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Federal Claims to Unappropriated Waters

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FEDERAL CLAIMS TO UNAPPROPRIATED WATERS

By HON. CLIFFORD STONE,

Director and Secretary, Colorado Water Conservation Board, given before the Association of Western State Engineers at Phoenix, Ariz.

JUDGE STONE: Mr. Chairman and gentlemen. According to the program my remarks shall be confined to a discussion of the paper entitled "Federal Claims to Unappropriated Waters" by Charles J. Bartholet. You have listened to a reading of that paper.

There appeared in the paper a resume of the claims of the United States Government as set forth in the petition of intervention of the government in the case of Nebraska vs. Wyoming and Colorado. This suit is now pending in the United States Supreme Court and was instituted for the purpose of securing a judicial decree equitably apportioning the waters of the North Platte River among the three states mentioned. After the commencement of the suit the United States filed a peition of intervention and was allowed by the court to intervene. On the principle that the government has federal investments on the river and should be permitted to protect its claim to water necessary for the operation of structures built by the government, such intervention was granted, but the claim that the United States is the owner of all unappropriated waters in the North Platte has not been passed upon by the court and remains a question for adjudication in this litigation.

In order to understand the claim of the United States in this case, which if sustained by the court, establishes a principle which would be applicable to all rivers in the West, some of the specific statements of such claim contained in the petition of intervention should be recited. These are:

"2. France, Spain, and Mexico, by treaties with the United States in 1803, 1819, and 1848, respectively, and Texas by agreement with the United States in 1850, ceded to the United States territories including the entire basin of the North Platte River.

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

"4. The rights of the United States in the waters of the North Platte River did not pass to Nebraska, Wyoming, and Colorado upon

their creation and admission to the Union, but remained in the United States.

"5. The United States has never, by Act of Congress or otherwise, abdicated or ceded away its rights in the waters of the North Platte River except that by acquiescence in the local practices and by the Acts of July 26, 1866 (14 Stat. 253), July 9, 1870 (16 Stat. 218), and March 3, 1877 (19 Stat. 377), the United States adopted the practice of permitting rights in the waters of the streams of the public domain (including the North Platte River) to be acquired by private persons by compliance with state and territorial law prescribing how rights in waters could be acquired. From time to time private persons have, by appropriation in compliance with the law of one of the litigant States, acquired from the United States rights to use certain quantities of the waters of the North Platte River, and from time to time the United States, as is more specifically set forth hereinafter, has reserved waters of the river for Federal reclamation projects. Waters so appropriated or reserved were withdrawn from future appropriation, but rights in waters which have not been so appropriated or reserved are open to acquisition by private individuals as above described, all rights in such waters remaining meanwhile in the United States."

"7. For the purposes of the North Platte Project, as more particularly hereinafter described, the United States reserved and withdrew from future appropriation certain quantities of the theretofore unappropriated waters of the North Platte River. Pursuant to Section 8 of the Reclamation Act, and in order that an orderly system of priorities might be maintained, the United States effected these reservations by procedure substantially in conformity with the law of the State where the waters were to be diverted as to the acquisition by appropriation of rights to the use of water. In the case of waters to be diverted or stored in Wyoming for use in Nebraska, the United States proceeded in conformity with the law of Wyoming, and, as far as possible, with the law of Nebraska also."

The broad principle on which the government relies is stated in the "Appendix to Motion on Behalf of the United States for Leave to Intervene" as follows:

"* * * It is the contention of the United States that existing rights to appropriate and use the waters of the non-navigable streams of the public domain country are derived from the United States, either under the acts of 1886, 1870, and 1877, or by tacit grants in the era preceding those statutes; that these rights were granted by the United States, using local customs and State and Territorial laws as subordinate instrumentalities only. It is the further contention of the United States that title to all the water of the non-navigable streams of the public domain country which has not been granted away by the United States remains in the United States."

