No. 5 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

THE STATE OF NEBRASKA, COMPLAINANT,

vs.

THE STATE OF WYOMING, DEFENDANT,

and

THE STATE OF COLORADO, IMPLEADED DEFENDANT,
THE UNITED STATES OF AMERICA, INTERVENOR.

REPLY BRIEF FOR THE STATE OF COLORADO, IMPLEADED DEFENDANT.

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INDEX

INDEX—(Continued)

INDEX—(Continued)

TABLE OF AUTHORITIES

CASES PAGE

INDEX—(Continued)

INDEX—(Continued)

CONSTITUTIONS AND STATUTES

INDEX—(Continued)

TEXTS AND MISCELLANEOUS

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STATEMENT OF ISSUES TO BE ARGUED BY COLORADO.

The other parties in their briefs have little to say about Colorado. The very minor position which Colorado occupies in the law suit makes this understandable, and adds weight to the Colorado argument that, no matter what may be the disposition of the case as to the other litigants, Colorado is entitled to a judgment of dismissal.

Appraising the situation from the standpoint of Colorado, we say:

1. No party asserts that Colorado has injured or presently threatens to injure any downstream water user.

2. The only claim of damage is that made by Nebraska, and it is based upon alleged diversions and storage in Wyoming by projects said to have priority dates junior to Nebraska canals, which at the time were assertedly short of water. In support of this claim, there is *no* showing of crop losses, decreased irrigated acreage, population decline or any other adverse effect on the welfare and prosperity of Nebraska.

3. The only attempt to establish a presently threatened injury is that made by Nebraska in regard to the Kendrick project of the United States for the storage of water in Wyoming to irrigate lands in Wyoming.

It follows that there may be no affirmative decree against Colorado unless the Court is to overthrow the long-established rule that the actions of a state may not be controlled by a decree of this Court in a suit by another state unless there is clear and convincing evidence of an injury of serious magnitude to the substantial interests of the complaining state.

Colorado might well rest its case at this point. The fact that it does not do so results, not from any lack of confidence in its position, but from an appreciation of the importance of this litigation to its water users and a realization that a state must, in the protection of its citizens and their interests, explore and answer all adverse contentions. Accordingly, we shall examine the exceptions and supporting arguments of the other parties so far as they affect Colorado, either directly or indirectly.

Wyoming, the state which requested that Colorado be impleaded as a defendant, has taken no exception and presented no argument with reference to any point affecting Colorado in the Report of the Master.

Nebraska attacks but one detail of the Master's report affecting Colorado, namely, the proposed limitation on storage of water which, Nebraska says, is 5,000 acre-feet too high (see Nebraska Exceptions 3 and 22, Nebraska brief pp. 71-75).

The United States has taken and argued one exception directly involving Colorado. It concerns the omission from the recommended decree of a provision requiring Colorado to maintain records of irrigation and storage of water (see United States Exception 6, United States brief, p. 21 and 22, and pp. 198-200).

In addition to these two minor details, the only argument of the other parties directly pertaining to Colorado relates to the point that an affirmative decree of apportionment of streamflow should be made between the three states (according to Wyoming and Nebraska) or between the three states and the United States (according to the United States). On this, none of the parties has presented any argument which has not been discussed in the opening Colorado brief. We shall not repeat those arguments in this reply brief.

Colorado has a vital interest in two other matters which are argued extensively but which do not concern Colorado directly in this case. These are (1) the contention that there should be a decree apportioning the streamflow between Wyoming and Nebraska upon the basis of priorities without regard to state lines; and, (2) the contention of the United States that a decree should be entered apportioning to the United States a portion of the streamflow. The great interest of Colorado in the development of the West through the beneficial consumptive use of water impels it to take advantage of its position as a litigant for the purpose of expressing its views on these two points which, in this case, affect it only indirectly.

SUMMARY OF THE ARGUMENT.

The argument to be presented by Colorado in this reply brief may be summarized thus:

I. If there is to be an affirmative decree affecting Colorado then:

   1. The allotment to Colorado as recommended by the Master should not be reduced because the

proposed allotment is well within Colorado's equitable share of streamflow.

2. There is no reason for a decretal provision requiring Colorado to keep records of irrigation and storage because Colorado law requires Colorado water officials to make such records.

II. No decree should be entered apportioning streamflow upon the basis of priorities without regard to state lines because:

1. The decisions of this Court do not approve such a method of apportionment.

2. The entry of such a decree, in the absence from this case as parties of the owners of the water rights, would violate the Fifth Amendment to the United States Constitution.

3. The imposition of such a schedule of interstate priorities contravenes the principle of equality of states.

III. There should be no apportionment to the United States because:

1. The claim of the United States does not present a justiciable controversy.

2. An apportionment to the United States of its relative share of streamflow would violate the Fifth Amendment because the owners of related rights are not before the Court.

3. The claim of the United States based upon its alleged ownership of unappropriated waters of of non-navigable streams is unsound because:

(a) The United States obtained no proprietary rights in such unappropriated waters and since the creation of the states has had no sovereign rights to control the use and disposition of such waters.

(b) Federal statutes sustain the position that the United States has neither proprietary ownership nor sovereign control of the unappropriated waters of non-navigable streams.

4. Appropriations rights for federal reclamation projects secured by compliance with state law do not justify or require an apportionment of a share of streamflow to the United States by a decree in this case because:

(a) The water users on the projects are the true owners of the water rights.

(b) The only applicability of the constitutional provision empowering Congress to control the use and disposition of property of the United States is to authorize Congress to regulate the disposition of the water appropriated by compliance with state law.

ARGUMENT.

I.

THE RECOMMENDED ALLOTMENT OF WATER TO COLORADO IS WELL WITHIN THE EQUITABLE SHARE OF COLORADO.

Nebraska, by its Exceptions 3 and 22 and supporting argument at pp. 71-75 of its brief, contends that the Master has awarded to Colorado more than its equitable share of water.

The Master defined Colorado's share as follows: (1) the water necessary to irrigate 135,000 acres of land; (2) the storage of 17,000 acre-feet of water a year; and (3) the transbasin exportation of 6,000 acre-feet of water a year. Nebraska complains that: (1) the allowance of 135,000 acres contains a safety margin of 3,200 acres and that such a safety margin was not given to Nebraska;[1] and (2)

[1] The Nebraska argument seems to go to the point that the Nebraska allowance should be increased rather than that Colorado allowance be decreased (See Nebraska brief, p. 72).

the allowance for storage should be reduced 5,000 acre-feet.

As to the irrigated acreage, the Colorado evidence is that in 1939 there was in Jackson County, Colorado, an irrigated area of 131,800 acres (R. 43)[2] and in addition 30,390 acres irrigable under constructed ditch systems having decreed water rights (R. 44). The 1940 Census reported an irrigated area in Jackson County of 154,279 acres (U. S. Ex. 204-B, App. 25). The Master's recommendation of 135,000 acres is thus 27,190 acres under the 1939 irrigated and irrigable area as disclosed by the Colorado investigation, and 19,279 acres under the irrigated acreage reported by the 1940 U. S. Census. Under such circumstances, the treatment afforded Colorado is neither liberal, nor a subject for proper complaint by Nebraska.

As to storage water, the Master adopted the figure of 17,000 acre-feet from the Colorado evidence as to the aggregate appropriation decrees for storage which amount to 17,050 acre-feet (see Colo. Ex. 35, Neb. brief p. 161).

The recommended allowance to Colorado of the pitifully small amount of 17,000 acre-feet of storage should in justice and equity provoke no complaint from down stream areas. Storage of water is the only way to protect against deficiencies in natural precipitation. In Jackson County there is a chronic water shortage and the only way to meet it is through stream regulation by reservoirs (Tr. 22861-22862, App. 51-52). Reservoir construction was prevented for a time by the federal embargo on rights of way over public lands for ditches and reservoir sites in Jackson County (Tr. 22444-22446, App. 50-51), and the needed additional reservoir sites (see Colo. Ex. 58, App. 7) are available.

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[2] In this brief identifying references preceding page numbers are as follows:

"R." — Master's Report.
"Tr." — Transcript of Record.
"App."— Appendix to this brief.

