No. 6 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.

BRIEF ON BEHALF OF THE STATES OF ARIZONA, CALIFORNIA, IDAHO, KANSAS, NEVADA, NEW MEXICO, NORTH DAKOTA, OREGON, SOUTH DAKOTA, TEXAS, UTAH AND VERMONT AS AMICI CURIAE.

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THE QUESTION PRESENTED

The United States of America, Intervenor, takes the position that it owns the unappropriated waters of the North Platte river, a non-navigable interstate stream, as well as the waters reserved (or appropriated) for use on the North Platte and Kendrick Federal Reclamation Projects and that such waters are free from state control. Intervenor claims that it became the owner of all lands and waters in the territory affected

Such contention is vigorously resisted by Nebraska, Wyoming and Colorado, and the Special Master, after

carefully and fully analyzing the theory and argument of the United States (pp. 165 to 177, Report of Special Master) stated (pp. 174-175):

> "Upon original acquisition of the territory ceded by France, Spain, and Mexico, the United States became both sovereign and proprietor. When the state governments were set up, sovereignty, generally speaking, passed to them. Proprietorship of the land passed out of the Government insofar as it has parted with title by the issuance of patents. The Desert Land Act separated the water from the land. There has been no subsequent general grant or divestment of the rights of the United States in the unappropriated water by or under any congressional act, and it would seem that such rights must continue to exist. Just what the nature and incidents of such rights may be in the light of intervening facts is an interesting question, but one of little practical importance in this suit. So long as Federal law remains what it is, all waters either wholly or partly on the public domain are open to appropriation under the laws of the states. Rights therein can be acquired only by compliance with the conditions prescribed by those laws, and plenary administrative control exists in the States. The rights of the Secretary of the Interior or of the United States in respect to the storage of water for the North Platte Project are derived from 'appropriation' under Wyoming law, using the word 'appropriation' broadly as including the privilege of storing and delivering water to the project appropriators."

and (pp. 176-177) concluded:

> "The conclusion is that the Secretary of the Interior (representing the United States) is an 'appropriator' of water for storage for the North Platte and Kendrick Projects under the laws of Wyoming, and occupies the same position as any private appropriator of a similar water right. Whether the

United States is, strictly speaking, the owner of a right to use the unappropriated water of the river is an academic question as far as the issues are concerned.

"Any apportionment, therefore, should be between the States of Nebraska, Wyoming, and Colorado. Needless to say, this contemplates no interference with the continued ownership and operation by the United States of its storage and power plants, works, and facilities."

The states, party to this case, contend that under either the riparian or appropriation doctrine the only rights which exist in water in its natural state are rights to use. Further, they maintain that the common law riparian doctrine was never in effect in any part of the North Platte River basin and therefore no proprietary rights were obtained by the United States under that doctrine. Consequently, the states upon their admission to the Union had the absolute right to adopt any system of water law they desired and that in fact they did choose the appropriation theory, which was a dedication of the waters to a public use, open to all upon compliance with state law. Next, that whatever rights, if any, the United States may have had in such waters were surrendered or relinquished by the Congressional Acts of 1866, 1870 and 1877 (14 Stat. 251; 16 Stat. 217; and 19 Stat. 377). And finally, that under state-adopted water codes vast property rights have vested and that the United States at all times has acquiesced in state control of the taking and use of such waters.

ARGUMENT.

1. STREAM WATER NOT SUBJECT TO OWNERSHIP.

Water in streams is not a commodity to be owned and held as property. It is only the use of water in its natural state which is subject to ownership, and then only, while in possession. So said the United States itself on page 27 of the appendix to its motion for leave to intervene in this case:

"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."

In the early case of *Tyler v. Wilkinson,* 4 Mason 397, 400, 241 Fed. Case No. 14312, Mr. Justice Story 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."

2. APPROPRIATION SYSTEM—NOT COMMON LAW DOCTRINE OF RIPARIAN RIGHTS — PREVAILS IN ARID AND SEMI-ARID REGIONS OF THE WEST.

The common law doctrine of riparian rights has been, as a matter of necessity, conservation and utilization abrogated in most western states and complete recognition given to the fundamental principles of the doctrine of appropriation, namely, that rights to water flowing in public streams shall be acquired by actual diversion of the water and applied to a beneficial use with the rights so secured being recognized in the order of their priority. This established doctrine was clearly recognized by Mr. Justice Stone in *Arizona v. California,* 298 U. S. 558, 565, 56 S. Ct. 848, in these words:

"Under this doctrine, diversion and application of water to a beneficial use constitute an appropriation, and entitle the appropriator to a continuing right to use the water, to the extent of the appropriation but not beyond that reasonably required and actually used."

