage water should be necessary. There is no difference in the quality of natural flow and storage.

In paragraph XV of Intervener's Brief, pages 221 to 223, inaccuracy of Table III, page 67, of the Master's Report is suggested. It is pointed out, for illustration, that in 1933 some water passel Guernsey, which was unusable. Recognition of this fact is given in the Master's Report at page 96, where he says that mean divertable flow passing Tri-State Dam for the May-September period, 1931-1940, was 81,700 acre feet; giving as the source of his information Wyoming Exhibit 180. Examination of this exhibit discloses that the actual average flow passing Tri-State Dam during that decade was 94,500 acre feet, and a reduction to 81,700, designated as divertable or useable flow, was because of unuseable water in 1933.

In paragraph XVI of Intervener's Brief, pages 223, 224, comment is made concerning the Table on page 81 of the Master's Report concerning percentages of use during the 1931-1940 dec-

ade of the canals in the Whalen-Tri-State Dam section. Our conclusion about this table is that it is wholly misleading because it is not a comparison of the use of the respective states, but only an analysis of use of individual appropriators.

SECTION II

ANSWER TO NEBRASKA BRIEF SUMMARY OF THE ARGUMENT

The argument in answer to the Nebraska Brief, is summarized as follows:

1. The conclusion of the Master that the evidence fails to disclose damage to Nebraska, by reason of use of water in Wyoming, is fully supported by the evidence, particularly in view of the Master's conclusion that Nebraska is not entitled to any water for use below Tri-State Dam. As to the Whalen-Tri-State Dam section, the Master's report shows that in the 1931 to 1940 decade, Nebraska made excessive use of 1,505,789 acre feet, including divertible water passing Tri-State Dam, and that the total excess use of Wyoming in the same period was only 130,429 acre feet. It further appears that if this excess use had not been made by Nebraska, there would have been no deficiency for her appropriators at any time during the ten year period.

2. The dependable supply is not to be determined on the basis of the run-off of the lowest years, but production of the entire period for which information is available should be considered. The record discloses such a supply during the entire period, 1895 to 1943, as will serve all present uses, supply the Whalen-Tri-State Dam section with the requirements proposed by the Master and permit the irrigation of the Kendrick Project.

3. The doctrine of prior appropration is not the exclusive criterion upon which the relative rights of the states are to be determined, but only one of the elements to be considered. In any event, whatever weight is given to the doctrine of prior appropriation in measuring the relative rights of the states, equitable apportionment is to be effected only by means of mass allocation, as was done in Wyoming v. Colorado, and interstate priority administration, or a decree fixing the individual rights of the appropriators is not warranted.

4. The interstate priority administration, proposed by Nebras-

ka for the Whalen-Tri-State Dam section, or for the Whalen to Bridgeport area, is inequitable as it might deprive Wyoming appropriators, who have enjoyed undisturbed use of their rights for 40 to 50 years, of water supply for the purpose largely of furnishing natural flow to the Tri-State canal in Nebraska, which has a storage supply to cover any natural flow deficiency. The proposed interstate administration between Whalen and Bridgeport would serve to regulate only about 7,600 acres in Wyoming for the benefit of more than 120,000 in Nebraska, and that such regulation is necessary, is not disclosed.

5. The only proper apportionment in the Whalen-Tri-State Dam section is an allocation to the states based upon a combined supply of natural flow and storage. As to a division of natural flow only, that proposed by the Master of 75 per cent to Nebraska and 25 per cent to Wyoming, represents an equitable division and is preferable to the complicated "block system" advocated by Nebraska.

6. Canal requirements, in terms of water supply, are based upon the combination of the three factors of acreage, distribution system losses, and delivery to the land. No proper comparison can be made between such requirements and the use of acreage alone in the area above Whalen as fixing the rights to be enjoyed.

7. As between Wyoming and Nebraska, Wyoming produces 45 per cent of the water and irrigates only 29 per cent of the acreage. Nebraska also enjoys the irrigation of over 70,000 acres from return flows of the North Platte Project, without contribution to the cost of storage. Measuring the relative rights of the two states, Wyoming is clearly entitled to the enjoyment of present uses above Whalen, as recommended by the Master, and to an allotment for use in the Whalen-Tri-State Dam section, and for the irrigation of the Kendrick Project. No restriction should be imposed upon Wyoming, unless Nebraska is limited to the use of such seasonal quantities, including storage as well as natural flow, as are necessary to meet the demands of beneficial use of Nebraska appropriators making diversions in the Whalen-Tri-State Dam section.

THE ARGUMENT

1. CLAIMED DAMAGE TO NEBRASKA

The Master found:

"If to sustain her burden of proof Nebraska must establish not only violations of her priorities or infringement otherwise on her equitable share by the other States, but also that as a result she has suffered injury of great magnitude in the broad sense of serious damage to her agriculture or industries or observable adverse effects upon her general economy, prosperity or population, then her proof has failed, for there is no clear evidence of any of these things." (M.R. p. 105.)

Considering evidence presented as to the production of crops in Nebraska, the Master came to the following conclusion:

"The statistics, taken all in all, are, to say the least, inconclusive as to the existence or extent of damage to Nebraska by reason of the drouth or by reason of any deprivation of water by wrongful uses in Wyoming or Colorado." (M.R. p. 91.)

These conclusions are amply supported by the evidence, and we find nothing in the Nebraska Brief which casts any doubt upon their accuracy.

Certain contentions are advanced by Nebraska in her Brief, pages 7 to 24, as to claimed damage, based upon claimed "out-of-priority" diversions. We do not understand the pertinence of such arguments in the face of the Master's conclusions above stated, and especially in view of the fact that the interstate priority administration, contended for by Nebraska, has never been in effect.

Reference is made to the refusal of Wyoming to administer the stream on an interstate priority basis, and certain testimony is set forth in the Appendix to the Nebraska Brief, pages 93 to 104. Wyoming admits that her officials have never administered the stream on the basis of an interstate priority schedule, and their action is confirmed by the refusal of the Master to recommend such an administration.

At page 21 of the Nebraska Brief, we find the following:

"It is equally obvious that in the fourteen years, 1930 to 1943 inclusive, there was not even sufficient flow in any of said years to fill Pathfinder Reservoir, and that for that per-

iod, any water which might be used in the Casper Irrigation District must be subtracted from the supply for existing irrigation projects."

Run-off at Pathfinder for the years 1930 to 1943 was as follows:

Year	Acre Feet	Year	Acre Feet
1930	1,072,800	1937	1,130,600
1931	706,300	1938	1,334,900
1932	1,506,600	1939	698,200
1933	1,140,500	1940	569,800
1934	382,200	1941	850,000
1935	696,200	1942	1,100,000
1936	1,045,600	1943	1,000,000

The values for the years 1930 to 1940 are taken from the Master's Report, pages 23 and 24, and for the years 1941 to 1943 from the chart in the Master's Report at page 25. Capacity of Pathfinder Reservoir is 1,045,000 acre feet (M.R. p. 30). In seven years out of fourteen the run-off exceeded the capacity of Pathfinder, and in an additional year (1943) it was almost equivalent. The Nebraska statement that in any of the fourteen years there was not suffcient flow to fill Pathfinder Reservoir is grossly erroneous.

Contention is made that the Kendrick Project will be operated by Wyoming without regard to the needs of Nebraska. The first unit of the Kendrick is completed and the reservoirs commenced operating in 1938 and 1939, as shown by the Engineers' Stipulation, pages 5 and 6. (See p. 1, Appendix to Wyoming Brief heretofore filed.) Testimony in this case was concluded in December 1941 and this is the beginning of 1945. It seems wholly idle for Nebraska to contend she is threatened by the use of the Kendrick Project, when, although the Project has been completed several years, there is no evidence or suggestion that any actual use has been made adverse to Nebraska's rights.

A large part of the Nebraska argument as to damage and threatened damage, relates to distribution of water in the Whalen-Tri-State Dam section in the drouth decade 1931 to 1940. Using the values in the Tables at pages 76 to 79 of the Master's Report, showing diversions in that decade of the canals diverting in the Whalen-Tri-State Dam section, we compiled a table appearing at pages 88 and 89 of our Brief heretofore filed,

showing the excess diversions made by Wyoming and Nebraska. It was also there pointed out that Nebraska obtained excesses passing Tri-State Dam in an average amount of 81,700 acre feet for the May-September period during the 1931-1940 decade. All divertible water passing Tri-State Dam was excess supply because of the Master's conclusion that no up-stream supply is needed below that point (M.R. pp. 9, 92, 96). In order that we may fully show the excesses received by Nebraska, the quantities passing Tri-State Dam, taken from Wyoming Exhibit No. 180, are set forth in the following tabulation:

Year	Acre Feet	Year	Acre Feet
1931	58,600	1936	59,400
1932	145,900	1937	98,800
1933	285,500	1938	94,700
1934	16,100	1939	41,000
1935	112,900	1940	32,400

The average of the May-September period for the decade was 94,500 acre feet, but since there was 128,000 acre feet of unuseable supply in 1933, the average divertible or useable supply was 81,700. Summarizing for the 1931-1940 decade the excesses received by Wyoming and Nebraska respectively through excess canal diversions, the values for which appear in our table at pages 88 and 89 of the Brief heretofore filed, and including therewith the excess supplies passing Tri-State Dam we find that the two states participated in these excesses as follows:

Canal	Wyoming Acre Feet	Nebraska Acre Feet
Interstate	6,000	236,000
	900	
	1,300	52,000
Ft. Laramie	20,320	21,916
9 Wyo. Private Canals	101,909	
Mitchell		37,430
Gering		18,711
Tri-State		285,201
Ramshorn		3,853
Northport		33,678
Passing Tri-State		817,000
Total	130,429	1,505,789

It therefor appears that during the drouth decade total excess supplies were received by both states of 1,636,218 acre feet. It was found by the Master that the respective rights of the two states in the Whalen-Tri-State Dam section are represented by 75 per cent for Nebraska and 25 for Wyoming (M.R. pp. 158, 159). However, excesses were enjoyed during the 1931-1940 decade in the relationship of 92 per cent to Nebraska and 8 to Wyoming. All of the excess use made by Wyoming amounts to 130,429 acre feet, or only an average of 13,000 each year. This is less than half of the average annual excess of supply in the section of 31,645 acre feet as determined by the Master (M.R. p. 67). Of course, we realize that Nebraska contends the 9 Wyoming Private Canals received an adequate supply in all years, and this is true. Likewise, the Nebraska canals could have received an adequate supply in all years except for their excessive use in 1931 to 1933 and 1936 to 1939. Any shortage that was sustained by the Nebraska canals could have been completely alleviated if Nebraska had permitted them to use only the supplies required each year, and if Nebraska had not demanded, and obtained divertible supplies passing Tri-State Dam.