In referring to exhibits the abbreviated name of the party offering the exhibit and the exhibit number will be used, for example, Colo. Ex. 58.

The Master recommends for the Whalen-Tri-State Dam section of Wyoming and Nebraska, a full water supply ideally distributed. This is possible because of the enormous reservoirs in Wyoming. Yet Nebraska still objects and would prevent Colorado from protecting against chronic water shortages.

II.

THERE IS NO REASON FOR A DECRETAL PROVISION REQUIRING COLORADO TO KEEP RECORDS OF IRRIGATION AND STORAGE.

United States Exception VI and argument at pages 198-200 of its brief present the contention that there should be a decretal provision requiring Colorado and Wyoming "to maintain complete, accurate and available records of irrigation and storage of water in areas above Pathfinder."

Speaking only for Colorado, there is no need for such a provision—even if an affirmative decree is to be entered. By law in Colorado, water commissioners are required to report irrigated acreages (Colo. Stat. Ann., Chap. 90, Sec. 244). Records of storage in reservoirs must be kept (Colo. Stat. Ann., Chapter 90, Sec. 244). Likewise transmountain diversions are recorded and reported (Colo. Stat. Ann., Chap. 90, Sec. 100-102). It must be presumed that the Colorado water officials will carry out these statutory duties.[3]

Attention is further directed to the fact that Colorado has by its Ex. 58 (App. 7) introduced in evidence a map showing the irrigated acreage in 1939.[4] A spot check against this map will at any future date readily disclose any change in irrigated acreage.

It is clear that so far as Colorado is concerned the exception of the United States is not well taken.

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[3] Public officials are presumed to do their duty (*Louisiana v. Texas*, 176 U. S. 1, 20 S. Ct. 251, 257).

[4] The map as introduced in evidence is on a much larger scale than the reproduction in the Appendix.

III.

NO DECREE SHOULD BE ENTERED WHICH APPORTIONS STREAM-FLOW UPON THE BASIS OF THE PRIORITIES OF CANALS AND RESERVOIRS WITHOUT REGARD TO STATE LINES.

1. IN GENERAL.

Nebraska in its complaint sought a decree apportioning the stream-flow between it and Wyoming upon the basis of priorities without regard to state lines. The Nebraska position, as indicated by its brief, is now considerably modified. On pages 42-43 its counsel state:

> " * * * we do not seek in this suit to regulate Wyoming private canals above Whalen except to ask that Wyoming should not place further burdens on the river by further developments."

On page 43 they say:

> " * * * we think that the priority schedule should include the area down to Bridgeport * * * ."

We take it then, that the Nebraska position is that there should be an apportionment on the basis of a priority schedule from Guernsey[5] to Bridgeport. This would be in addition to the requirement that the Pathfinder, Guernsey, Seminoe and Alcova reservoirs and Casper canal maintain priorities as between themselves and also in relation to the North Platte project canals and certain Nebraska canals.

The United States contends (brief pp. 186-193) that a priority schedule for application in the Whalen to Tri-State Dam section is a more equitable basis of apportionment than is the flat percentage method recommended by the Master.

Wyoming has opposed such a method of apportionment in its pleadings and presentations to the Master. In its opening brief Wyoming advocates a mass apportionment between states.

As no party has urged that an interstate priority schedule should include Colorado, it cannot be said that Colorado

[5] Apparently Nebraska would prefer the point of Guernsey rather than Whalen (see Nebraska brief, p. 30).

has a direct interest in this phase of the argument. However, Colorado feels strongly that this method of apportionment is unsound, both legally and practically, and desires to set forth its reasons.

The Master agrees basically with Colorado as is shown by his conclusion 4 on page 9 which reads thus:

> "Neither the equitable shares of the states nor the matter of apportionment by decree ought in this case be determined *solely upon the basis of priorities.* A decision could not be so reached that would be wholly equitable. However, priorities are in my view one of the principal factors—perhaps the most important single factor—determinative of equitable apportionment."[6]

On page 112 of his Report the Master gives his reasons against an interstate priority schedule as follows:

> "Among the factors opposing the strict application of the priority rule are the very large number of appropriations involved, the great distances between points of diversion, and the wide diversity between the States in respect to (a) physical and climatic conditions; (b) the industries dependent upon irrigation; (c) uses and duty of water; (d) character and rate of return flows; (e) irrigation practices and legal policies."

2. THERE IS NO PRECEDENT IN ANY DECISION OF THIS COURT FOR AN INTERSTATE APPORTIONMENT ON THE BASIS OF A PRIORITY SCHEDULE WITHOUT REGARD TO STATE LINES.

In suport of its position Nebraska contends that the decision of this Court in *Wyoming v. Colorado,* 259 U. S. 419, constitutes a precedent for an interstate apportionment upon the basis of priorities. Such is not the case. Never, in *Wyoming v. Colorado* or in any other case, has this Court given approval, either directly or by way of implication, to a decree allotting water to two or more states upon the basis of an interstate priority schedule.

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[6] All italics in this brief are supplied by the author.

The Laramie River case (*Wyoming v. Colorado*) has been before this Court four times. To understand the situation all the decisions should be considered together. In 1911, Wyoming sued Colorado to enjoin transportation of water out of the basin of the Laramie river, a tributary of the North Platte, by an irrigation project known as the Laramie-Poudre tunnel, then under construction in Colorado. The Court made a comprehensive analysis of the water supply and determined that, after the satisfaction of demands having priority dates senior to the tunnel, there was left an overplus of 15,500 acre-feet per year (259 U. S. 496). The decree of this Court, as modified on rehearing, appears at 260 U. S. 1. That decree completely and absolutely ignores the doctrine of priority administration. First, the defendants are enjoined from diverting or taking from the Laramie river and its tributaries in Colorado more than 15,500 acre-feet per annum in virtue of the tunnel appropriation. Next appears a provision wherein it is expressly stated that the decree shall not prejudice the right of Colorado, or of anyone recognized by it as duly entitled thereto, to divert 18,000 acre-feet annually in virtue of the Skyline ditch appropriation, 4,250 acre-feet in virtue of meadowland appropriations, and an undesignated amount (later found to be 2,000 acre-feet) through the Wilson Supply ditch. Nothing could be clearer than the fact that the purpose of the Court was to protect existing vested rights in each state and to permit the diversion through the tunnel of only the overplus quantity of water remaining after the satisfaction of such existing vested rights. The decree ignores all principles of administration by priorities. It says nothing about any rights in Wyoming. There is no requirement that Colorado permit the passage of any specific amount of water to Wyoming at any time or for any specific appropriation.

In 1932 Wyoming again hailed Colorado before this Court, contending that Colorado was taking more water than the decree allowed. A motion of Colorado to dismiss was denied (286 U. S. 494, 508). The decision then announced contains no reference to any priorities and un-

equivocally states that the 1922 decree had as its purpose the determination of the quantity of water which Colorado might divert and thus withhold from Wyoming.

After the joining of issues and the taking of evidence, the Court held (298 U. S. 573) that meadowland diversions were in excess of the amount permitted by the decree and directed that an injunction be allowed to restrain such departure from the decree. So far as the transmountain projects were concerned, the Court held that such diversions in the aggregate did not exceed the total as recognized by the 1922 decree and hence were proper.

In 1940 Wyoming sought to have Colorado adjudged in contempt for violation of the decree, contending that Colorado's 1939 diversions were greatly in excess of the total allowable diversion of 39,750 acre-feet, and particularly that meadowland diversions had greatly exceeded 4,250 acre-feet. In defense Colorado contended that the meadowland diversions in excess of 4,250 acre-feet were in accordance with Colorado law and were not in violation of the decree until diversions in Colorado for all purposes reached the allotted total of 39,750 acre-feet. In support of its contention, Colorado presented a declaratory judgment of a state district court which held that the 1922 decree of this court was intended only to bear upon the relative rights of the states and was not intended to be an adjudicaion of the relative rights of the decreed appropriations in Colorado.