Furthermore, the common law riparian system was never in effect in the area comprising the North Platte River basin because it was not practicable in that region. Mr. Justice Holmes, in *Boquillas Land and Cattle Company*

v. Curtis, 213 U. S. 339, 29 S. Ct. 493, so aptly announced this rule:

> "The right to use water is not confined to riparian proprietors * * * such a limitation would substitute accident for a rule based upon economic considerations, and an effort, adequate or not, to get the greatest use from all available land."

This Court, in its decision in *Wyoming v. Colorado,* (295 U. S. 419, 458, 459, 52 S. Ct. 552) recognized the inapplicability of the common law when it said:

> "The common law rule respecting riparian rights in flowing water never obtained in either state. It always was deemed inapplicable to their situation and climatic conditions. The earliest settlers gave effect to this rule whereby the waters of the streams were regarded as open to appropriation for irrigation, mining, and other beneficial purposes."

This same view has been adopted by various state Supreme Courts in the following cases:

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. 290;

Meng v. Coffee, 67 Nebr. 500, 511, 93 N. W. 713

3. CONGRESSIONAL ACTS OF 1866, 1870 AND 1877 CONSTITUTED IRREVOCABLE SURRENDER OF FEDERAL RIGHTS, IF ANY.

Assuming, for sake of argument only, that the federal government through territorial cessions obtained some kind of proprietary ownership over the waters of non-navigable streams, then it is obvious that such rights were irrevocably and unconditionally surrendered or relinquished by the Congressional Acts of 1866, 1870 and 1877.

The Act of July 26, 1866 (14 Stat. 251) and the Act of July 9, 1870 (16 Stat. 217) are codified together as section 661, Title 43, United States Code, reading as follows:

> "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.
>
> "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.

Then the so-called desert land act of March 3, 1877 (19 Stat. 377, 43 U. S. C. 321) applying to many western states except Colorado and Nebraska, was passed, reading thus:

> "* * * Provided, however, that the right to the use of water by the person so conducting the name, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona bide 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 the existing rights."

Colorado was brought within its terms by the amendatory act of March 3, 1891 (see 43 U. S. C. A. 323 and historical note).

This court has repeatedly and consistently held that through these Acts the United States, as owner of the public domain, severed the land and waters and dedicated the waters in the arid-land states for the use of the public under the laws of such states.

In the early case of *Jennison v. Kirk,* 98 U. S. 453, 25 L. Ed. 240 (1879) construing the 1866 law, it was stated (p. 458):

> "The doctrines of the common law respecting the rights of riparian owners were not considered as applicable, or only in a very limited degree, to the condition of the miners in the mountains."

and (p. 459):

> "It merely recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system, but sanctioned, regulated and confirmed a system already established, to which the people were attached."

Recently in *California Oregon Power Co. vs. Beaver Portland Cement Co.,* 295 U. S. 142, 55 S. Ct. 725 (1935), this Court said (pp. 157, 158):

> "The streams and other sources of supply from which this water must come were separated from one another by wide stretches of parched and barren land which never could be made to produce agricultural crops except by the transmission of water for long distances and its entire consumption in the processes of irrigation. Necessarily, that involved the complete

subordination of the common-law doctrine of riparian rights to that of appropriation. And this substitution of the rule of appropriation for that of the common law was to have momentous consequences. It became the determining factor in the long struggle to expunge from our vocabulary the legend 'Great American Desert' which was spread in large letters across the face of the old maps of the far west."

and (p. 163) summarized its decision:

"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."

To like effect, see:

Atchison v. Peterson, 20 Wall, 507, 22 L. Ed. 414;

Basey v. Gallagher, 20 Wall. 670, 683, 684, 22 L. Ed. 452;

Broder v. Natrona Water & Mining Co., 11 Otto 274, 276; 25 L. Ed. 790;

United States v. Rio Grande D. & L. Co., 174 U. S. 690, 706; 19 S. Ct. 770;

Gutierres v. Albuquerque Land & Irrigation Co., 188 U. S. 545, 553; 23 S. Ct. 338.