Comparison should be made between the rights of the states and not as to individual canals. When such comparison is made, it is entirely obvious from the values taken from the Master's Report in the Tables at pages 76 to 79 inclusive, that when Nebraska suffered any shortage of supply it was due to her own excessive use in a prior year or years.

Nebraska contends that the Mitchell canal received very unfair treatment in 1940, but that same year 32,400 acre feet of divertible water passed Tri-State Dam which was unneeded for any lower point, and which could have been used to supply Mitchell's deficiency.

Percentages of use of different appropriators in the section, as disclosed at page 81 of the Master's Report, and much discussed in the Nebraska Brief, are misleading. The nine Wyoming Private Canals, credited with a supply of 122 per cent, actually diverted in excess of their needs during the entire 1931-1940 decade only an average of 10,120 acre feet each year, while a single Nebraska canal, the Tri-State, diverted an average in excess of requirements of 19,900 acre feet each year, or almost twice that of the Wyoming Canals (For Tri-State Canal see M.R. Table XII, page 78, and for the Wyoming Canals, Table IX, page 77).

If percentages are to be employed, the only proper comparison is that between the states instead of between individual canals or groups, and, as pointed out above, the Nebraska excesses during the decade were 92 per cent of the total excess use and that of Wyoming only 8 per cent. We do not contend that Wyoming did not receive a better distribution of these excesses than Nebraska, but it is equally clear that Nebraska would have had no shortage whatever if she had not taken the excesses whenever opportunity presented. Largely what occurred is that the appropriators in each state took excess supplies whenever they could. Unlike Nebraska, we propose a remedy for the situation by confining each state to the amounts necessary for beneficial use. Nebraska proposes only restrictions on Wyoming and offers to submit to none.

No relief can be predicated upon any claimed dispute as to the priority of the Kendrick Project, such as is suggested at page 18 of the Nebraska Brief, for the reason that there is no controversy in this case concerning same. In the Amended and Supplemental Answer of Wyoming, page 19, it is admitted that the priority of Seminoe Reservoir is December 1, 1931, and of the Casper-Alcova Canal July 27, 1934.

The "threat" of the Kendrick Project is not real. Its facilities have been completed for several years and Wyoming has had ample opportunity to supply it with water at the expense of the lower appropriators and has not done so. Moreover, the Master concludes that the evidence is convincing that given supply conditions of 1895 to 1939, the Kendrick Project can be irrigated without violation of priorities and with a considerable return flow representing net seasonal gain to the river below Alcova (M.R. p. 143).

2. DEPENDABLE SUPPLY

It is contended in the Nebraska Brief, page 27, that the dependable flow at Pathfinder should be either the average of the 1931 to 1940 decade, or of the 1930 to 1943 period. This is directly contrary to the principles announced by this Court in Wyoming v. Colorado, 259 U. S. 419, where it is said:

> "According to the general concensus of opinion among practical irrigators and experienced irrigation engineers, the lowest natural flow of the years is not the test." (p. 484.)

The subject of available and dependable supply has been

covered in our Brief heretofore filed, pages 19 to 27 inclusive, and we have little to add to what is there said. In our discussion in our former Brief, under the heading "The Water Supply of 1931 to 1940", pages 27 to 31, we pointed out the error in using the period of lowest supply as the basis of equitable apportionment. We renew the suggestion there made that it would be just as erroneous to use the 1931 to 1940 decade of low supply as a basis as it would be to adopt the abnormally high run-off of the prior decade, 1921 to 1930. The only sound basis is the consideration of all historical data available comprising the entire period 1895 to 1940.

There is no evidence in the record concerning the years 1941 to 1943 but the Master included run-off for these years in the graph at page 25 of his Report, and Nebraska discusses water supply from the standpoint of inclusion of these additional years. Thus invited to go outside the record, we feel justified in saying to the Court that all requirements were met in the years 1941 to 1943, and that upon September 30, 1942, there was in storage in the upper reservoirs, Seminoe, Alcova and Pathfinder, 399,220 acre feet, and upon September 30, 1943, 414,940. The September 30, 1942 value is taken from the Nebraska Biennial report of 1941-1942, pages 671 to 673, and the September 30, 1943 figure comes from records of the Bureau of Reclamation. We have no hesitancy in saying that all requirements were met during the three years, as otherwise the surplus would not have been in the upper reservoirs at the end of 1943. Considering the net consumptive use of the Kendrick Project, as suggested by Nebraska in its Brief, (page 20) of 122,000 acre feet, it is obvious this quantity could have been supplied for the three years in question since the surplus at the end of 1943 was 414,940 acre feet. In connection with the Wyoming study, comprised in Wyoming Exhibits 170 to 176, discussed in our Brief heretofore filed (pp. 20-27) showing that all present uses upon the stream could have been supplied from 1895 to 1940 inclusive, including the Kendrick Project, with a residue of 169,300 acre feet in the upper reservoirs at the end of 1940, and taking into account the surplus at the end of 1943 of 414,940 acre feet, it is obvious that continuously from 1895 to 1943 inclusive all present uses could have been supplied, including the Master's proposed requirement for the Whalen-Tri-State Dam section and with complete irrigation of the Kendrick Project during the entire period.

3. EXTENT OF APPLICATION OF PRIOR APPROPRIATION DOCTRINE

It is argued by Nebraska that since the doctrine of prior appropriation prevails in Wyoming, and because it has been applied in suits between individuals, it must be recognized as the sole basis for determination of the rights of Nebraska and Wyoming. Chief reliance is placed upon Wyoming v. Colorado, 259 U. S. 419, wherein decisions in certain cases between irrigators in adjoining states are cited, followed by this statement:

> "These decisions, although given in suits between individuals, tend strongly to support our conclusion, for they show that by common usage, as also by judicial pronouncement, the rule of priority is regarded in such states as having the same application to a stream flowing from one of them to another that it has to streams wholly within one of them."

Observe it is said only that the decisions between individuals "tend strongly to support our conclusion," and are not assumed to be controlling. In a later case, Connecticut v. Massachusetts, 282 U. S. 660, 75 L. Ed. 602, this Court said:

> "The determination of the relative rights of contending States in respect of the use of streams flowing through them does not depend upon the same considerations and is not governed by the same rules of law that are applied in such States for the solution of similar questions of private right. Kansas v. Colorado, 185 U. S. 125, 146; 46 L. Ed. 838, 846; 22 S. Ct. 552. And, while the municipal law relating to like questions between individuals is to be taken into account, it is not to be deemed to have controlling weight. As was shown in Kansas v. Colorado, 206 U. S. 46, 100; 51 L. Ed. 956, 975; 27 S. Ct. 655, such disputes are to be settled on the basis of equality of right. But this is not to say that there must be an equal division of the waters of an interstate stream among the States through which it flows. It means that the principles of right and equity shall be applied having regard to the 'equal level or plane on which all the States stand, in point of power and right, under our constitutional system,' and that, upon a consideration of the pertinent laws of the contending States and all other relevant facts, this court will determine what is an equitable apportionment of the use of such waters.

Wyoming v. Colorado, 259 U. S. 419, 465, 470; 66 L. Ed. 999, 1013, 1015; 42 S. Ct. 552." (282 U. S. 670, 671.)

Significantly, in the above case, Wyoming v. Colorado is cited as authority for the proposition that municipal law is to be taken into account, but is not to be deemed to have controlling weight.

In New Jersey v. New York, 283 U. S. 336, 75 L. Ed. 1104, decided subsequently to Wyoming v. Colorado, this Court said:

"We are met at the outset by the question what rule is to be applied. It is established that a more liberal answer may be given than in a controversy between neighbors, members of a single state. Connecticut v. Massachusetts, 282 U. S. 660, ante, 602. 51 S. Ct. 286. Different considerations come in when we are dealing with independent sovereigns having to regard the welfare of the whole population and when the alternative to settlement is war." (283 U. S. 342.)

In the latter case we also find this significant statement:

"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." (283 U. S. 343.)

Extremely pertinent is the statement of this Court in Hinderlider v. LaPlata, 304 U. S. 92; 82 L. Ed. 1202, as follows:

"For whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." (304 U. S. 110.)

The conclusion of the Master that neither the equitable shares of the States nor the matter of apportionment by decree ought to be determined solely upon the basis of priorities (M.R. pp. 9, 112), is fully supported by the decisions of this Court.

The authorities cited dispose of the Nebraska contention that the doctrine of priority of appropriations must be applied as the sole guide because Wyoming is an appropriation state. Nebraska also contends there is an estoppel against Wyoming because this Defendant in paragraph 22 of her Amended and Supplemental Answer herein alleged that the waters of the South Platte River were not so apportioned by compact as to give recognition to the rights of prior appropriators on the Platte River. The position was not that priority of appropriation

should be used as the basis of an interstate compact, but only that when it had not been in connection with the South Platte, Nebraska could not equitably demand its application on the North Platte; and particularly could not do so for the purpose of obtaining a supply for appropriators on the Platte who had the same rights to obtain water from the South Platte as from the North Platte.