This Court is purging Colorado of the contempt charge said flatly, "A review of our decisions confirms the construction thus placed upon them," and concluded that "the decree is not violated in any substantial sense so long as Colorado does not divert from the Laramie river and its tributaries more than 39,750 acre-feet per annum." (309 U. S. 572, 576, 581).

Thus it is clear that the Laramie river decision made a mass allocation of water whereby Colorado was permitted to take and use 39,750 acre-feet annually, and Wyoming was permitted to take and use all the remaining water in the

stream. *Such a decision is utterly contrary to the principles of priority administration.*

The only other decision of this Court which Nebraska cites as a precedent for an apportionment on the basis of an interstate priority schedule is *Washington v. Oregon,* 297 U. S. 517, 56 S. Ct. 540. Nebraska asserts (brief, pp. 37-38) that it was there accepted by all the parties and the Court that, if any decree were to be made, it would be upon the basis of priority of appropriation in the respective states and says:

> "This was made clear by the Court in its discussion (297 U. S. 517 at 521, 80 L. Ed. 837 at 839)."

Nebraska misreads the decision. At no place does it state that an affirmative decree should apportion water upon the basis of an interstate priority schedule. On the page to which specific reference is made (297 U. S. 521) it is simply stated that the parties have stipulated that for the purpose of the case the individual rights of the respective land owners and water owners in the two states are governed by the doctrine of prior appropriation. The Court denied all relief upon the ground that there was no showing of an injury of serious magnitude (297 U. S. 524, 529).

3. THE APPLICATION OF THE DOCTRINE OF PRIOR APPROPRIATION TO INDIVIDUALS AFFORDS NO BASIS FOR APPLYING THAT SAME DOCTRINE IN A SUIT BETWEEN STATES.

On page 35 of its brief, Nebraska cites seven cases assertedly holding that when the appropriation doctrine is applied in both states on an interstate stream, the existence of the state line creates no difference in right and the prior appropriator in the lower state is entitled to the water in preference to the junior appropriator in the upper state.[7]

In none of these cases was a state a party. In none of them had there been any apportionment either by deci-

[7] One of the cases cited by Nebraska on page 35 of its brief is that of *Finney County Water Users Association v. Graham Ditch Company,* 1 F. (2d) 650. The prosecution of that case was enjoined by this Court in its decree entered in *Colorado v. Kansas,* 322 U. S. 708.

sion of this Court or by compact between the states in which the individuals used the water. Colorado says that none of these decisions is persuasive in the case at bar. A state represents all of its citizens and the citizens are bound by the determination of the rights of the state. In the absence of any interstate apportionment it may be proper to apply the principle of priority between appropriators from the same stream even though the water is used on both sides of a state boundary. This would not be true if there were a division of the waters between the states either by decree of this Court or by compact. After such apportionment is made the criterion is not the individual priorities but the fact of whether or not the use made is within the state's share of the water.

Individual rights and individual priorities are important only to the extent that they are factors involved in the mass right of the state and in a determination of the total amount to which the state and its water users are entitled. The state law operates to divide that amount among the individual users. Hence decisions determining individual rights are neither controlling nor persuasive. In this connection we again direct attention to the rule that, in an interstate suit, municipal law relating to like questions between individuals does not control (*Connecticut v. Massachusetts,* 282 U. S. 660, 670, 51 S. Ct. 286.)

4. THE PRINCIPLE OF DUE PROCESS REQUIRES THE PRESENCE IN THE SUIT OF ALL WATER USERS BEFORE THE ENTRY OF A DECREE SETTING UP A SCHEDULE OF INTERSTATE PRIORITIES.

This is a suit between states, not a suit between individuals.[8] The water users are represented by their respective states and cannot appear and litigate in person. In its decision in this case, on Wyoming's motion to dismiss, this Court specifically pointed out that this suit is not between

[8] A noteworthy distinction between this case and the original Laramie river case is that in the latter (*Wyoming v. Colorado,* 259 U. S. 419) Wyoming joined the owner of the Laramie-Poudre tunnel as a defendant and hence it was proper to consider, and to some extent determine, its rights.

private appropriators but is one between states whose interests are indissolubly linked with the rights of their respective water users (see *Nebraska v. Wyoming,* 295 U. S. 40, 43, 55 S. Ct. 568).

The establishment of an interstate schedule of priorities to have any effect at all must necessarily determine the relative rights of individuals in different states. In other words, the relationship between water users in two or more states would be adjudicated without any of the holders of such rights having a day in court. In Colorado, priority dates are determined by court decree, in Wyoming and Nebraska by decisions of administrative boards. There is no showing in this case, and indeed there could be none, that in fixing such dates the same theories and principles are applied in the three states. For such a schedule to be fair to the individuals the same rules and the same procedure should be applicable throughout the affected length of the stream. The point is that different tribunals applying different concepts, both of law and fact, determine the individual rights, and in all fairness it is utterly impossible to superimpose the action of one upon another.

Private water users who may not be parties to suits in this Court between two or more states are protected by Article V of the Amendments to the United States Constitution against having these vested rights impaired or destroyed by a decree in this Court. A Wyoming appropriator may be utterly ruined by an interstate priority schedule which superimposes priorities determined by Nebraska law upon priorities determined by Wyoming law, and he is denied due process of law if he cannot appear in person and be heard to protect the relative position of his priority. Where relative rights are to be determined the holders of all such rights are necessary parties (*Commonwealth Trust Co. v. Smith,* 266 U. S. 152, 159, 161, 45 S. Ct. 26).

The United States urges (brief p. 189) that there is no denial of due process because the states appear as "*parens patriae,* trustee, guardian or representative" of their citizens and hence the right holders are in contemplation of law

before the Court. Support for this statement is said to be found in the decision of this Court in *Hinderlider v. La-Plata,* 304 U. S. 92, 58 S. Ct. 803. In that case, a Colorado water user sued to enjoin water officials from denying it water when there was sufficient streamflow to satisfy its right except for the fact that the officials in asserted reliance on an interstate compact were requiring the water to pass to New Mexico. This Court upheld the officials and denied relief. It held that under the compact the water belonged to New Mexico and the Colorado user was not deprived of a vested right because it could not secure under Colorado law a vested right to water belonging to New Mexico. No question of determination of relative rights was involved. The compact in question set up no interstate priority schedule.

In making the compact, Colorado represented all its citizens. When it made an equitable apportionment by compact, all of its citizens were bound but their relative rights were not disturbed. A compact or a decree in an original suit in this Court binds the individual water users to the extent of the particular state's equitable interests in the river, but the relative rights between private appropriators in the state are controlled by local laws, under which rights in the state's equitable apportionment of an interstate river are vested in individual appropriators.

It is elementary that strangers to a judgment or decree are not bound thereby in actions *in personam* (*National Licorice Company v. National Labor Relations Board,* 309 U. S. 350, 60 S. Ct. 569; *Hansberry v. Lee,* 311 U. S. 32, 61 S. Ct. 115). An exception is recognized in the cases of a judgment strictly *in rem* but it has been held by the 10th Circuit Court of Appeals (*Albion v. Naf Irrigation Company,* 97 F. (2d) 439, 444) that such exception does not apply to judgments in proceedings *quasi in rem* like suits to quiet title or to adjudicate water rights. A suit between two states over the apportionment of the flow of an interstate stream is not a case strictly *in rem.*

The Master has agreed with Colorado position in this regard. We quote from page 115 of his report:

> "An interstate priority schedule would necessarily interfere with the freedom of each State in the intrastate administration of the State's share of the water. It would have the effect of fixing the rights of the appropriators within each State as between each other. *Constitutionality of a decree having this effect would appear to be open to serious question in view of the absence of the appropriators as parties to the case.*"

5. THE IMPOSITION OF A SCHEDULE OF INTERSTATE PRIORITIES IS CONTRARY TO THE PRINCIPLE OF EQUALITY OF STATES.

All states of the Union are on an equal footing with respect to rank, the exercise of sovereign powers, and the restrictions imposed by the federal constitution (*Kansas v. Colorado,* 206 U. S. 46, 97, 27 S. Ct. 655; *Coyle v. Smith,* 221 U. S. 559, 31 S. Ct. 688, 692; *Pollard v. Hagan,* 3 How. 212, 11 L. Ed. 565).