In general the position of the states as indicated by reference to the "Objections to Intervention of the United States,"

filed in the Supreme Court by Wyoming, is that the following propositions have been established by decisions of the court:

"1. By the Act of March 3, 1877 (19 Stat. 377), if not before, all unappropriated waters of non-navigable streams in the arid portions of the public domain became property of the public subject to the plenary control of the states.

"2. There is no Federal statute authorizing the United States, or any of its agencies, to make an appropriation of water except the Reclamation Act of 1902, and under that Act an appropriation of water may be made by the Secretary of the Interior only in conformity with the laws of the state or territory wherein the appropriation is made. The Secretary of the Interior, as an appropriator of water, is in the same position as any other appropriator.

"3. The United States is not the owner of unappropriated water or of water rights under appropriations made by the Secretary of the Interior, but such rights belong to the owners of the land upon which the water is applied.

"4. The Congress in accepting, ratifying and confirming the Constitution of Wyoming agreed that the natural waters within its boundaries are the property of the State."

In explanation of the position of the United States, B. E. Stoutmeyer, District Counsel of the U. S. Reclamation Service, states in a letter to J. B. Fink, Director of the Department of Conservation and Development, Olympia, Washington, as follows:

"* * * that the conditions which have made it necessary for the United States to apply to the Supreme Court for permission to intervene in the case of Nebraska v. Wyoming, are stated in the Government's Petition to Intervene, and that the object of the Government's motion to intervene is to be permitted to participate in the presentation of evidence and argument in order to protect its extensive property and financial interest in reclamation projects as well as to protect farmers and other persons whose rights to water are derived from and dependant upon the water rights claimed by the United States * * *.

"The United States has asserted in its motion and petition that it owns the waters of the North Platte River which it has appropriated for its reclamation projects free from the 'sovereign supervision or control' of the States. By that the United States means that the States have no independent 'sovereign' control over the use by the United States of those waters, but only such control as Congress has conferred upon them.

"It means that in the instance in which the Secretary is obliged to comply with State law or is subject to State administrative control in his conduct of the reclamation projects of the United States he is so obliged or so subject by reason of Section 8 of the Reclamation Act, or some other act of Congress, and not by reason of the inherent force of State law or authority alone. The United States recognizes, of course,

that Section 8 of the Reclamation Act provided that the Secretary, in carrying out that Act, shall comply with State law. All that the United States contends is that the obligations upon the Secretary to follow State law comes from this provision or from other federal statutes, and not from the force of State law alone. As is explicitly stated on page 69 of the Appendix, the United States is not seeking to have the Supreme Court pass at this time upon the question whether the provision of Section 8 that the Secretary shall comply with State law is directly or mandatory. * * *

"It is the position of the Government in this case that water rights are acquired by compliance with State laws and customs, not because the State owns the unappropriated water but because the United States, which does own the unappropriated water, has provided by Act of Congress that the rights thereto shall be secured by individual appropriators by compliance with state law. It will be observed at once that this is a rather theoretical difference as to the origin of water rights, rather than any difference as to how the rights are acquired or the validity or indefeasibility of the rights when acquired. That is, both the attorneys for the States and the Solicitor General, representing the United States, agree that it is necessary to comply with State laws in acquiring water rights and that rights so acquired are vested property rights and indefeasible. But the Solicitor General contends that this is true because Congress so provided in the acts above quoted and that the water rights originally belonging to the United States thus became available for appropriation under State law because Congress so provided and not because the States have declared themselves to be the owners of such unappropriated waters. The attorneys representing the States of Colorado and Wyoming, while conceding that the United States originally owned all the unappropriated water, claim that the States have become the owners thereof either because they declared themselves to be such owners in their state constitutions or for some other reason. This difference of opinion, however, as to the origin of water rights does not involve any difference as to the validity and effectiveness of water rights acquired by compliance with state law nor any difference of opinion as to the authority of the state to administer such vested rights as provided for in the state statute."