It is contended Wyoming based her case against Colorado on the recognition of priorities. If so, the result was a mass allocation of supply and that is exactly what Wyoming asks for in this cause. We are at a loss to understand how Nebraska can depend so strongly on Wyoming v. Colorado (259 U. S. 419) and at the same time fail to advocate the kind of solution of the problem as was applied in that case. If Nebraska contends she is entitled to any benefit from the application of the principles announced in Wyoming v. Colorado, then she must submit to the same type of decision as was rendered in that case and cannot well argue for a different judgment here. No interstate priority administration was set up on the Laramie River as the result of the decision of this Court. As is clearly pointed out in this Court's opinion in Wyoming v. Colorado, 309 U. S. 572, at pages 575 to 577, the decree awarded to Colorado, 39,750 acre feet, and the remainder of the supply to Wyoming.

No clearer expression has ever been given as to the effect of the decree in Wyoming v. Colorado than that of Ralph I. Meeker, Nebraska's expert witness in this cause, in a paper written before his employment in this litigation, entitled "Interstate Water Problems and Their Solution," appearing as Wyoming Exhibit No. 122 herein. Mr. Meeker and his co-author, Mr. Hinderlider, said:

> "The Laramie River decision was based on the fundamental principles underlying the Doctrine of Priority, but the respective private rights in each State were grouped and the allocation made was based on the grouped demands and not on a basin-wide administration of priorities of both states. The Court gave to the most junior project (Colorado Tunnel) a preferred right of diversion as against senior canals in Wyoming which were compelled to build reservoirs to supply the deficiency. No Federal bailiff was appointed and no super-administration placed in the hands of the Federal Government. The internal administration of priorities of the

Laramie River in Colorado or in Wyoming remains undisturbed. No interposition of Colorado priorities was plastered upon the Wyoming priorities, or vice versa."

Nebraska, relying so strongly upon Wyoming v. Colorado in this case, can hardly contend that the Nebraska priorities should be "plastered" on those of Wyoming or vice versa.

Nebraska's expert, Mr. Meeker, also was the author of "Interstate Water Conflicts and Possible Solution," and "Controlling Factors of Complete Water Utilization of the North Platte River," which are in this record as Wyoming Exhibits 123 and 124 respectively. At page 159 of Wyoming Exhibit 123, we find the following:

"A popular fallacy has grown up among many water users, and some attorneys and engineers, that water priorities on the same stream should be enforced between the states regardless of state lines because of the prevailing common doctrine of priority within the states. This doctrine is plausible on first thought, but is erroneous because enforcement of the supply of any interstate stream according to priorities regardless of the state lines would deprive water users of vested rights (long used and assured by state laws) by changing the relation of every water right, and consequently, the amount of water divertible by each ditch. In some instances inferior water rights would be enriched and in others dependable direct flow rights depleted to flood rights or even worse, and every gradation between would occur. In fact, in many cases such administration would be practically confiscatory of vested rights."

At page 53 of Wyoming Exhibit 124 is this statement:

"Laws of individual states, under whatever general doctrine they may be classed are at best but rules of local administration of public property. Even these laws are ever changing and adapting themselves to local conditions and needs. California, for example, originally proceeded upon one rule of law, changed to a combined doctrine, and is fast gravitating back to the original rule, but may change from generation to generation as her necessities may require. New laws are needed to meet the new conditions; rules of local administration, whether under the riparian doctrine, appropriation dictrine or any other doctrine, cannot apply between

states. No state can fasten an interstate servitude upon any interstate stream without the consent of the other state involved."

We bring these treatises, written by Nebraska's witness, to the attention of the Court, not because of their authorship and the evident conflict between them and Nebraska's position, but for the reason that they contain cogent, convincing and unanswerable arguments against interstate priority administration. The exhibits were introduced at pages 19977 and 19978 of the Record and the cross-examination of Mr. Meeker relative to same appears at pages 26627 to 26647. We think their inclusion in an appendix hereto would unduly lengthen this Brief, but suggest that they appear in the record, either as original printing or completely legible photostatic copies of the originals.

One other point in this connection should be mentioned and that is the necessity of fixing the requirements of individual canals in any scheme of interstate priority administration. We have discussed this subject at considerable length in our previous Brief herein. We find nothing in the Nebraska Brief which in any way supports the proposition that the rights of individuals may be determined in a suit to which they are not parties. It is contended that the State "stands in judgment" for its appropriators (Nebraska Brief, p. 45). That is true only to the extent that an apportionment to the State affects the rights of the appropriators in that they can not, as a group, exceed the allotted quota to the sovereign. This is made clear in Hinderlider v. LaPlata, 304 U. S. 92. That is far from saying that the rights of individuals, as between themselves, can, to any extent, be determined in a suit between States. To illustrate here, if we assume that Nebraska is entitled to 790,000 acre feet in the May-September period for use at and below Whalen, as determined by the Master, the rights of the state of Nebraska are thereby determined and the demands of all Nebraska appropriators cannot rise above that amount. That is far from saying, however, that the rights of Nebraska users, as between themselves, are in any way fixed or determined, either as to priority or quantity. That is a matter for adjudication between them and can be determined only in suits in which they are parties. The Master has correctly said that any interstate priority schedule would have the effect of fixing the rights of appropriators within each State as between each other (M.R. p. 115),

and that such a schedule as to the Whalen-Tri-State Dam section would deprive each State of full freedom of intra-state administration; would indirectly fix a limitation upon each individual appropriator, and would be a very different matter from a determination of each State's equitable share (M.R. p. 149).

Another point deserves particular emphasis. Interstate administration would impose upon this Court the task of daily administration of the flow of the North Platte River. We think the function of the Court will be fully performed when a division of of the supply is made between the two states, leaving to the states the day by day administration, and without this Court being compelled to engage in the unending task of administering the water supply of the North Platte River. As said by the Master, interstate priority administration would burden the decree with unnecessary administrative detail.

4. INEQUITY OF PROPOSED INTERSTATE PRIORITY ADMINISTRATION

Nebraska first contends there should be interstate priority administration in the Whalen-Tri-State Dam section, and later that such administration should be extended to Bridgeport, which is 60 miles below Tri-State Dam (Nebraska Brief, pp. 40-54). A table of the canals showing priorities, acreages and requirements appears in the Nebraska Brief (pp. 49, 50).

The table at pages 49 and 50 of the Nebraska Brief discloses that of the Wyoming rights below Whalen, 7,217 acres are senior to all Nebraska priorities. Use of water on this senior acreage could not be regulated at any time for the benefit of Nebraska. Junior to this 7,217 acres and senior to the North Platte Project priority of December 6, 1904, there are only 7,623 acres in Wyoming, exclusive of the Lingle and Hill rights, with priority of September 6, 1901, which have storage supplies. Nothing could be gained by regulation of the Lingle and Hill rights, since any deficiency of natural flow is supplied by storage, and the result would be only that the storage supply for Nebraska use would be correspondingly diminished by any regulation of natural flow. Result is that the proposed interstate administration between Whalen and Bridgeport would regulate only 7,623 acres in Wyoming. The Nebraska acreage, as shown by the same table, which is senior to the North Platte Project, totals 120,772. No attempt is made in the Nebraska Brief to demon-

strate what effect it would have in any year or years to regulate this comparatively small Wyoming acreage for the benefit of the Nebraska seniors. In fact, no case is made showing any necessity for regulation. We do not over-look table III at page 53 of the Nebraska Brief, showing shortage of four Nebraska canals in July and August of three different years. Whether such shortage was occasioned by any adverse or excessive use in Wyoming or by mal-administration of the available supply in Nebraska, is not disclosed. Causes of shortage in the Tri-State Dam to Kingsley area in the face of apparent adequate seasonal supplies are given at page 95 of the Master's Report. Kingsley Reservoir has now been constructed and the supply below that point is adequate for all uses (M.R. pp. 96 to 99), and whatever shortages may have occurred in the past above Kingsley need not recur again because of any attempt to supply senior rights below the reservoir (M.R. p. 95).

Excepting the Wyoming canals having storage supplies, and excepting the French which has more acreage in Nebraska than Wyoming, the Wyoming canals which it is proposed to regulate in an interstate priority schedule, as shown by the tables in the Nebraska Brief at pages 49 and 50, have priorities, ranging between November 6, 1891 and December 2, 1904. The largest rights are the Torrington and Lucerne canals serving respectively 2, 061 and 4,221 acres and with respective priorities of November 28, 1891 and February 21, 1893. Of the 7,623 acres which would be subject to regulation these two canals account for 6,282. They have enjoyed their appropriative rights without interference for more than 50 years. Exceedingly pertinent in this connection are the following conclusions of the Master:

> "A final objection to the imposition at this late day of a river wide priority administration is the great disturbance of long established uses that would inevitably result." (M.R. pp. 114, 115.)
>
> "While the Wyoming appropriations in these groups are junior to Tri-State and Mitchell, they represent old established uses in existence for 40 to more than 50 years enjoying a supply of water not challanged by Nebraska on behalf of the Tri-State or Mitchell until the present drouth cycle. To place them now in complete subordination to these Nebraska canals on the priority theory would appear at least questionable from the standpoint of equity." (M.R. p. 155.)

The damage that would be done in shutting off these Wyoming rights, embracing only 7,623 acres, as contrasted with 120,772 acres in Nebraska, would appear to be out of all proportion to any good that might be accomplished for the large Nebraska acreage. This leaves wholly out of consideration what we conceive to be a complete lack of showing as to any necessity for the proposed regulation.

Another inequitable circumstance affecting this situation is the expansion of the Tri-State canal after acquisition of a storage supply. As stated in the Master's Report, pages 157 and 158, Tri-State at the time of consummation of its Warren Act contract for storage water, had a dependable flow of only 80,000 acre feet, adequate to supply only 22,850 acres upon the basis of 3.5 acre feet per acre, which is the headgate requirement allowed by the Master. After obtaining the storage supply it was possible to develop the acreage to over 50,000 acres, according to the Master—he having found 52,300 acres entitled to water. It is now proposed by Nebraska that appropriators in Wyoming having natural flow rights only shall be regulated in an attempt to supply completely a natural flow for the Tri-State for 52,300 acres. The purpose is to ignore completely the storage supply and permit Tri-State, with its senior priorities, to satisfy fully if possible, its requirements from natural flow.