Each state may adopt, construe, apply and repeal its own legislation (*Massachusetts v. Missouri,* 308 U. S. 1, 16, 60 S. Ct. 39, 42.)

The establishment of a schedule of interstate priorities actually constitutes the imposition on one state of the municipal law of another state. While it is true that, so far as the region involved in this litigation is concerned, all three of the states theoretically apply the appropriation doctrine, yet each of them is absolutely free to change its local law at any time except for such restrictions as appear in the federal constitution. The fact that Nebraska has the appropriation system today does not mean that it will have it tomorrow, and it may not be required to follow that system forever merely because a neighbor state has adopted the same doctrine. The benevolence of a state towards its own citizens obviously bestowed to encourage internal development may not be extended to citizens of another and rival state having the same internal policy upon any theory of an

estoppel or consent by either sovereignty to the adoption of the appropriation doctrine as the controlling principle for the adjustment of the rights of its citizens. The uniformity, or lack of it, in the municipal water law of two contending states is not and should not be determinative of rights.

In *Connecticut v. Massachusetts,* 282 U. S. 660, 51 S. Ct. 286, there were involved two states each of which adhered to the common law riparian principles. Yet this Court in its decision refused to apply such riparian principles in determining the interstate dispute. There is no reason for applying the theories of the appropriation doctrine in the instant interstate dispute merely because that is the local law of the litigant states. To the contrary the reasons for not following that doctrine are even more persuasive than were those for not applying the strict riparian principles to the determination of the Connecticut-Massachusetts controversy.

IV.

THERE SHOULD BE NO APPORTIONMENT TO THE UNITED STATES.

1. IN GENERAL.

The United States argues at length that there should be an apportionment to it of the water necessary for the North Platte and Kendrick projects. This claim has no direct effect on Colorado as the United States diverts and stores no water of the North Platte and its tributaries in the Colorado portion of the basin for any federal project.

As a state which applies the appropriation doctrine of water law, Colorado is vitally concerned with the position taken by the United States. If the federal theory should be accepted by the Court and an affirmative decree entered allotting to the United States a share of North Platte streamflow, a precedent of far reaching effect will be established.

Fundamentally, the issue raised by the United States relates to administrative control over the stream. Shall it

remain in the states or shall it be taken over by the United States? Counsel for the government will protest this statement of the question. They will point out that they recognize the existence and validity of vested private rights to the use of water created over the years, and that they do not dispute the fact that additional private rights to the use of presently unappropriated water may be acquired in the future. Such statements are correct. We are surprised that the United States feels it necesary to make them. They do not change the basic issue.

The beneficial consumptive use of water to irrigate the arid land of the west requires, above everything else, competent administration. While the definition of rights is important, the control of streamflows so as to make possible the maximum use, by those owning the rights of use, is of far greater practical importance. It does no farmer any good to have a water right unless the stream is so operated as to protect his right and afford him full opportunity for use. Thus far in the history of our nation, the reponsibility for stream administration has been a recognized function of state governments.[9]

The United States seeks a decree of this Court apportioning to it a share of the streamflow. Such a share will necessarily have a position which is relative to the shares of other water users both junior and senior. This follows beyond doubt as the government concedes the validity of pre-existing vested private rights and the possibility of future acquired rights. Since all such water rights, both government and private, are relative one to the other, the power of control rests in the authority which can, from day to day, administer the stream so as to maintain and enforce the proper relationship. This power and responsibility must be unified. It may not be dual. *Only chaos could result from the recognition of both state and federal juris-*

[9] See *Pacific Livestock Company v. Lewis*, 241 U. S. 440, 36 S. Ct. 637; *Bergman v. Kearney*, 241 Fed. 884, 893, and cases there cited; Miscellaneous Pub. No. 418, U. S. Department of Agriculture, page 78. Also dissenting opinion of Justice Jackson in *United States v. Powelsen*, 319 U. S. 266, 63, S. Ct. 1047, 1058, and cases there cited.

diction to administer streamflow so as to satisfy related rights.

The United States diverts and stores water in Wyoming when there is water available to supply its priorities. After it has diverted the water from the river, it has control over the distribution and disposition thereof. This being true, there can be no reason to apportion by decree a share to the United States unless thereby the United States is given the right to determine whether there is water in the stream available for use under its priorities. Wyoming makes this determination for all other priorities. Obviously, if two different sets of officials, one state and one federal, are determining the availability of water for related rights, a situation is presented in which it is reasonable to expect disagreement and confusion. Divided authority over the river can produce no good result.

For the United States to exercise effectively the right to determine the availability of water for its priorities, it would have to determine the availability of water for all other related rights. In other words, the United States would have to take over the administrative functions of the State of Wyoming so far as the North Platte river and all of its tributaries are concerned. The obvious lack of a federal statute under which such administrative functions could be performed, and the unconstitutionality of such a statute, if ever enacted by Congress, would seem to preclude all possibility of a decree apportioning a share of the streamflow to the United States.

Counsel for the government devote pages 30 to 177 of their brief to a skillfully developed legalistic argument supporting their theories. They have nothing to say about the practical aspects of the situation. To Colorado, the orderly and efficient administration of water resources is a matter of highest importance. If a precedent is created in this case which recognizes any federal jurisdiction to determine the availability of water to supply relative rights within a state, then all progress which has been made in the

development of state water administration has gone for naught. In its place there will be a new and untried system having as its basis a court decree rather than statutory law.

2. THE CLAIM OF THE UNITED STATES DOES NOT PRESENT A JUSTICIABLE CONTROVERSY.

Most certainly the government claim presents no justiciable controversy between the United States and Colorado because the United States claims no rights in the Colorado section of the basin.

We say further that neither the pleadings, the evidence nor the briefs disclose any justiciable controversy between the United States on one side and Wyoming and Nebraska on the other in regard to the asserted claim by the United States of an apportionment of water to it. There is no assertion that Wyoming and Nebraska are depriving the United States of any water; that either state is interfering with the use of water by the United States; or that anything whatsoever is being done by either state, its officials or water users, to injure the United States in any way. *There being no claim of injury, there is no reason to grant any relief.*

The argument for the government is that the United States has certain sovereign powers over its property and this fact requires recognition by a decree allotting a share of the streamflow to it. The argument for the states is that the government does not have any sovereign powers which either justify or require such a decree. Thus we have presented an abstract proposition—nothing more.

In the case of *Ashwander v. Tennessee Valley Authority,* 297 U. S. 288, 338, 56 S. Ct. 466, 472, this Court pointed out that the pronouncements, policies and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy save if they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining. In *New Jersey v. Sargent,* 269 U. S. 328, 46 S. Ct. 122, the Court declined to determine the abstract question of whether or not certain

features of the Federal Water Power Act exceeded the authority of Congress and encroached upon that of the state. The effect of diversion of water from Lake Michigan upon hypothetical water power developments in the indefinite future was left undecided in the case of *New York v. Illinois,* 274 U. S. 488, 47 S. Ct. 661. Claims based upon assumed potential invasion of rights are not enough to warrant judicial intervention. (*Arizona v. California,* 283 U. S. 423, 462, 51 S. Ct. 522.)

The proposition of state as opposed to federal control merely presents rival claims of sovereign powers made by the national and state governments. The judicial power does not extend to the adjudication of differences of opinion.[10] As pointed out by the Court in *United States v. West Virginia,* 295 U. S. 463, 474, 55 S. Ct. 789, 793:

> "*There is no support for the contention that the judicial power extends to the adjudication of such differences of opinion.* Only when they become the subject of controversy in the constitutional sense are they susceptible of judicial determination. * * * Until the right asserted is threatened with invasion by acts of the state, which serve both to define the controversy and to establish its existence in the judicial sense, there is no question presented which is justiciable by a federal Court."

As the Court observed in the West Virginia opinion (295 U. S. 475) the sovereign rights of the United States are not invaded or even threatened by mere assertions. This one principle is sufficient to dispose of the government claim to an apportionment of water in the instant case.