Recently the doctrine of the California Oregon Power Company decision has been reiterated in two decisions of this Court, viz:

Ickes v. Fox, 300 U. S. 82, 95; 57 S. Ct. 412 which reads:

"The federal government, as owner of the public domain, had the power to dispose of the land and water composing it together or separately; and by

the Desert Land Act of (March 3) 1877 (Chap. 107, 19 Stat. 377), 43 U. S. C. A., No. 321), if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately. Acquisition of the government title to a parcel of land was not to carry with it a water right; but all non-navigable waters were reserved for the use of the public under the laws of the various arid-land states."

Also, in *Brush v. Commissioner of Internal Revenue,* 300 U. S. 352, 367, 57 S. Ct. 495, this court said:

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

In short this court has consistently held that following the passage of the Acts of 1866, 1870 and 1877, if not before, the non-navigable waters of the public domain "became *publici juris,* subject to the plenary control of the designated states", and that the United States assented to the abrogation of the common law riparian doctrine.

4. EACH STATE MAY CHOOSE ITS OWN SYSTEM OF WATER LAW.

That each state may choose its own system of water law is a principle so long and well established and settled that argument appears unnecessary. The federal government is one of express delegation of powers, all other powers being reserved to the states as guaranteed by the Tenth Amendment. Therefore, the power to legislate on the matter of acquisition and control of water rights obviously belongs to the states. Mr. Justice Brewer passed definitely on this question in *Kansas v. Colorado,* 206 U. S. 46, 94; 27 S. Ct. 655, in these words:

> "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 purposes

of irrigation shall control. Congress cannot enforce either rule upon any state." (Italics supplied.)

and (p. 92):

"While arid lands are to be found mainly, if not only, in 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."

Other cases holding directly in point are: *Bean v. Morris,* 221 U. S. 485, 486; 31 S. Ct. 703; *Coyle v. Smith,* 221 U. S. 559, 576-580; 31 S. Ct. 688; *Hudson County Water Company v. McCarter,* 209 U. S. 349, 356; 28 S. Ct. 529.

5. WATERS DEDICATED TO THE PUBLIC BY A STATE CREATES WATERS PUBLICI JURIS, OPEN TO USE BY ALL UPON COMPLIANCE WITH STATE LAW.

The water involved in this case is *publici juris,* open to use by all upon compliance by state law and definitely so treated and recognized by the constitutions of Colorado (Art. XVI, Sec. 5), Wyoming (Art. VIII, Sec. 1) and Nebraska (Art. XV, Secs. 5 and 6). Also by constitution or statute, Arizona, Idaho, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington recognize this principle (see compilation in Miscellaneous Publication No. 418, United States Department of Agriculture, page 78). Thus we find that states comprising approximately half of the area of the United States by constitutional and statutory declarations have developed their lands, waters and agricultural civilizations on the basis that the waters are *publici juris,* free for all to take, but subject to regulation under the state police powers.

In California the doctrines of appropriation as well as of riparian rights have been and are in effect (see Cali-

fornia Constitution, Art. IV, Secs. 1 and 3, as to appropriations made on streams in public domain). California has always placed full reliance on the Acts of 1866, 1870 and 1877, *supra,* and on its Supreme Court decisions construing these acts (see: *Osgood v. Eldorado Water and Mining Co.,* 56 Cal. 571, 580; *Cave v. Typler,* 133 Cal. 566, 569, 65 Pac. 1089; *Duckworth v. Watsonville Water Co.,* 170 Cal. 425, 432; 150 Pac. 58; *Haight v. Constanich,* 184 Cal. 426, 430, 194 Pac. 26).

The two great legal writers on irrigation definitely recognize this principle (see 1 Kinney on Irrigation, 2nd Edition, 656; and Wiel on Water Rights, 3rd Edition, 197).

6. VAST PROPERTY RIGHTS HAVE VESTED UNDER OPERATION OF STATE WATER CODES.

Vast property rights have vested under western states water codes and have been so long recognized as to be immune to challenge at this late date. State administrative control has been expressly recognized by a federal agency (Miscel. Pub. No. 418—U. S. Department of Agriculture, page 78) in these words:

> "However, while the system as a whole has not been applied as completely in some jurisdictions as in others, and has not met with uniform success in all places, it is undeniable that a long period of time has shown that centralized control over water-right functions is workable. The system is generally conceded in the west to have been of marked public benefit. None of the states which have imposed public control have receded from the priniciple, excepting in those instances in which specific functions have been rendered inoperative, as the result of unfavorable court decisions. The general principle is now well established in most of the western states, for it is widely realized that the foundation of the system is the vital interest of the state in its water resources."

(See page 80 to 109 inclusive thereof for state compilation.)