Also it is pointed out in the Master's Report, page 29, that 70,650 acres are supplied in that state from return flow waters developed from the operation of the North Platte Project, and that this is a "windfall" to these irrigators who are so situated that they obtain this benefit without having to carry any burden of storage costs (M.R. p. 33). Such being the situation, how can it be contended that Wyoming can properly be called upon to regulate its appropriators in the Whalen-Tri-State Dam section for the purpose of further enhancing the Nebraska supply? No such benefit from return flows can be received by Wyoming because the total lands which might benefit are located necessarily below the points of diversion of the North Platte Project, and consequently in the Whalen to State line area. The total acreage in that section which does not have storage rights is only 15,359 acres (M.R. p. 74). As between the two states Nebraska receives the benefit of the irrigation of over 70,000 acres from return flows without any contribution to the cost of storage, while Wyoming may receive some indirect benefit to only 15,000 acres. Under these circumstances it is a manifest injustice to impose

regulation upon the Wyoming appropriators below Whalen for the purpose of further benefiting Nebraska, and particularly is this true when the chief beneficiary would be the Tri-State canal which has a storage contract, and any deficiency in natural flow can be made up out of storage.

5. RECOMMENDED APPORTIONMENT IN WHALEN-TRI-STATE DAM SECTION

The Master's recommended apportionment of natural flow in the Whalen-Tri-State Dam section is discussed in the Nebraska Brief at pages 55 to 69 inclusive. Complaint is made that the proposed division of 75 per cent to Nebraska and 25 per cent to Wyoming is improper. The argument is founded on the theory that apportionment should be based solely on priorities. The Master, for reasons which seem to us entirely sound, has concluded that priorities are to be considered, but that the respective rights of the states should not be determined solely on such basis. .(M.R. pp. 9, 112).

It is contended that in three selected years, 1932, 1934 and 1936, the proposed division of 75 per cent to Nebraska and 25 per cent to Wyoming, would not have resulted in supplying Nebraska rights on a priority basis. Little can be judged of long term conditions by a study of three years only, as fluctuations from day to day and month to month occur which prevent any one year becoming a pattern for any other season. If the Nebraska argument is sound, it would seem that it could be substantiated by conditions existing outside of the drouth decade.

Principal grievance of Nebraska seems to be that the Tri-State Canal may not receive a complete supply of natural flow at all times. It's priority is September 16, 1887 for its senior right, for which the Master has assigned 51,000 acres, and a second foot requirement of 729. As heretofore pointed out 7,217 acres in Wyoming are senior to this Tri-State appropriation, and could not be regulated for its benefit under priority administration of any kind. This leaves a junior acreage in Wyoming for which there is no storage supply, of only 7,623 acres, excluding the French canal, and under the latter there is junior acreage of 1,025 in Nebraska and only 651 acres in Wyoming. The Tri-State Canal has a Warren Act contract and is not dependent solely on natural flow. When it was so dependent it had a dependable supply of only 80,000 acre feet, adequate to

serve only 22,850 acres at the Master's proposed requirement of 3.5 acre feet per acre (M.R. pp. 157, 158). If Tri-State is now allotted the acreage assigned by the Master of 52,300 the result is that a supply for an additional 30,000 acres is required. The obvious injustice of imposing this increased demand against natural flow in a priority administration of natural flow only between Tri-State and the Wyoming appropriators is apparent. The storage supply of Tri-State is enjoyed by virtue of the December 6, 1904 priority of Pathfinder Reservoir, and all of the Wyoming appropriators in the Whalen-Tri-State Dam section, who are without storage rights, are senior to December 6, 1904, excepting only the French and, as above stated, this canal serves junior acreage of 1,025 in Nebraska and 651 in Wyoming. Aside from the inequity of the situation, what reason can there be for attempting to give Tri-State a complete supply of natural flow? The Farmers Irrigation District has bought and paid for storage for the lands under the Tri-State. No reason can be perceived why this storage should not be used. If it be contended that Wyoming should have purchased storage supplies for the small acreage junior to Tri-State in the Whalen-Tri-State Dam section, the answer is that the record fails to disclose any large expansion in acreage under these rights. If Tri-State Canal presently served only the 22,850 acres for which it had a supply before storage was available, there would be better foundation for the Nebraska claim of using priorities as a sole guide for apportionment.

At page 63 of the Nebraska Brief it is said that during July and August of the year 1936, there would have been barely enough natural flow for Tri-State. Storage supplies are used in July and August, and Tri-State does not then need a complete supply of natural flow. As disclosed at page 71 of the Master's Report, over half of the supply of the Whalen-Tri-State Dam section during the 1931-1940 decade was storage. This being true why should any plan be proposed or considered, which has for its purpose the making available of a complete supply of natural flow to the Tri-State Canal, which has a Warren Act contract. The Warren Act contract of the Farmers Irrigation District, which operates the Tri-State Canal, provides for a total supply of 180,000 acre feet (M.R. p. 190). This is 100,000 acre feet more than the supply enjoyed by this canal under natural flow conditions prior to operation of the North Platte Project (M.R. p. 157). This situation emphasizes the propriety of the solution

of the case proposed by Wyoming, which is an allocation in acre feet per season covering respective requirements of the two states.

The "block system" advocated by Nebraska (Nebr. Brief p. 63), is extremely cumbersome and for the reasons pointed out above, we believe it to be not only inequitable, but unnecessary as well.

Nebraska argues the question of "flexibility." If by that term is meant the opportunity for Nebraska appropriators to obtain water in excess of actual needs based on the requirements of beneficial use, then admittedly the Wyoming plan of mass allocation restricting Nebraska to only as much water as is necessary is not "flexible." If, on the other hand, water is to be supplied only to the extent that it is needed, a seasonal allocation of the necessary supply will permit complete freedom of use during the irrigation season, especially in view of the amount of existing reservoir control. To permit unwarranted waste of water in the Whalen-Tri-State Dam section on the false plea of "flexibility" is manifestly unjust.

It is argued by Nebraska that the Interstate, Fort Laramie and Northport canals should be included in paragraph 3 of the recommendations for decree (M.R. p. 177). If these canals are included, we submit that they, and also the State line canals, should each be limited to the requirements necessary, based upon beneficial use, including both natural flow and storage.

We do not mean by anything we have said hereinabove to indicate any recession from our proposed solution of the case, but present these matters solely in answer to the Nebraska arguments.

6. CANAL REQUIREMENTS

The Master has dealt with acreage as a basis of apportionment for Colorado, and the area above Pathfinder in Wyoming, and for use from the main stream between Pathfinder and Whalen. On the other hand, in the Whalen-Tri-State Dam section requirements of individual canals have been determined. Only the element of acreage is taken into account in the first instance, while in the latter acreage, distribution system losses and delivery at the land must be considered. Nebraska complains of the permission to irrigate 15,000 acres from the main stream between Pathfinder and Whalen, when only about 14,000

acres are now irrigated, and similarly complains of allowance of 153,000 acres above Pathfinder in Wyoming when 149,400 acres are presently irrigated. In the fist instance the difference is 7 per cent, while in the latter it is only 2½ per cent. Seeking to take advantage of this situation, Nebraska contends that where a different method of apportionment was used there should nevertheless be a 7 per cent increase above actual acreage irrigated. Just as reasonably it can be contended that the differential should be only 2½ per cent as was allowed above Pathfinder. In our opinion the entire argument lacks validity because of different treatment accorded in the different sections, due to different conditions. If a liberal view is taken as to acreage only one element is involved, but when generous allowances are made for acreage, distribution system loss, and delivery at the land, "liberality" is multiplied three-fold. How this has operated in connection with the requirements of the Interstate, Tri-State and Northport Canals we have set forth in our Brief heretofore filed, pages 67 to 75 inclusive.

Tri-State Canal

With reference to the Tri-State, Nebraska contends a 7 per cent increase should be allowed because of claimed comparison with the treatment of the area between Pathfinder and Whalen. We think we have pointed out above the lack of analogy between the two situations. However, the acreage of 52,300 as determined by the Master, is not less than 7 per cent more than the average acreage of the only years for which there is any direct evidence in the record, to-wit: 1933 to 1937. The average of this period, as pointed out at page 72 of our Brief heretofore filed, was 48,676. By the aerial survey method, Colorado made a determination of 48,900 acres (M.R. p. 242). If there is any analogy between the acreages above Whalen in Wyoming and that of the Tri-State no reason is perceived why the 2½ per cent differential, applied above Pathfinder, should not be used as to Tri-State. If it is, the reduction of 5 percent will amount to 2,500 acres. We do not concede the pertinence of the argument either way, and believe the acreage of the Tri-State should be determined on the bases set forth in our Brief heretofore filed, and that 49,000 is a liberal allowance when used as one of the factors in determining water requirement.

It is contended in the Nebraska Brief that the preferred

rights of the Tri-State were not taken into account by the Master (Nebr. Brief, pp. 78 to 83). This is an erroneous view as the Master used in his determination of the acreage the values taken from page 24 of Nebraska Exhibit 489, for the years 1933 to 1937 inclusive (M.R. pp. 239, 242). These values appear for the respective years in the column "Irrigated Acreage" in the table at page 242. With reference to the high-value column on page 24 of Nebraska exhibit 489, Mr. E. O. Daggett, Manager of the Farmers Irrigation District (M.R. p. 240) testified that the preferred right acreage is included within the values there appearing. His testimony is at pages 10670 and 10671 and 10532 of the record, and appears in the Appendix at page 3. It is clear from Mr. Daggett's testimony, that the acreage irrigated in each year, 1933 to 1937 inclusive, as same appears in the high value column on Page 24 of Nebraska Exhibit 489, includes the preferred rights.