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[10] Attention is also directed to the decision of this Court in the New river case where it was said (*United States v. Appalachian Electric Power Company,* 311 U. S. 377, 423, 61 S. Ct. 291, 306):

> "The brief and arguments at the bar have marshaled reasons and precedents to cover the wide range of possible disagreement between nation and state in the functioning of the Federal Power Act. To predetermine, even in the limited field of water power, the rights of different sovereignties, pregnant with future controversies, is beyond the judicial function. The Courts deal with concrete legal issues, presented in actual cases, not abstractions."

8. THERE MAY BE NO APPORTIONMENT TO THE UNITED STATES OF ITS RELATIVE SHARE OF STREAMFLOW BECAUSE THE OWNERS OF THE RELATED RIGHTS ARE NOT BEFORE THE COURT.

As we have repeatedly said, the right of the United States is a relative right. The government necessarily concedes this when it admits that private rights to the use of water have vested and that additional private rights may be acquired in the future.

The rights of the states are of a different nature. Each is entitled to its equitable share, but such shares, if relative at all, are relative only to each other—not to all appropriators as is the government's alleged share. Thus, if the decree should allot water to the states and also the United States, it would be mixing rights of different natures. A basic amount of water would be awarded to Wyoming and Nebraska. On top of this, an allotment to the United States would occupy a most uncertain position. Would it be superior to the state rights? If so, how could there possibly be any integrated administration of the stream?

To the best of our knowledge, this is the first case which has ever been presented to this Court involving the claims of two or more states and the United States to the waters of an interstate stream. In *Kansas v. Colorado,* 206 U. S. 46, the United States intervened and asserted national control over interstate waters, a claim which was denied by the Court. In *Wyoming v. Colorado,* 259 U. S. 419, the United States appeared and argued that the United States owned the unappropriated water of the stream, an argument which was not even referred to in the opinion of the Court. In the first *Arizona v. California* case (283 U. S. 423) the Secretary of the Interior was joined as a party defendant but the case was disposed of on a motion to dismiss and there was no discussion of an apportionment of water. In the third *Arizona v. California* case (298 U. S. 558) the United States was not a party and the Court sustained a motion to dismiss on the ground that the presence of the United States was indispensable. In

this connection, the Court specifically stated (298 U. S. 558, 572):

> "We leave undecided the question whether an equitable division of the unappropriated water of the river can be decreed in a suit in which the United States and the interested states are parties."

While this statement would seem to leave the question open, it must be remembered that the situation along the Colorado is vastly different from that along the North Platte. The Colorado is navigable—the North Platte non-navigable. The immense storage facilities along the lower Colorado were constructed under the Boulder Canyon Project Act (45 Stat. 1057) which gave to the Secretary of the Interior exclusive power to dispose of the stored water by contract. Arizona was seeking an allotment to it of a portion of this stored water.

In that section of this brief dealing with the Nebraska contention that the decree should apportion the streamflow upon the basis of priorities without regard to state lines, we have presented an argument that such a decree determining relative rights cannot be entered in the absence from the case of the owners of such relative rights. The situation in regard to the government claim is even more serious. The United States asks a decree for its relative share even though the private holders of the other relative rights are not in the case and cannot get in. While this Court has permitted the intervention of the United States, it has denied the same right to a private water user (see order of November 18, 1935, 296 U. S. 548, 56 S. Ct. 176, denying a motion of the Platte Valley Public Power and Irrigation District for leave to intervene). Not only the Fifth Amendment but also the fundamental principles of equality and justice forbid a determination of relative rights without at least affording the claimants of all of the rights an opportunity to be heard. In this case, the owners of the private rights are not given that opportunity. The argument that the states represent such private rights under the *parens patriae* theory is unavailing as the private

rights are conflicting among themselves and the state surely cannot constitutionally represent conflicting rights.

Despite the protestations of the United States to the contrary, it would seem that this matter was settled by the Court in its ruling on the Wyoming motion to dismiss. The Court then said (295 U. S. 40, 43):

> "The motion asserts that the Secretary of the Interior is an indispensable party. The bill alleges and we know as a matter of law, that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator or an irrigation district formed under the state law. *His rights can rise no higher than those of Wyoming, and an adjudication of the defendant's rights will necessarily bind him.* Wyoming will stand in judgment for him as for any other appropriator in that state. He is not a necessary party."

The Master has agreed with our contention in this respect. We quote from page 11 of his report:

> "The position of the United States (or the Secretary of the Interior as representative of the United States) is that of an appropriator of water for storage under the laws of Wyoming. Its interests in that connection are represented by the state of Wyoming. *No separate allocation to it would be proper in any scheme of apportionment.*"

4. THE CLAIM BY THE UNITED STATES THAT ITS OWNERSHIP OF THE UNAPPROPRIATED WATERS OF THE STREAM ENTITLES IT TO A DECREE APPORTIONING TO IT THE WATER USED ON FEDERAL RECLAMATION PROJECTS IS UNSOUND.

a. In General.

This contention of the United States is based upon its "examination of title" theory. The argument proceeds thus: the United States owned all land and water by reason of territorial cessions to it; it has never parted with title

except to the extent that it has acquiesced in the creation of private rights under state law; water necessary for the federal reclamation projects was reserved or withdrawn from the water not then covered by private rights. In answer we say (1) all rights to water are of a usufructuary nature and in the absence of a use there is no basis for a claim of title; (2) the United States has irrevocably surrendered or relinquished whatever rights it had; (3) no reservation or withdrawal of water has been or could be effective to establish title in the United States to water used on a federal reclamation project.

b. The United States Obtained No Proprietary Rights in Unappropriated Waters and, Since the Creation of the States Has Had No Sovereign Rights to Control the Use and Disposition of the Water of Non-navigable Streams.

At the time of the territorial cessions there was no private ownership in the North Platte basin and hence the United States secured full proprietary and sovereign control. However, this, does not mean that the United States owned any water rights. Because of its fugitive nature, the only property rights which exist in water in its natural state, under either the riparian rights or the appropriation doctrine, are rights of use, the corpus being susceptible of ownership only while in possession (see 1 *Wiel, Water Rights,* 3rd Ed. p. 736; 1 *Kinney on Irrigation,* 2nd Ed. p. 763).

Mr. Justice Story in the early case of *Tyler v. Wilkinson,* 4 Mason 397, 400, 24 Fed. Case No. 14312 said:

> "In virtue of this ownership he has a right to the use of the water flowing over it in its natural current without diminution or obstruction. *But strictly speaking he has no property in the water itself; but a simple use of it while it passes along.*"

The United States argues (brief footnote 9 on page 50 and pages 127-129) that this is unimportant because whatever rights there were in the water belonged to the United States. The trouble is that counsel for the United States confuse proprietary title with sovereign control. As pro-

prietor the United States could not and did not own any water rights in the absence of use. As sovereign it could govern the manner in which rights of use could be secured, but such sovereign control passed to the states upon their creation. Thereafter, all proprietary rights, whether of the United States or of private citizens could be secured only by compliance with state law.[11]

This Court has repeatedly held that every State may choose its own system of water law. The federal government has only such powers as are delegated to it by the United States Constitution. All powers not so delegated are by the express provision of the Tenth Amendment reserved to the states. The power to legislate on the question of the acquisition and control of water rights has never been delegated to the United States, and hence such power properly and unquestionably belongs to the individual states. Such was the holding in *Kansas v. Colorado,* 206 U. S. 46, 94, 27 S. Ct. 655, wherein the Court said:

> "It (a state) 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 purpose of irrigation shall control. *Congress cannot enforce either rule upon any state.*"

In the same effect are *United States v. Rio Grande Dam and Irrigation Company,* 174 U. S. 690, 19 S. Ct. 770; *Gutierres v. Albuquerque Land and Irrigation Company,* 188 U. S. 545, 23 S. Ct. 338, and *California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U. S. 142, 164, 55 S. Ct. 725. In *Bean v. Morris,* 221 U. S. 485, 31 S. Ct. 703, this Court had before it a water right dispute in which there was a prior appropriation in Wyoming and an alleged interference by a diversion in Montana. We quote from the decision (221 U. S. 486):

> "We know of no reason to doubt, and we assume, that subject to such rights as the lower state may be decided by this Court to have, and to vested private

[11] See *United States v. Fox,* 4 Otto 315, 24 L. Ed. 192.

rights, if any, protected by the Constitution, the State of Montana has *full legislative power* over Sage Creek while it flows within that state."