It will be observed that Mr. Stoutmeyer's statement evidences, as he admits, a theoretical difference of opinion as to the origin of water rights. However, if the court should sustain the principle that the water rights become available for appropriation under state laws because Congress so provided, then these rights in the state are threatened because if these rights were so granted by Congress, they can likewise be taken away. On the other hand, if these rights are founded in the constitutions of the several states as recognized and accepted by the Congress, then they are secure. The principle claimed by the government, if sustained by the Supreme Court, would lay

a basis upon which the Congress may pass appropriate legislation revoking the grant to regulate and control the unappropriated waters of the streams of the West. If the position of the states is sustained, then these rights are irrevocable. Constitutional provisions of the state, federal statutory enactments and interpretations of the courts over a long period of time have rendered these rights secure in the states; and the states are not in a position where the water rights of its citizens and the right to claim and appropriate water in the future is dependent upon a mere federal grant which may be revoked.

The government in recent years has established the policy of control of power produced by federally-financed utilization projects. Such projects are dependent upon a water supply. If the government is attempting to establish a policy as to such power through control of unappropriated water in the rivers of the West, then irrigation development is submerged in order to make more secure the government control over such power devlopments. On the other hand, if the government in appropriating water under state laws is in the same position as any citizen of a state, its rights arising no higher or no lower than those of a citizen, then the security of the inhabitants of the West in these water rights for all purposes is not jeopardized and the government is adequately protected.

The ultimate legal question presented by the motion for leave to intervene is whether the U. S. has an interest in the subject matter of the litigation which the states are not competent to represent, or are not adequately representing, and which, therefore, the U. S. is entitled to urge, as a party. The motion sets forth two distinct interests of the U. S. which will be affected by the litigation:

First, its interest in the appropriations of the waters of the North Platte River which have been initiated by the U. S. for federal reclamation projects; and, second, its claim to all of the appropriated waters of that river.

The U. S. Supreme Court has heretofore ruled on the motion of Wyoming to dismiss the complaint of Nebraska in the instance case (Nebraska v. Wyoming and Colorado). One ground in support of the request to dismiss was that the Secretary of the Interior was an indispensable party.

The court said (295 U. S. 40, 43):

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

There would seem to be no reasonable distinction between the Secretary of the Interior representing one of the government departments and the United States appearing directly through the Attorney General. It follows then in view of this decision of the court that where one of the litigant states moved to dismiss because the Secretary of the Interior was not a party, the court established the principle that the Secretary 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; and that his rights can rise no higher than those of Wyoming. Since the ownership in water is nothing more than the right to use it, it would seem from this statement just cited that such right can be acquired only through the state government; and that claim to "ownership in all unappropriated water" is an empty phrase which has no bearing on the substantial rights involved. Wiel in his work "Water Rights in the Western States" (3rd Ed.), pp. 752-755, states:

"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."

The principle set forth in the last quotation seems to be accepted by the government. Such a principle taken in connection with the announcement of the Supreme Court (last quoted above) shows that an academic discussion of the origin of the states' rights lends no weight to a determination of the question as to ownership in all unappropriated waters. The assertion of ownership in all unappropriated water is a naked claim if such ownership cannot be enjoyed except through recognition of the right to use such water by observance of state laws and regulations.

The farmer who places the water to a beneficial use is the beneficiary. It is his use by observing all state laws and regulations which establishes the right. His exercise of this right must be controlled by the same law which limits and establishes the rights of other water users out of the same stream. A farmer under a federal reclamation project has no different rights from those enjoyed by any other appropriator. If the United States observes the state laws and regulations in appropriating the water, then it acts only as a carrier and distributor of such water; it is in the position of trustee for the benefit of those water users and is not acting in a governmental capacity. Its rights in litigation are represented by the state.