It is next contended that as between Nebraska and the United States, the latter is estopped from claiming less than 63,000 acres irrigated under the Tri-State canal. It is not contended such estoppel is operative as to Wyoming, but we point out there is no such bar as far as the United States is concerned. The claim is based upon a stipulation in the case of United States v. Tilley, 124 Fed. (2d) 850, by virtue of paragraph 30 of the findings of fact in that cause appearing at page 157 of the Appendix following the Nebraska Brief. The stipulation is to the effect only that the district contained not to exceed 60,000 acres of "irrigable" lands and 3,000 acres of "irrigable" lands under the preferred rights. There was no stipulation as to the amount of land actually irrigated.

Other Canals

It is claimed that the Nebraska allocation for the Gering-Fort Laramie canal is insufficient because the same headgate requirement in acre feet per acre is allowed for Nebraska as for Wyoming (Nebr. Brief, pp. 69, 70). The same allowance for the lands in each state is well supported by the evidence as the witness Roush testified that the delivery to the lands in each state in relation to headgate diversions was practically the same, being 57 per cent in Wyoming and 56 per cent in Nebraska—an insignificant difference. (Record, p. 15460). The evidence as to this particular canal is in the record and the comparison which

Nebraska counsel attempt to make between this and other canals is therefore inappropriate.

An increased allottment is claimed for Winters Creek and Central Canals in Nebraska (Nebr. Brief, pp. 84, 85). The only basis therefor is the assumption, which we think wholly invalid, that when water requirement is determined, the same basis of acreage should be used as for Wyoming areas dealing only with acreage and for which no water requirement is specified. Moreover, the increases claimed are so small that it can not be said they would disturb the finding of the Master that there is an adequate supply below Tri-State Dam without up-stream water.

7. CONCLUSION

Accuracy of the values at page 22 of the Master's Report, showing water production in acre feet and percentages of the three states, is questioned by Nebraska (Nebr. Brief, p. 85). If the changes there suggested are made, the effect would be to reduce the percntage of the Nebraska contribution to the common supply and therefore make comparison between Nebraska and Wyoming more favorable to the latter.

Taking the values at page 22 of the Master's Report, in connection with acreages in the respective states, as disclosed in the Table at page 37, it appears that Wyoming produces 45 per cent of the water and irrigates only 29 per cent of the acreage, while Nebraska, producing only 34 per cent of the water, enjoys the use of 59 per cent of the acreage. As pointed out in our Exception VIII, 1,336,090 acre feet credited to Nebraska at page 22 of the Master's Report, includes approximately 700,000 acre feet of return flow, which is not produced in that state at all, but in Colorado and Wyoming. The water originally produced in Nebraska therefore does not exceed 700,000 acre feet. While the Master's proposed apportionment, or that suggested by this Defendant, is not based upon comparative production and use in the three states, nevertheless we think it is a fact of some significance, affecting the equitable rights of Nebraska and Wyoming, that Wyoming produces a much larger percentage of the supply than Nebraska and enjoys much less use therefrom. Nebraska irrigates twice as much acreage as Wyoming, and Wyoming produces not less than 45 per cent of the common supply, as contrasted with a maximum of 34 per cent for Nebraska.

A discussion of the Master's recommendations as to storage

water and Warren Act contracts appears in the Nebraska Brief, pages 86 to 88 inclusive. Significantly, Nebraska counsel say:

> "It must be remembered that in practical administration where storage water is carried down the main stream commingled with natural flow water it is only by bookkeeping system that the two can be separated and segregated." (Nebr. Brief, p. 88.)

True it is that segregation of natural flow and storage is only a bookkeeping process. The admission that it is so by Nebraska supports the argument in the opening Wyoming Brief under the heading "Segregation of Natural Flow and Storage," pages 40 to 47, and argues strongly for an apportionment between the states, including both natural flow and storage.

We reiterate that Nebraska bases its argument for recognition of priorities largely upon the decision of this Court in Wyoming v. Colorado, 259 U. S. 419. The solution of the case proposed by Wyoming gives the same recognition to priorities as was accorded in that case. No interstate priority schedule for the Laramie River was imposed by the Decree. In the pungent language of Mr. Meeker, witness for Nebraska, the Colorado priorities were not "plastered" upon those of Wyoming or vice versa (W-122, heretofore quoted). From the last decision in that controversy, Wyoming v. Colorado, 309 U. S. 572, it is made clear beyond peradventure of a doubt that mass allocation was employed. There is no foundation in that case for Nebraska's claimed interstate administration for the North Platte River, or any section thereof. The Court did not there fix the rights of individual canals or projects, as is so clearly set forth in the opinion in 309 U. S. 572. That decision rules out the recommendations of the Master in this case, insofar as they depart from the principle of mass allocation, and fix the rights of individual canals and projects. Similarly, Nebraska's claimed solution of the case, should be denied.

Excessive uses of the supply were made by Wyoming and Nebraska through their respective appropriators in the Whalen-Tri-State Dam section during the 1931-1940 decade. The total Wyoming excess was 130,429 acre feet, while that of Nebraska was 1,505,789 (See pages 87 to 89 of the Wyoming Brief heretofore filed). Recurrence of such mal-distribution over a period of years can be prevented only by limiting each state to requirements based upon beneficial use. The excesses of one year

must inevitably result in deficiences in a succeeding year or years, or in diminution of the supply for the Kendrick Project, or both.

It is disclosed that had the Seminoe and Alcova reservoirs been in operation, and the Kendrick Project irrigated, there would have been a supply adequate for all existing uses, including the May-September requirement of the Whalen-Tri-State Dam section proposed by the Master of 1,027,000 acre feet, and for the full development of the Kendrick Project for the entire period 1895 to 1943 inclusive. For the reasons pointed out in our opening Brief, we believe the Whalen-Tri-State Dam section requirements should be reduced 85,000 acre feet because of excessive allowances for Nebraska lands, and as a result apportionment should be made of 705,000 acre feet during May-September season to Nebraska lands instead of 790,000, and that Wyoming should be allotted 237,000 acre feet for the Whalen-Tri-State Dam section plus 168,000 for the Kendrick Project, providing that for the first five years of development of that project, the allowance need be only 105,000 or a total to Wyoming of 342,000 acre feet. We further propose, as heretofore, that in order to give effect to existing conditions of low run-off, irrigation under the Kendrick Project should not be commenced until that year in which storage and run-off at Pathfinder will equal 1,000,000 acre feet.

In the Briefs now submitted no contention is made by any litigant that the requirements for Wyoming use in the Whalen-Tri-State Dam section are excessive, or that the demand of the Kendrick Project of 168,000 acre feet is erroneous. These values therefore may be accepted.

The position of Wyoming in this litigation is in significant contrast to that of Nebraska. This defendant has always admitted that if an equitable apportionment is made between the states it must submit to proper limitations on use within its jurisdiction. Nebraska has always contended for limitation upon Wyoming, but none for Nebraska. The case cannot be equitably determined between these two states unless the use of each is limited. In that respect, we do not contend that Nebraska should be restricted to anything less than is needed for her irrigators, based upon requirements of beneficial use. We ask the same treatment for Wyoming. The supply of the North Platte River can and will serve adequately the demands upon it only if

the states are limited each year to the amounts of water necessary, thereby permitting the storage and retention in the reservoirs of surplus supplies in years of good production for use in subsequent years of lower run-off. Only in this way can the Kendrick Project, constructed at great cost by the United States, be protected in its right to the use of supplies which are available above existing demands.

We do not propose the submission of Wyoming to any restriction in this case unless similar and correlative limitations are imposed upon Nebraska. As we endeavored to point out in our Brief heretofore filed under the heading "A Complete Equitable Apportionment Should Be Made" (page 80), it would be manifestly unjust to limit Wyoming in any way without applying similar limitations to Nebraska. In that respect the recommendations of the Master are inequitable as they do impose restrictions on Wyoming without limiting Nebraska to the quantity of water necessary for use in that State. They are further inequitable in failing to limit the use of storage water, comprising over one-half of the supply, as thereby Nebraska would obtain an unfair advantage since a larger use of storage water is made in that State than in Wyoming. Leaving storage water out of consideration, would permit unrestricted use such as has frequently occurred in the past, and if repeated during another period such as 1931 to 1940, would result in shortages caused by such excesses. Such shortage would have to be borne by both states. It is also this Defendant's position that the restrictions on Colorado recommended by the Master should be incorporated in the Decree. In any affirmative Decree all States should be restricted to their respective needs.

Nebraska has a "windfall" in the irrigation of over 70,000 acres from the return flows of the North Platte Project (M.R. pp. 29, 33). Measuring the respective equities of Nebraska and Wyoming, this defendant is clearly entitled to irrigate the lands below Whalen and to the allotment of a water supply for the Kendrick Project of 60,000 acres.

SECTION III

ANSWER TO COLORADO BRIEF
SUMMARY OF THE ARGUMENT

The argument in answer to the Colorado Brief, is summarized as follows:

1. The Kendrick Project Appropriation Act of August 9, 1937, insofar as it purports to make an apportionment of the water supply of the North Platte River between Colorado and Wyoming, is invalid, since Congress can not make a compact between states.

2. Colorado, having invoked the jurisdiction of the Court by her Cross Bill in which prayer is made for equitable apportionment, is not entitled to have the suit dismissed.

3. Colorado has admitted the jurisdicion of the Court to make an apportionment between the three states.

4. Since Colorado has admitted the jurisdiction of the Court to make an equitable apportionment, and has prayed therefor, the only issue remaining in the case is as to what kind of apportionment should be made.

5. Relief may be granted without proof of injury or threatened injury by the State of Colorado, since an affirmative decree was rendered in Wyoming v. Colorado, 259 U. S. 419, without showing of damage.