As the states have full power of choice, consideration should next be given to the choice which they made in the arid west. It is clear that the common law riparian system was never in effect in any part of the region with which this case is concerned. While the litigant states, in common with other western states, adopted the common law of England as their system of jurisprudence, this adoption has by unanimous authority been construed to mean that the common law was adopted only so far as applicable to the physical characteristics of the region and the position in which the settlers found themselves (see 1 *Kinney on Irrigation,* 2nd Ed. p. 1017). It was well said by Justice Story in *Van Ness v. Pacard,* 2 Pet. 137, 143, 144, 7 L. Ed. 374:

> "The common law of England is not to be taken, in all respects, to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation."

In the same effect are *Hurtado v. California,* 110 U. S. 516, 531, 4 S. Ct. 111; *Boquillas Land and Cattle Company v. Curtis,* 213 U. S. 339, 29 S. Ct. 493; and *Clark v. Nash,* 198 U. S. 361, 370, 25 S. Ct. 676.

The inapplicability of the riparian system to the arid and semi-arid west has been recognized by the highest Court of each of the states involved in this case. See *Yunker v. Nichols,* 1 Colo. 551, 553; *Coffin v. Left Hand Ditch Company,* 6 Colo. 443, 446; *Farm Investment Company v. Carpenter,* 9 Wyo. 110, 136, 61 Pac. 258, 264; *Willey v. Decker,* 11 Wyo. 496, 73 Pac. 210; *Meng v. Coffee,* 67 Neb. 500, 511, 93 N. W. 713; and *Crawford v. Hathaway,* 67 Neb. 325, 93 N. W. 781.

The Colorado Constitution (Art. XVI, Sec. 5) provides

that the unappropriated water of every natural stream is the property of the public and dedicated to the use of the people of the state.

The Wyoming Constitution declares (Art. VIII, Sec. 1) that the water of all natural streams, springs, lakes, or other collections of still water, is the property of the state.

The Nebraska Constitution (Art. XV, Secs. 5 and 6) dedicates the use of water of every natural stream to the people of the state for beneficial purposes, subject to appropriation.

By constitution or statute, Arizona, California, Idaho, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington have similar provisions (see compilation in Miscellaneous Publication No. 418, United States Department of Agriculture, page 78). Such constitutional and statutory declarations mean that the waters are *publici juris,* free for all to take subject to the provisions of state law (see 1 *Kinney on Irrigation,* 2nd Ed. 656; *Wiel on Water Rights,* 3rd Ed. 197; *California Oregon Power Company v. Beaver Portland Cement Company,* 295 U. S. 142, 163, 55 S. Ct. 725).

Government counsel dispose of the state constitutions and statutes by saying that the states cannot by the adoption of a certain system of law deprive the United States of its property. They miss the point which is that the United States had no property because it had never put the water to use. After it lost sovereign control at the time of creation of the states, the United States could then obtain a property right only by compliance with state laws.

The United States attempts to escape this argument by reliance upon the old common law rule that the beds of non-navigable streams and lakes are the private property of riparian owners (See *Pollard, et al, Lessee v. Hagan,* 3 How. 212; *Martin v. Waddell,* 16 Pet. 367; *Shively v. Bowlby,* 152 U. S. 1; *Scott v. Lattig,* 227 U. S. 229). The answer is that this rule refers to the ownership of the beds of non-navigable streams, not to the ownership of the

water flowing in such streams. The owner of the bed does not own the water. He can obtain ownership of a right to use the water only by putting it to use in compliance with law.

All doubt whatsoever on this point is dispelled by a consideration of the rights for which the United States seeks recognition. It asks to have apportioned to it water for storage in Pathfinder and Guernsey reservoirs of the North Platte project and Seminoe and Alcova reservoirs of the Kendrick project. *No possible theory of water law can base a storage right upon an inchoate claim of ownership by reason of the territorial cessions.*

Under the riparian system, there exists no right to store water for future use. Hence, whatever rights the United States may be able to assert by reason of the territorial cessions are confined to the use of so much of the water on riparian lands as is permissible under the narrow and restricted rules of riparian doctrine. The controlling principle is well stated in "Selected Problems in the Law of Water Rights in the West, Miscellaneous Publication No. 418, United States Department of Agriculture," from which we quote (page 47):

> "The riparian right, while including the right to detain water temporarily in forebays or reservoirs for power purposes, does not extend to a detention of surplus water above immediate needs from a wet season to a dry one—in other words it does not include the right to store water for future use. Seasonal storage, therefore, is not a proper riparian use but constitutes an appropriation of the water."

The rule that the storing of water for future use is not within the exercise of riparian rights has long been recognized. See 3 *Kent's Commentaries,* Sec. 439; *Angell on Water Courses,* 6th Ed. Sec. 115; *Gould on Waters,* 2nd Ed. Sec. 218; *Tyler v. Wilkinson,* 4 Mason 397, 24 Fed. Case No. 14312; *Herminghaus v. Southern California Edison Company,* 200 Calif. 81, 252 Pac. 607; *City of Lodi v. East Bay Municipal Utility District,* 7 Calif. (2d) 316, 60

Pac. (2nd) 439, 447; *Davis v. Town of Harrisonburg,* 116 Va. 864, 868, 83 S. E. 401; *Little Falls Fibre Co. v. Henry Ford and Sons,* 249 N. Y. 495, 164 N. E. 558; *Still v. Palouse Irrigation and Power Company,* 64 Wash. 606, 117 Pac. 466.

These authorities clearly establish that under the riparian system water may not be stored for future use. It follows that the right to impound the flow of the North Platte in the reservoirs of the North Platte and Kendirck projects is by compliance with state law and in no event can such rights be greater than the perfected appropriations.

This Court has recognized the principle that appropriation rights are secured by acts done in compliance with state laws. We quote from *Arizona v. California,* 283 U. S. 423, 459, 51 S. Ct. 522:

> "To appropriate water means to take and divert a specified quantity thereof and put it to a beneficial use *in accordance with the laws of the state where such water is found,* and, by so doing, to *acquire under such laws,* a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever subject only to the right of prior appropriations."

It follows that whatever rights the United States has in the waters of the North Platee have been acquired by compliance with state law. The position of the United States is like that of any other appropriator. It is entitled to no different treatment in the decree than that afforded all others holding such rights secured by compliance with state law.

c. Federal Statutes Sustain the Position That the United States Has Neither Proprietary Ownership Nor Sovereign Control of the Unappropriated Waters of the Stream.

Counsel for the government devote much time to the development of the argument that the Acts of 1866, 1870 and 1877 did not divest the United States of title to or control over unappropriated waters. They follow this

argument with the contention that the Reclamation Act of 1902 likewise does not disturb the ownership or control of the United States. We have heretofore presented our contention that the United States obtained no proprietary ownership in the waters of the non-navigable streams by reason of the territorial cessions, and that it lost whatever sovereign control it had at the time of the admission of the various states. We say that each and every Act which the United States discusses at such great length proves the validity of our contention.

The Acts of 1866 and 1870 (14 Stat. 251, 16 Stat. 217, 43 USCA 661) have been considered by this Court on many occasions. The purport of all of these decisions is that the Congress of the United States thereby recognized the doctrine of prior rights by prior appropriation, in accordance with local law (see *Jennison v. Kirk,* 98 U. S. 453, 25 L. Ed. 240; *Atchison v. Peterson,* 20 Wall. 507, 22 L. Ed. 414; *Basey v. Gallagher,* 20 Wall. 670, 22 L. Ed. 452). In *Broder v. Natrona Water and Mining Company,* 11 Otto. 274, 276, 25 L. Ed. 790, the principle was simply stated that the Act of 1866 was "rather a voluntary recognition of a pre-existing right of possession, consisting of a valid claim to its continued use, than the establishment of a new one."