This Court has stated this principle so clearly in *Arizona v. California,* 283 U. S. 423, 459; 51 S. Ct. 522, in the words of Mr. Justice Brandeis:

> "To appropriate water means to take and divert a specified quantity thereof and put it to 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." (Italics supplied.)

and in the California Oregon Power Company case, *supra.* (295 U. S. 142, 165; 55 S. Ct. 725):

> "The public interest in such state control in the arid land states is definite and substantial."

7. THE RECLAMATION ACT, AS WELL AS OTHER FEDERAL ACTS, AFFIRMATIVELY RECOGNIZES STATE CONTROL AND DEMANDS COMPLIANCE THEREWITH.

In addition to the expressions of Congress in the Acts of 1866, 1870 and 1877, the Reclamation Act, Section 8 thereof (Act of June 17, 1902, 32 Stat. 388), requires the Secretary of the Interior to proceed in conformity with state laws and provides that the act shall not be construed as interfering with the laws of any state relating to the control, acquisition, use or distribution of irrigation water. Section 27 of the Federal Power Act (16 U. S. C. A. 821) protects the rights of the state in these words:

> "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective states relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses of any vested right acquired therein."

And again in Section 9(b) (16 U. S. C. A. 802) said act requires applicants for permits to show compliance with state laws, and in the Boulder Canyon Project Act

(43 U. S. C. A. 617q) and in the Boulder Canyon Adjustment Act (43 U. S. C. A. 618m) recognized such state rights. See also the Act of June 28, 1938 (52 Stat. 1215) concerning the Dennison dam on the Red River.

Two Circuit Court decisions have recognized the effect of the provisions of Section 8, *supra*, of the Reclamation Act, viz: *Burley v. United States,* 179 Fed. 1 (9th Cir.) and *United States v. Humboldt Lovelock Irrigation Light and Power Company,* 97 Fed (2nd) 38, certiorari denied, 305 U. S. 630, 59 S. Ct. 94.

8. FEDERAL CONSTITUTION NOT VIOLATED BY PRINCIPLE OF STATE CONTROL.

There is no violation of the constitutional provision (Clause 2, Section 3, Article IV, United States Constitution), empowering Congress to dispose of and regulate federal property, in recognizing state control, and this Court in *Kansas v. Colorado, supra,* has so specifically held (page 89):

> "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 * * * 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."

and concludes (page 93):

> "But it is useless to pursue the inquiry further in this direction. It is enough for the purposes of this case that each state has full jurisdicition over the lands within its borders, including the beds of streams and other waters."

To the same effect, see *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 388, 56 S. Ct. 466, *Colorado v. Toll,* 268 U.S. 288; 45 S. Ct. 505.

9. RECOGNIZED PRINCIPLE OF POLITICAL EQUALITY AMONG STATES REQUIRES RECOGNITION OF STATE CONTROL.

The principle of political equality among all states of the Union has long been settled and recognized and hardly requires argument. Unless state control is recognized inequality would necessarily follow by granting such control to a riparian state and at the same time denying it to an appropriation state. See *Hudson County Water Company v. McCarter, supra* (209 U. S. 349, 28 S. Ct. 529, 531).

In the last analysis the United States can only obtain a decree to water on a stream by complying with state law exactly the same as an individual would exercise his rights of appropriation and a private individual cannot obtain a decree without other parties on the stream holding related rights having their day in court. Fundamental priniciples or equality and justice demand this protection, and the owners of private rights on the North Platte River and its tributaries are not parties to this case. The Fifth Amendment to the Federal Constitution is still in effect.

All states joining in this brief as *amici curiae* are vitally interested and would be materially and adversely affected if the astounding claim of the federal government to the ownership and control of waters in natural streams was sustained by this Court. So also would be all other states in the union which has developed such waters for any beneficial use under their respective state water codes.

CONCLUSION.

We strenuously urge that this Court recognize the fact that over a long period of years civilizations have been built in the western states based on the assurance that the waters of the streams therein were dedicated to a public use open to appropriation but upon compliance with the constitutional and statutory provisions pertinent in such states.

During all of this time the United States itself has acquiesed and for it to come in to Court at this late date in the face of a long and uniform line of decisions of this

Court recognizing these principles, and ask that the water codes governing an area representing approximately half of the United States be ignored and the vested water rights placed in jeopardy, creates a situation which we feel this Court will refuse to recognize and sustain.

Therefore, the findings and recommendations of the Special Master in this respect should be affirmed.

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