6. The record discloses by pleading, evidence and Brief before the Master, such claims on the part of Colorado as warrant judgment against that state.

7. The decision in Colorado v. Kansas, 320 U. S. 383, is not persuasive in this cause because it was based upon the question of increased depletion in relation to the prior adjudication in Kansas v. Colorado, 206 U. S. 46.

8. Dismissal can not be granted consistently with the specific prayer of Colorado for equitable apportionment.

9. Relief by affirmative decree can appropriately be granted under the Declaratory Judgment Act, particularly as to Colorado, since that state, in her pleading, admitted the jurisdiction of the Court to enter a decree and prayed for equitable apportionment.

10. Compact negotiations have failed, and the only way in which this dispute can be settled is by affirmative decree of this Court, and equitable apportionment can not be decreed except by inclusion of Colorado within the terms of the decree.

THE ARGUMENT

THE KENDRICK PROJECT APPROPRIATION ACT

Colorado complains of the failure of the Master to give effect to the act of August 9, 1937, appropriating funds for the construction of the Kendrick Project (Colo. Brief, pages 50 to 52).

By the Tenth Amendment to the Constitution of the United States, powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states or to the people. The Constitution does not delegate to the United States any power to make a compact between states. The powers of Congress are specifically enumerated in section 8 of Article I of the Constitution and no authority is granted Congress to make such a compact. Section 10 of Article I of the Constitution provides that no state shall, without the consent of Congress, enter into any agreement or compact with another state. It is clear that a compact between states can be made only by the states themselves, with the consent of Congress. The act referred to, if valid, would effectuate a distribution or apportionment of the waters of the North Platte River between Colorado and Wyoming. An apportionment of water supply between states can be accomplished by only two methods—one, the making of a compact, or, two, a decision of this Court.

Inability of Congress to make compacts between states was recognized by this Court in Kansas v. Colorado, 206 U. S. 46, the Court saying:

> "As Congress cannot make compacts between the States, as it cannot, in respect to certain matters, by legislation compel their separate action, disputes between them must be settled either by force or else by appeal to tribunals empowered to determine the right and wrong thereof." (Page 97.)

Colorado contends the act of Congress is not an attempt to make an apportionment of the waters of the North Platte River between Colorado and Wyoming . This seems to be an erroneous view of the situation as the restrictive clauses of the statute are

founded upon the "recognition of the respective rights of both the States of Colorado and Wyoming to the amicable use of the waters of the North Platte River." Upon its face the statute purports to make an apportionment between the states. Our conclusion is that the statute is void, since Congress is without power to make a compact between states.

Arguing for dismissal of this cause, Colorado says:

> "The apportionment of inchoate rights by court decree will create a multitude of unknown hazards. A court deals with actualities, not with unpredictable future possibilities." (Colo. Brief, p. 30.)

Colorado quotes with approval the conclusion of the Master, at page 129 of his report, that the projects in North Park are "latent projects representing mere possibilities of the indefinite future." (Colo. Brief, p. 19.) Notwithstanding this position in urging dismissal of the suit, Colorado contends that the statute in question should be given effect and future development in Jackson County, Colorado, given preference over the Kendrick Project. The Kendrick Project has been constructed and is an actuality. If Colorado is right as to future possibilities in North Park, the Kendrick should be allotted a water supply in preference to latent projects representing mere possibilities of the indefinite future.

It can not be concluded that irrigation of the Kendrick Project will prevent future development within the basin in Colorado. We know of no evidence in the record, and none is pointed to in the Colorado Brief, showing that the use of the Kendrick will prevent whatever new development may be possible. The reservoirs constructed to serve the Kendrick are located 180 miles or more below the Colorado-Wyoming boundary, and that their utilization will interfere with such development as may be possible in the basin in Colorado does not appear from the record. As to transbasin use the statute purports to protect only "vested rights," and any additional use is not within its protection.

DISMISSAL OF THE CASE

Colorado has Invoked the Jurisdiction of the Court

In response to the prayer of Wyoming's Amended and Supplemental Answer, Colorado was made a party to this suit (296 U. S. 553). Colorado filed an Answer and Cross Bill. The Cross Bill comprises pages 25 to 48 of this pleading.

The fifth paragraph of the prayer of Colorado's Answer and Cross Bill is as follows:

> "And that the Court further find and determine the equitable share and apportionment of the waters of the North Platte River, except the waters of its tributary, the Laramie River, to which the States of Colorado, Nebraska and Wyoming, with their respective appropriators, are entitled, and that the prayer of the complainant, the State of Nebraska, and of the defendant, the State of Wyoming, be denied, except to the extent that this impleaded defendant, the State of Colorado, has joined therein."

Colorado's present contention is that the jurisdiction of this Court should not be exercised because of the claimed falure of the evidence to show a case of serious magnitude clearly and fully proved. (Colo. Brief, pp. 26 and 27).

That the Court has jurisdiction in this cause can not be denied. The remaining questiion is whether such jurisdiction shall be exercised. Colorado, by its Cross Bill, and the prayer thereof, neither of which has ever been with-drawn, has invoked the exercise of the Court's jurisdiction. Colorado can not complain if that for which she has asked is granted. We think the reasoning and conclusion of the Court in Phelps v. Scott, 325 Mo. 711, 30 S.W. (2nd) 71, 71 A.L.R. 290, entirely appropriate here, and quote the following from the opinion:

> "But the judgment is responsive to the issues presented by appellant's own pleading in both cases. In his motion (so-called) in suit C as well as by his petition in suit B, he invoked the equity jurisdiction of the court and presented facts and issues properly cognizable in a court of equity, and as above shown, tried out all the issues as though they had been presented in a single proceeding. Having voluntarily thus presented his cause, he should not now be heard to complain that the proceeding was irregular or that respondent did not ask equitable relief, so long as the court's judgment did no more than determine the issues which appellant by his own pleadings presented."

Colorado has Admitted the Jurisdiction of the Court

At page 10 of the Answer and Cross Bill of the State of Colorado, is the following admission:

"This defendant, further admits, that complainant is entitled to an equitable apportionment of the waters of the North Platte River, but in this behalf avers that the states of Colorado and Wyoming are likewise entitled to such equitable apportionment, and, that in determining the respective apportionments to each of the states, party to this suit, the Court should take into consideration the relative requirements, and present uses, and future needs of each of said states and the appropriators within the same, and all other pertinent facts, and determine such equitable apportionment accordingly."

Where the Court has general jurisdiction of the subject matter, a lack of jurisdiction of the particular case may be waived by failure to make timely and specifc objections, or by an invocation of or submission to the jurisdiction.

In Hollins v. Brierfield Coal & Iron Co., 150 U.S. 371, 37 L. Ed. 1113, this Court said:

"Defenses existing in equity suits may be waived, just as they may in law actions, and when waived, the cases stand as though the objection never existed. Given a suit in which there is jurisdiction of the parties, in a matter within the general scope of the jurisdiction of courts of equity, and a decree renderd will be binding, although it may be apparent that defenses existed which, if presented, would have resulted in a decree of dismissal."

It appears to us that the cases involving waiver of the defense that a particular proceeding should have been prosecuted as an action at law instead of a suit in equity are pertinent. In that situation this Court in Brown, Bonnell & Co. v. Lake Superior Iron Co., 134 U.S. 530, 33 L. Ed. 1021, said:

"Good faith and early assertion of rights are as essential on the part of the defendant as of the complainant. This matter has recently been before the court in Reynes v. Dumont, 130 U.S. 354, 395, and was carefully considered, and the rule, with its limitations thus stated: 'The rule as stated in 1 Daniell's Chancery Practce, 555 (4th Am. ed.), is that, if the objection of want of jurisdiction in equity is not taken in proper time, namely, before the defendant enters into his defense at large, the court, having the general jurisdiction, will exercise it; and in a note on page 550, many cases are

cited to establish that 'if a defendant in a suit in equity answers and submits to the jurisdictiion of the court, it is too late for him to object that the plaintiff has a plain and adequate demedy at law. This objection should be taken at the earliest opportunity.' "

Other decisions of this Court supporting the same rule are Singer Sewing Machine Company v. Benedict, 229 U.S. 481, 57 L. Ed. 1288, and Duignan v. United States, 274 U.S. 195, 71 L. Ed. 996.

Where jurisdictional facts are averred and jurisdiction is not denied, it is not incumbent upon complainant to make proof. Thus, it is said in Betterman v. Louisville Railway Company, 207 U. S. 205, 52 L. Ed. 171:

> "The bill contained an express averment that the amount involved in the controversy exceeded, exclusive of interest and costs, the sum of $5,000 as to each defendant. The defendants not having formally pleaded to the jurisdiction, it was not incumbent upon the complainant to offer proof in support of the averment."

Colorado contends she is entitled to a judgment of dismissal because of the presentation of timely motions therefor (Colo. Brief, p. 15). However, these motions came only after the introduction of the Nebraska testimony and after presentation of all the evidence. Colorado's first opportunity to object to the exercise of jurisdiction by this Court was in her pleading. When she filed her Answer and Cross Bill no objection to the jurisdiction of the Court was raised, but on the contrary there was first an admission of the right of the other litigant states to equitable apportionment and secondly a prayer for such relief in favor of Colorado. Upon plainest principles of justice and fair dealing, it would seem that Colorado could not join in the prayer of the other states for equitable apportionment and, at some later time and without seeking to with-draw such prayer, ask for dismissal of the case.

The Only Issue Before the Court is that of Equitable Apportionment

It is readily apparent in a case such as this, that two questions are before the Court. First, should an equitable apportionment be made, and secondly, what kind of apportionment or

type of decree should be entered. The pleadings in this cause have wholly removed from the consideration of the Court the first question.