The Act of 1877 (19 Stat. 377, 43 USCA 321) is the so-called Desert Land Act which provides for desert land entries and read thus:

> "* * * Provided, however, that the right to the use of water by the person so conducting the same on or to any tract of desert land of 320 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."

This Act together with the Acts of 1866 and 1870 were before this Court in the case of *California Oregon Power Company v. Beaver Portland Cement Company,* 295 U. S. 142, 55 S. Ct. 725. There the Power Company claimed riparian rights and sought to enjoin the Cement Company, which had appropriation rights, from interfering with waters of the Rogue river in Oregon. The Court reviewed at length the conditions in the west which led to the passage of these Acts and commented upon them and the decisions construing them. The Court held that the appropriation rights of the defendant were good and hence the injunction should not issue. The Court thus summarized its decision (295 U. S. 142, 163):

> "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 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 to riparian rights should obtain."

By such holding, the Court has recognized that sovereign control over the non-navigable waters has passed to the states. The belabored legalistic argument of government counsel cannot detract from the effect of this decision. In *Ickes v. Fox,* 300 U. S. 82, 95, 57 S. Ct. 412, the rule announced in the California Oregon Power Company case was repeated, and again in *Brush v. Commissioner of Internal Revenue,* 300 U. S. 352, 367, 57 S. Ct. 495, the Court took occasion to restate the rule saying:

> "Many years ago, Congress * * * passed the Desert Land Act * * * 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."

The Acts of 1866, 1870 and 1877 are in effect today[12] They are a true recognition by Congress of the plenary control which the states have over the waters of the non-navigable streams.

In the United States brief at page 138, it is argued that there is a definite limitation upon the operation of these Federal Acts. Citing *United States v. Rio Grande Dam and Irrigation Company,* 174 U. S. 690, 19 S. Ct. 770, counsel urge that in the absence of specific authority from Congress a state cannot by legislation deny the right of the United States, as the owner of lands bordering on streams to the continued flow of the waters so far as may be necessary for the beneficial use of government property. This so-called limitation is in no way applicable to the instant case. There is no allegation in any pleading, no evidence of any character, and no claim asserted in the brief of the government that any of the litigant states are doing or threatening to do anything to disturb any rights which the United States may have as the owner of lands bordering on the North Platte river or its tributaries.

It must be remembered that much of the land under the North Platte and Kendrick projects was *private* land at the time each project was initiated. On page 5 of the United States Petition of Intervention, it is conceded that of the lands under the North Platte project, 100,000 acres were privately owned when the project was commenced. As to the Kendrick project, there is no statement in the petition as to the amount of publicly owned land, but we believe it will be conceded that practically all lands under this project are privately owned.[13] This being true, the asserted limitation has no application.

Strong reliance is also placed upon the case of *Winters v. United States,* 207 U. S. 564, 28 S. Ct. 207. There the

[12] The United States urges that these laws might be repealed by Congress. We say that their repeal would make no difference. Municipal sovereignty, which controls the acquisition of water rights, has passed to the states.

[13] In its brief, page 42, the United States says that "about seven per cent of the irrigable area will be public lands."

United States sued to enjoin diversions from a non-navigable Montana stream upon the ground that the waters so diverted were, by the agreement with the Indians creating Fort Belknap Reservation, reserved for use thereon. The defendants claimed that the waters in question were open to appropriation under Montana law. The Court granted an injunction. The reservation was made while Montana was yet a territory. The agreement with the Indians was a treaty which by Article VI, Clause 2, of the United States Constitution is the supreme law of the land and hence could not be superceded or affected by the Montana Constitution or her statutes. Moreover, in that case the reservation which the Court recognized was of a right to use waters on Indian lands through which the stream flowed and the reservation was made before the admission of Montana to the the Union. In the case at bar, the federal reclamation projects were initiated many years after Wyoming and Nebraska became states and the water was for use on lands located many miles from the stream and the lands, as we have stated above, were in large part held in private ownership. There is such a difference between an Indian treaty affecting land within a territory and a reclamation project for the benefit of privately owned lands within a state that a decision in regard to the first cannot even have a persuasive effect as to the second.

The third decision cited by the United States in support of its position is *Ide v. United States,* 263 U. S. 497, 44 S. Ct. 182. There the United States asserted ownership to return flows developed on a Wyoming reclamation project. The Court upheld the ownership of the United States therein as against the appropriation claims of the defendant. With such decision we have no quarrel. The Court merely recognized ownership of the United States in waters appropriated for a reclamation project. The holding would have been the same if a private company had been in the position of the United States. The Ide case does not hold that the United States owns the unappropriated waters of the non-navigable streams. Likewise, it does not hold that

the United States has any sovereign control over the waters of non-navigable streams after the creation of the states.

The consistent policy of Congress is further exemplified by the Reclamation Act of 1902 (32 Stat. 388.)

Section 8 of that Act reads as follows:

> "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 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 the Federal Government or of any land owner, 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 limitation of the right."

Counsel for the United States devote pages 93 to 127 of their brief to the argument that the Reclamation Act, and particularly the section quoted above, does not have the effect of disturbing the ownership or control of the United States in non-navigable unappropriated waters, but to the contrary, establishes the right of the United States in the ownership and control of such waters for reclamation projects. The argument is so far fetched that it is easy to understand the necessity for the devotion of so many pages to it. It is submitted that the real effort is to present a false issue in órder to distract attention from the plain, unambiguous, and unmistakeable language of Section 8 which requires the Secretary of the Interior to comply with state law.

It is pertinent to consider the decision of this Court denying the Wyoming Motion to Dismiss this case. It was

there argued that the Secretary of the Interior was an indispensable party. The Court ruled otherwise, saying (295 U. S. 40, 43) that the Secretary of the Interior and his agents acting under the Reclamation Act must obtain permits or priorities for the use of waters from the State of Wyoming in the same manner as a private appropriator, and as Wyoming will stand in judgment for him as for any other appropriator, the Secretary of the Interior is not a necessary party. While the principle of the law of the case may not apply because at that time the United States was not a party to this litigation, nevertheless it would seem that by this statement the Court so clearly expressed the intent of Congress, as shown by Section 8, that no just attack may be made upon it. The government argues to the contrary, saying that the order of this Court permitting the United States to intervene precludes any implication that the Court was denying the claim of government ownership in its action on the motion to dismiss. Our reply is that the decision of the Court is unquestionably right and that the permission for the United States intervention means nothing in this regard because the order of the Court then entered (304 U. S. 545, 58 S. Ct. 1035), specifically provides in its 4th paragraph, that the order allowing intervention should be without prejudice to the determination, on final decree, of any of the substantive questions of law or fact.

Section 8 of the Reclamation Act has been construed by this Court as requiring the Secretary of the Interior to proceed in conformity with state law. In *Silas Mason Company v. Tax Commission of the State of Washington,* 302 U. S. 186, 198, 58 S. Ct. 233, this Court referred to the 1902 Reclamation Act stating:

> "That Act was not intended to provide for the acquisition of exclusive federal jurisdiction. The Act itself stated the contrary (Sec. 8, 43 USC Sect. 383). It directed the Secretary of the Interior to proceed in conformity with the state laws in carrying out the provision of the Act and provided that nothing therein contained should be construed as interfering with the laws of the state relating to the control, appropriation,

use, or distribution of water used in irrigation. *The Act has been administered in harmony with this controlling principle that the state should not be ousted of jurisdiction.''*

Such a holding is in conformity with the Circuit Court decisions of *Burley v. United States,* 179 F. 1 (9th Cir.), and *United States v. Humboldt Lovelock Irrigation Light and Power Company,* 97 F. (2d) 38, certiorari denied, 305 U. S. 630, 59 S. Ct. 94.