Nebraska's Bill of Complaint is framed for the purpose of obtaining an equitable apportionment of the use of the North Platte River between that state and Wyoming, and appropriate prayer therefor is made. Wyoming's Amended and Supplemental Answer contains such allegations as are suitabble for the granting of affirmative relief to this defendant and the prayer is, among other things,

> "that upon final hearing this court find and determine the equitable share of the water of the North Platte River to which the State of Colorado, this defendant and the complainant are respectively entitled; and that the prayer of complainant's Bill of Complaint be denied except to the extent that this defendant has joined therein."

Colorado was impleaded and filed an Answer and Cross Bill, the latter containing about 23 pages, and praying that the waters of the North Platte River be apportioned between the three states. Subsequent pleadings were filed, comprising the Answer of Wyoming to Colorado's Cross Bill, Nebraska's Replication to Wyoming's Answer, and to Colorado's Answer and Cross Bill, and a Replication of Colorado to the Answers of Nebraska and Wyoming to her Cross Bill. In the latter pleading Colorado "humbly prays as in and by its Cross Bill it hath already prayed."

All the litigant states having expressly invoked the exercise of the Court's jurisdiction in the matter of an equitable apportionment, the only question before the Court is what that apportionment shall be. The litigant states are before this Court on the pleadings without any claim that the jurisdiction of the Court should not be exercised. Colorado waived whatever defense she might have had that the Court should not intervene because of the case not being one of serious magnitude, capable of proof by clear and convincing evidence. How can Colorado now contend that Nebraska and Wyoming have failed to make out a case requiring the intervention of the Court when, by her pleadings, she has requested that the Court exercise jurisdiction and make an equitable apportionment between the states?

In This Case Proof of Injury or Threatened Injury Is Unnecessary

Within the principles of those cases requiring proof of damage of serious magnitude established by clear and convincing evidence, we have endeavored to point out that this case is removed from the rule because of the admissions and pleadings, particularly those of the state of Colorado. However, in a controversy such as this, we do not admit that there must be proof of injury, actual or threatened, of serious magnitude by clear and convincing evidence. An apportionment was made in Wyoming v. Colorado, 259 U.S. 419, without any showing whatever as to damage. Nowhere in the opinion is there any discussion of the subject or any finding that Colorado in that case threatened substantial injury to Wyoming.

In the Colorado Brief herein, pages 31 and 32, it is pointed out that this Court in footnote No. 2 to the opinion in Colorado v. Kansas, 320 U.S. 383, 88 L. Ed. 123, said that Wyoming v. Colorado was not an exception to the rule requiring the showing of serious injury. If Wyoming v. Colorado is not an exception, neither is this case. Perhaps the basis of decision in the former was that both states applied the doctrine of appropriation. If so, the same doctrine is applicable here.

Further it is said in the footnote to Colorado v. Kansas, that in Wyoming v. Colorado it was possible, in enforcing equitable apportionment, to limit the amount of water which Colorado might divert without injury to Wyoming's interests, to an amount not exceeding the unappropriated flow. The recommendations of the Master in this cause as to Colorado, will permit the full utilization of presently existing rights. The limitations which this defendant proposes upon the states of Wyoming and Nebraska for the use of water in the Whalen-Tri-State Dam section and for the Kendrick Project can in no way affect the exercise of presently existing rights in Colorado. In these circumstances if apportionment was appropriate in Wyoming v. Colorado, certainly it is in the instant case. If the apportionment in Wyoming v. Colorado is not an exception to the rule, as stated by this Court, the apportionment in this case likewise will not constitute such exception.

Relief Against Colorado Is Justified by the Record

In paragraph Fifteen, page 44 of the Colorado Cross Bill, it

is alleged that Colorado has planned the diversion of additional quantities of water from the North Platte River in that state; that the amount of water available for such appropriation in the state of Colorado is not less than 250,000 acre feet per annum, and that the aggregate effect of contemplated projects would be to take from the river approximately said quantity of 250,000 acre feet. It is further alleged that an additional 100,000 acres of land in Jackson County, Colorado, are susceptible of irrigation, and that in addition to the development by irrigation of said 100,000 acres, Colorado has made surveys and investigations for the diversion of additional quantities of water to the basin of the Cache LaPoudre River. These are the claims set forth in the Colorado pleading for additional use within the basin and for diversion to the South Platte basin. Issue is joined upon these claims by Wyoming in her Answer to Colorado's Cross Bill, paragraph Fifteen, and by Nebraska in her Answer to said Cross Bill, paragraph Fifteen.

The claims made by Colorado before the Master are set forth at page 129 of the Master's Report, as follows:

> "In its brief Colorado says that it is equitably entitled to use consumptively an additional 40,400 acre feet, 25,500 for the irrigation of 30,390 acres of new land in North Park, 8,900 acre feet to cover increased reservoir evaporation, and 6,000 acre feet for further transmountain exportation. This would represent a total increase of 39 per cent over present consumption."

Although transmountain diversions under existing facilities averaged only 4,069 acre feet during the 27 year period, 1913 to 1939 inclusive (M.R. p. 46), and are expected to average 6,000 acre feet per annum in the future (M.R. p 44), Colorado demanded 12,000 acre feet, or an addition of 6,000. It is now said in the Colorado Brief, Page 20, as to additional facilities for transmountain diversion: "There is absolutely no evidence that such enlargements or extensions are contemplatd by anyone." If this is true, it is all the more reason for restricting Colorado to a transbasin diversion of 6,000 acre feet annually, as a claim for anything more is wholly speculative and unwarranted.

Before the Master, Colorado also contended for the use of an additional 40,400 acre feet within the basin for the irrigation of 30,390 acres of new land in North Park (M.R. p. 129).

In view of the claims made by Colorado in her Cross Bill,

supported by her evidence and urged upon the Master, the following conclusion of the Master is well supported:

> "The position, intention, and claims of Colorado, as defined in her pleadings and brief and as somewhat clarified by the evidence may, I think, properly be regarded as constituting a threat of further depletion of the river within North Park." (M.R. pp. 129, 130).

The contentions of the Colorado Brief herein filed, that there is no evidence of any immediately threatened increase in stream depletion in that state which will injure any downstream water user (Colorado Brief, p. 19), are at variance with the Colorado pleading, the evidence produced by that state, and the contentions made before the Master.

Colorado v. Kansas Is Not Persuasive

Counsel for Colorado rely upon Colorado v. Kansas. 320 U.S. 383 (Colo. Brief, pp 26 and 27), as imposing upon the litigants here an obligation to show a case of serious magnitude, fully and clearly proved. The question in that case, as stated by this Court, was:

> "We come now to the vital question whether Kansas has made good her claim to relief founded on the charge that Colorado has, since our prior decison, increased depletion of the water supply to the material damage of Kansas' substantial interests."

That question was answered in the light of the previous decision in Kansas v. Colorado, 206 U.S. 46. Here we do not have a prior judgment of the Court in any way fixing the rights of the respective states. There is no question of increased depletion in relation to a prior adjudication.

It is also suggested in the Colorado Brief (page 35) that in Colorado v. Kansas, supra, both parties prayed for an equitable apportionment. From the opinion of this Court, however, it does not appear that the prayer of Colorado was broadly one for equitable apportionment. Among other things the prayer was that Kansas be enjoined from litigating,

> "the relative rights of the two states and their citizens to the waters of the river on claims similar to those made by the Association in its pending suits, and that the rights of

Colorado and her citizens as determined by the judgment in Kansas v. Colorado be protected."

We do not have the pleadings before us and they are not set forth in the Colorado Brief, but as far as the record of the prayer, as set out in the opinion, is concerned, Colorado did not there request the making of an equitable apportionment in terms such as are employed in this case. Moreover, in Colorado's Answer and Cross Bill herein, we find the definite admission that the states, including Wyoming and Nebraska, are entitled to an equitable apportionment. (See quotation from page 10 of the Colorado pleading above set forth.)

Dismissal Can Not Properly Be Granted Under the Colorado Prayer

The prayer of Colorado's Answer and Cross Bill is specific in requesting equitable apportionment between the states. There is in addition, a general prayer. In Kansas v. Colorado, 185 U.S. 125, in passing upon a Demurrer, this Court said:

> "Doubtless the specific prayers of this bill are in many respects open to objection, but there is a prayer for general relief, and under that such appropriate decree as the facts might be found to justify could be entered, if consistent with the case made by the bill and not inconsistent with the specific prayers in whole or in part, if that were also essential."

The rule is stated in Dobie v. Sears, Roebuck & Co., 164 Va. 469, 180 S.E. 289, 107 A.L.R. 1026, as follows:

> "A party seeking equitable relief is entitled to any relief which the material facts and circumstances put in issue by the bill may sustain, but such relief must be consistent with the pleadings and the prayer."

In Blue v. Blue, 92 W. Va., 574, 116 S.E. 134, 30 A.L.R. 1169, the Court said:

> "It is urged by appellant's counsel that an accounting should have been ordered under the prayer for general relief. Where a bill contemplates and the prayer asks for specific relief, as in this case reformation of a deed, the court under the prayer for general relief cannot award relief inconsistent with the objects and purposes of the bill."

Colorado, having prayed specifically for equitable apportionment between the states, relief inconsistent therewith, such as a dismissal of the cause, can not be granted under the general prayer of the Colorado Answer and Cross Bill.

Propriety of Relief Under Declaratory Judgement Act

At page 29 of the Colorado Brief it is said this Court has repeatedly refused to issue declaratory decrees, citing Arizona v. California, 283 U.S. 423; United States v. West Virginia, 295 U.S. 463; Alabama v. Arizona, 291 U.S. 286, and Massachusetts v. Missouri, 308 U.S. 1. The Federal Declaratory Judgment statute was enacted June 14, 1934, (Judicial Code 274-D; 28 U.S.C.A. 400; 48 Stat. 955). Arizona v. California, and Alabama v. Arizona, supra, were decided prior to the enactment of this statute. In United States v. West Virginia, and Massachusetts v. Missouri, referred to above, it was the decision of this Court that there was not an actual controversy, and hence the Declaratory Judgment Act did not apply. It is specifically provided that declaratory judgments may be issued only "in cases of actual controversy."