The government argues further that Section 8 is directory rather than mandatory, the theory apparently being that, if the Secretary of the Interior does not like a particular federal statute, he may utterly ignore it. The question of whether or not the statute is mandatory or directory is of no moment here. Such a question is important only in consideration of the validity of acts done by a government official. When a statute says plainly that an official shall proceed in a certain way, that provision is definitely binding on the official. He may not disregard it at will. Moreover, if we accept the argument on the basis of the government's presentation, then we find that the statute is unquestionably mandatory. Under the law announced in *French v. Edwards,* 13 Wall. 506, 20 L. Ed. 702, 703, wherein it is said that when statutory requirements are intended for the protection of a citizen and to prevent a sacrifice of his property and by disregard of which his rights might be injuriously affected, the statute is not directory but mandatory. The requirement of Section 8, that the Secretary of the Interior comply with state laws, is designed to protect all water users along streams both under federal projects and those under private enterprises. There may be no orderly administration of streamflow unless there is uniform definition of rights. Section 8, by requiring compliance with state law, assures both uniform definition of rights and orderly administration. In this connection, it is interesting to note that the matter of state as opposed to federal control was debated in Congress when the Reclamation Act of 1902 was up for passage. Pertinent references to the legis-

lative history of the Act are contained in footnote 1 on page 175 of the report of the Master.

It is noted that there is no provision of the Reclamation Act authorizing the Secretary to make a reservation of water. Government counsel, to make good their claim that there should be an affirmative apportionment to it of a share of the streamflow, necessarily have to define that share. Accordingly, they argue that such share consists of the waters reserved by the Secretary for use on the North Platte and Kendrick projects. Such reservations, they say, were accomplished in either one of two ways,[14] viz: the action of the Secretary in withdrawing public land susceptible of irrigation with project waters from public entry, or the water filings made by the Secretary in conformity with the laws of Wyoming and Nebraska. The validity of the first of these arguments would appear to be destroyed by the fact that very large areas, composing in the aggregate well over 50% of the lands, were privately owned. The idea of a government official reserving waters for use on private lands merits no credence. As to the second method, the Master well characterized the situation when he said (R. 173-174):

> "I see no reason for regarding the action taken by the Secretary as an assertion of a previously existing right or as a 'reservation' of water under such right, or as a 'withdrawal' of water, as by the 'owner', from appropriation by others. *If such was the intention of the Secretary, he could hardly have chosen a more inept manner of making it manifest.* His action gives clear evidence of a purpose on his part to conform to the direction of the Reclamation Act to proceed in conformity with state law."

The Acts of Congress, the decisions of the Court, and the acts of the Secretary of the Interior all give support to our theory that the United States had no proprietary ownership in unappropriated waters of the non-navigable streams and that sovereign control thereof passed to the

[14] See United States brief, pages 108-109, and particularly footnote 35.

states. It necessarily follows that the Secretary could make no valid reservation or withdrawal of waters and can obtain in this case no affirmative decree apportioning to the United States waters of the North Platte.

5. THE APPROPRIATION RIGHTS SECURED BY COMPLIANCE WITH STATE LAW DO NOT JUSTIFY OR REQUIRE AN APPORTIONMENT OF A SHARE OF STREAMFLOW TO THE UNITED STATES BY DECREE IN THIS CASE.

The government contends that if its position predicated upon the ownership of unappropriated waters is not sustained, nevertheless it is entitled to have a decree apportioning to it a share of the waters because it has made valid appropriations under state law and hence secured property rights which may not be controlled by the states. Reliance is had upon Article IV, Section 3, Clause 2, of the United States Constitution, which imposes on Congress the power to dispose of and make all laws and regulations respecting the property of the United States.

In discussing this matter, attention is first directed to the decision of this Court in *Ickes v. Fox,* 300 U. S., 82, 57 S. Ct. 412, wherein this Court held that upon the federal reclamation projects the water users and not the United States are the true owners of the water rights. In that case a water user on the Yakima federal reclamation project in Washington brought suit to require the Secretary of the Interior to vacate an order which, it was alleged, would have the effect of reducing the amount of water for the irrigation of the petitioner's land. The Secretary moved to dismiss on the ground that the United States was an indispensable party. In disposing of the Secretary's contentions that the government owned the water used on the project, the Court said (300 U. S. 82, 95):

> "Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract already referred to, the water rights became the property of the land owners, wholly distinct from the property right of the government in the

irrigation works. * * * The government was and remained simply a carrier and distributor of the water * * *, with the right to receive the sum 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."

After the denial of the Secretary's motion to dismiss, this case was decided on its merits in favor of the land owned (see *Fox v. Ickes,* 137 F. (2d) 30, certiorari denied, 320 U. S. 792). The decision of the Court of Appeals of the District of Columbia was squarely based upon the decision of this Court in *Ickes v. Fox* referred to above.

Counsel for the United States make a detailed analysis of this decision in an endeavor to show that it is unsound and not applicable here. While it is true that the United States was not a party to that case, still the Secretary of the Interior was the defendant and he urged most forcefully the contention that the government owned the waters. There is no good reason for refusing to accept the decision merely because the United States, as such, was not a litigant. The proposition that a person cannot at the same time be both an owner and a lienor is so apparent that the mere statement is enough. Attention is directed that the situation shown to exist on the reclamation project involved in the case at bar is the same as that presented in *Ickes v. Fox.* We refer to United States Exhibits 46 to 56 inclusive which are various forms of water right applications and water right certificates. A typical provision is that contained in United States exhibit 48[15], wherein it is expressly agreed that annual charges and other matters "are hereby made a lien upon the tract of land above described and

[15] This Exhibit is set out in full in Appendix VI to the United States brief. See its paragraph 3.

on water rights now or hereafter appurtenant or belonging thereto."

If it be conceded that the United States is owner of project waters, nevertheless, the constitutional provision relied upon (Article IV, Section 3, Clause 2) does not have the effect for which government counsel contends. In the case of *Kansas v. Colorado,* 206 U. S. 46, the United States invoked this constitutional provision in support of its claim of national control as asserted in that case. The Court there said (206 U. S. 80):

> "The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property. * * * *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."

The same construction was placed upon this constitutional provision in the case of *Ashwander v. Tennessee Valley Authority,* 297 U. S. 288, 338, 56 S. Ct. 466, wherein this Court said:

> "The Constitutional provision is silent as to the method of disposing of property belonging to the United States. That method, of course, must be an appropriate means of disposition according to the nature of the property, it must be one adopted in the public interest as distinguished from private or personal ends, and we may assume that it must be consistent with the foundation principles of our dual system of government and *must not be contrived to govern the concerns reserved to the states."*

It is apparent from these decisions that in applying this constitutional provision there must be, first, consistency with the fundamental principles of our dual system of government, and second, no interference by the United States with the matters reserved to the states. These require-

ments can only be obtained by recognizing the United States, or the Secretary of the Interior in its behalf, as an appropriator under state law. Only by compliance with state law may the government acquire a property right in the use of waters.[16] Such right is dependent upon state law for its very existence. It is a right which is relative to the rights of other appropriators from the stream. The sum total of all these related rights is represented by the states in litigation with other states, and it is not proper for any decree in such a suit to single out the holder of one isolated right and award to it a share of the streamflow. This does not in any way conflict with the constitutional provision on which the government relies because the United States has full power to regulate the distribution and control the disposition of water after it has been stored or diverted in accordance with the appropriation rights. The United States has the full power of distribution and regulation required to satisfy both the literal wording and the clear intent of the constitution. There is no conflict even of a theoretical nature between the federal and state authorities if the position for which we contend is adopted.

CONCLUSION.

On the three issues, which it believes to be of paramount importance in this case, Colorado states its position thus: (1) a decree apportioning waters between states should not be made in the absence of a showing by clear and convincing evidence of an injury of serious magnitude; (2) a decree apportioning streamflow between states should not be predicated upon priorities without regard to state lines; (3) the United States is an appropriator under state law and is not entitled to a decree apportioning to it any share of streamflow.

These three basic considerations must not be lost sight

[16] It should be noted that there has been no cession by the states of jurisdiction to the United States. In the absence of cession of jurisdiction state authority is absolute. See *Colorado v. Toll*, 268 U. S. 228, 45 S. Ct. 505; *Fort Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 5 S. Ct. 995; *St. Louis Ry. v. Satterfield*, 27 F. (2d) 586, 588.

of in the mass of evidence and argument that is presented to the Court.

The answers are plain. A dismissal of this case as to all parties is the most desirable end to this litigation so far as the ultimate welfare of the nation and of the states is concerned.

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