What constitutes actual controversy under the Federal Declaratory Judgment Act is given thorough consideration by this Court in Aetna Life Insurance Company v. Haworth, 300 U.S. 227; 81 L. Ed. 617. In the opinion it is said:

> "The Declaratory Judgment Act of 1934, in its limitation to 'cases of actual controversy,' manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense. The word 'actual' is one of emphasis rather than of definition. * * *
>
> "A 'controversy' in this sense must be one that is appropriate for judicial determination. Osborn v. Bank of United States, 9 Wheat. 738, 819, 6 L. Ed. 204, 233. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. * * * The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. * * * It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of

facts. * * * Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. * * * And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required."

Numerous authorities are cited in support of the propositions above quoted.

Prior to enactment of the Federal Declaratory Judgment Act, this Court, in Nashville Railway Company v. Wallace, 288 U. S. 249, 77 L. Ed. 730, found that it had jurisdiction to review a declaratory judgment of a State Court. We quote the following from the opinion:

"Thus the narrow question presented for determination is whether the controversy before us, which would be justiciable in this Court, if presented in a suit for injunction, is any the less so because through a modified procedure appellant has been permitted to present it in the state courts, without praying for an injunction or alleging that irreparable injury will result from the collection of the tax.

"While the ordinary course of judicial procedure results in a judgment requiring an award of process or execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function."

The Court then referred to the exercise of its power to adjudicate boundaries between states, saying that it gave no injunction or other relief beyond the determination of the legal rights which were the subject of controversy, and cited numerous boundary dispute cases. A case involving the question of jurisdiction under the Federal Declaratory Judgment Act is Currin v. Wallace, 306 U. S. 1, 83 L. Ed. 441.

Much of the argument of Colorado for dismissal of this case is rested upon the proposition that as to that State there is a failure of proof of actual or threatened injury. Purpose of the Federal Declaratory Judgment Act was to afford an adjudication of rights before the accrual of damage. The following is from the opinion in Edelman & Co. v. Triple-A Specialty Company, 88 Fed. (2d) 852, Certiorari denied 300 U. S. 680:

"It was the congressional intent to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued."

Citing as authority for its statement, Nashville Railway Company v. Wallace, 288 U. S. 249, United States v. West Virginia, 295 U. S. 463, and other cases, the Court in Gully v. Interstate Natural Gas Company, 82 Fed. (2d) 145, certiorari denied, 298 U. S. 688, said:

"When, then, an actual controversy exists, of which, if coercive relief could be granted in it the federal courts would have jurisdiction, they may take jurisdiction under this statute, of the controversy to grant the relief of declaration, either before or after the stage of relief by coercion has been reached."

These cases and others which might be cited, such as Lehigh Coal & Navigation Co., v. Central Railway Company of New Jersey, 33 Fed. Supp. 362, make it clear that the purpose of the Federal Declaratory Judgment Act is to enable litigants to obtain an adjudication of rights before damage is sustained. That being true, this is exactly the type of case in which relief might be appropriately granted under the Declaratory Judgment Act if it be assumed that Colorado has not injured or threatened to injure either of the other states.

The Federal Declaratory Judgment Act should be given a liberal interpretation. (See Mississippi Power & Light Company v. City of Jackson, 116 Fed. (2d) 924, certiorari denied 312 U. S. 698, and Tennessee Coal, Iron & R. Co., v. Muscoda Local Union No. 123, 137 Fed. (2d) 176, 88 L. Ed. 611.) The latter case was decided by this Court March 27th, 1944.

Each of the litigant states in this cause is before the Court with prayer for equitable apportionment of the waters of the North Platte River. The suit was commenced after enactment of the Federal Declaratory Judgment Act. While we do not deem it necessary to rely upon that enactment for affirmative relief in this case, we do say that under the principles of the cases above cited, and particularly Nashville Railway Company v. Wallace, 288 U. S. 249, and Aetna Life Company v. Haworth, 300 U. S. 227, the Court can appropriately make apportionment of the use of the waters of the North Platte River between the

litigant states. Particularly is this true as to Colorado, since that state has not only entered prayer for such apportionment, but has admitted in her Answer and Cross Bill that the other states are entitled to such relief. (See Colorado Answer and Cross Bill, page 10, above quoted.)

Conclusion

Colorado is an indispensable party to the settlement of the controversy over the use of the waters of the North Platte River. An apportionment can not be made between Nebraska and Wyoming unless Colorado's rights are fixed. The possibility of additional depletion in the upper state makes it impossible for the two lower ones to agree upon any division of supply between them. There must be a balance of the rights of all three states before the problem can be solved.

In Colorado v. Kansas, 320 U. S. 383, it was found that a Decree, such as was recommended by the Master, would inflict serious damage on existing agricultural uses in Colorado, and would operate to deprive some citizens of Colorado to some extent of their means of support. The situation is entirely different here as the proposed Decree will permit full and complete exercise of all presently existing uses.

In paragraph Seventeen, at page 46 of her Cross Bill, Colorado admits the failure of compact negotiations. All efforts of the states to settle their differences by compact have failed (M.R. p. 38). Since a compact can not be made, the only means of settlement is by decree of this Court, as is so clearly pointed out in Kansas v. Colorado, 206 U. S. 46 (pp. 96, 97). This litigation has continued over a period of more than ten years. There are almost 30,000 pages of testimony, and in addition 1,288 exhibits. The basic findings and conclusions of the Master are extensive and cover quite fully the factual issues in the case. Upon this record it is possible for this dispute to be settled. We think the states ought not be denied relief on Colorado's plea of immunity from a decree which does not in any way restrict her present uses from the stream, and which is to be an open decree, permitting her application to make additional use if future water supply conditions warrant the same. Particularly is this true when Colorado, by her pleading in the cause,

has admitted the right of the other states to equitable apportionment and has prayed therefor.

We urge that a Decree be entered as proposed in our Brief heretofore filed.

Respectfully submitted,

LOUIS J. O'MARR,
Attorney General,
Cheyenne, Wyoming.

W. J. WEHRLI,
Special Counsel,
Casper, Wyoming.

February 26, 1945.

APPENDIX

WYOMING ANSWER BRIEF

NEBRASKA EXHIBIT NO. 577
THE STATE OF WYOMING

Certificate of Appropriation of Water

Certificate Record No. 55, Page 318
Proof Number 21826, Page 1
Farm Unit Number 187

WHEREAS, CHARLES A. TOLLE, has presented to the Board of Control of the State of Wyoming proof of the appropriation of water from the North Platte River through the Interstate and Tristate Canals under Permit Number 1398 Enl., the Pathfinder Reservoir under Permit Number 609 Res., the Guernsey Reservoir under Permit Number 3905 Res., and Secondary Permit Number 4969 Enl., and the applications therefor including the General Statement filed therewith and made a part thereof, for the irrigation of the lands herein described, lying and being in MORRILL COUNTY, NEBRASKA.

NOW KNOW YE: That the Board of Control, under the provisions of Chapter 122, Wyoming Revised Statutes 1931 Sections 418 and 1501, by an order duly made and entered on the 15th day of November, 1937, in Order Record No. 8, Page 159, has determined and established the priority and amount of such Appropriation as follows:

NAME OF APPROPRIATOR, CHARLES A. TOLLE: POST OFFICE ADDRESS: LODGEPOLE, NEBRASKA.

AMOUNT OF APPROPRIATION: (a) One (1) cubic foot per second of time for each seventy (70) acres of irrigable land, said appropriation to be supplied by re-application of water from the Interstate Canal which is picked up by the Tristate Canal, and (b) Supplemental storage supply from the Pathfinder Reservoir and the Guernsey Reservoir; or any combination of the said sources of supply;

DATE OF APPROPRIATION: Natural flow re-application of water of the North Platte River, December 6, 1904; Right of storage in Pathfinder Reservoir, December 6, 1904; Right of storage in Guernsey Reservoir, April 20, 1923;

DESCRIPTION OF LAND TO BE IRRIGATED AND FOR WHICH THIS APPROPRIATION IS DETERMINED AND ESTABLISHED:

26.5 A. Lot 2,
36.6 A. SW¼ NE¼, Sec. 5, T. 19 N. R. 49 W.

TOTAL ACREAGE: Sixty three and one tenth (63.1) acres

The right to the use of water hereby confirmed and established is limited to irrigation and domestic use, and is subject to all the terms, conditions, and limitations of the Constitution and laws of the State of Wyoming governing the appropriation of water and applicable contracts with the United States of America made pursuant to the Act of Congress of June 17, 1902 (32 Stat., 388), as amended and supplemented, known as the Federal Reclamation Law.

IN TESTIMONY HEREOF, I, JOHN D. QUINN, President of the State Board of Control, have hereunto set my hand this 26th day of March, 1938, and caused the seal of said Board to be hereunto affixed.

John D. Quinn,
President.

Attest: Fulton R. Bellamy,
Ex-Officio Secretary.

(SEAL)

TESTIMONY OF E. O. DAGGETT, CONCERNING PREFERRED RIGHT ACREAGE UNDER TRI-STATE CANAL

(Pages 10670-71)

Q.—Now, which column on page 24 indicates the land on which toll has been charged?

A.—Well, these lands include the preferred rights.

Q.—Well, I know—oh, they do include the preferred rights?

A.—Yes, sir, with the toll charge.

Q.—But there is one of those columns which includes the land upon which toll has been charged, is there not?

A.—With the preferred rights.

Q.—What?

A.—The preferred rights and the toll charge.

Q.—Now, what column is that?

A.—Under 'Water delivery acreage, High Value.'

Q.—That is the first column after the column designating the years, isn't it?

A.—Yes sir.

(Page 10532)

Q.—Does this tabulation on page 24 include also the lands outside the District such as the preferred rights?

A.—It does include the preferred rights.

Q.—Does it include the 660 lands also?

A.—Yes sir.