The litigation over the waters of the North Platte in which the government claims ownership to all unappropriated water involves a determination of the proper division of the flow of the stream as between the litigant states. If the United States on a federal reclamation project owns all rights of appropriation free from the sovereign control of the states through which the river flows (as is claimed by the government), then the principle of equitable apportionment is nullified so far as arid states are concerned. There remains, if this claim of the government is correct, no basis upon which an equitable apportionment of unappropriated water can be determined. The unappropriated water would not be apportioned on an equitable basis to the citizens of the litigant states, but would go to water users under federal reclamation projects constructed in the various states and a race between the states to secure reclamation projects which would finally appropriate all of the unappropriated flow of the stream and be substituted for equity.

That the state represents all appropriators of water is sustained in other Supreme Court cases. In Kansas v. Colorado, 206, U. S. 46, as follows:

"While several of the defendant corporations have answered it is unnecessary to specially consider their defenses, for, if the case against Colorado fails, it fails also as against them."

The court held in Wyoming v. Colorado, 286 U. S. 494, 508, as follows:

"But it is said that water claims other than the tunnel appropriation could not be and were not affected by the decree, because the claim-

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

Since the court in the Nebraska case has permitted the United States to intervene without opinion and without passing upon the government's claim to all of the unappropriated waters of the North Platte, and in view of the decisions above cited, it is logical to assume that the court recognized the interest of the government as appropriator for the actual users and as an investor on the river and by such permission to intervene made provision for the government being adequately represented in the proceedings. There is no indication that such intervention was permitted on the basis that the government is recognized as owning and in control of all unappropriated waters to the exclusion of what we believe to be the well-recognized rights in the states; but pending this litigation and before the final decree is entered in the case it is necessary that the states defend their rights to control the use and appropriation of water, which is tantamount to ownership.

Section 8 of the Reclamation Act of June 17, 1902 (C. 1093, 32 Stat. 388), provides as follows:

"Sec. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, * * *"

Respecting this federal provision, the Solicitor General of the United States in his brief states:

"* * * As made clear in the Appendix to the Motion of the United States (pp. 68, 69), no question is here at issue concerning the authority or present applicability of Section 8 of the Reclamation Act.

That section, it may be assumed, requires exact conformity with State law in the administration of the Reclamation Act, save as Congress has otherwise expressly directed. * * *"

The government's interpretation of this clause is most interesting when we note the following:

"What is solely important is that if the existing exceptions to the requirement of conformity are valid, and if Congress has power further to depart from that requirement in the future, then the rights of the U. S. in the waters appropriated for federal reclamation projects do not fall in the same category as do the rights of private appropriators. * * *"

It will be observed that the position of the United States, as disclosed by the above statements, is that the Congress in passing the Reclamation Act of 1902 consented to a conformity of state laws in the administration of water rights and the control of waters appropriated for reclamation projects, but that Congress has power "further to depart from that requirement in the future," and that, therefore, the rights of the United States fall in a different category from that of private appropriators. In other words, the government takes the position that this provision represents a mere acquiescence by Congress in the control by the states of the water rights, with implied reservation to revoke any such law, and that future federal legislation may provide for taking water for federal projects free from the sovereignty of the states and in utter disregard of these rights as they have been recognized in the past. This position goes further than the statement contained in Stoutmeyer's letter, a portion of which is above quoted. He states that:

"Both the attorneys for the states and the Solicitor General representing the United States agree that it is necessary to comply with state laws in acquiring water rights and that rights so acquired are vested property rights and indefeasible."

The proper interpretation of the Reclamation Act and other federal legislative provisions respecting this subject would seem to be that the Congress in passing the Act did not merely acquiesce in the state laws, but on the contrary recognized the rights of the states to control the appropriation and use of water for irrigation and other purposes. In other words, there has been a deliberate congressional intent to recognize these states' rights. Such recognition has ample foundation in

the customs, constitutions of the several states, and constitutional interpretations by decisions of the federal and state courts. Reference is made in the government brief to the Acts of 1866 (14 Stat. 253), 1870 (16 Stat. 218), 1877 (19 Stat. 377). In the last cited statute, after providing that a claimant's right to the use of water depends upon bona fide prior appropriation, it is expressly stated that:

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

Sections 5 and 6 of Article XVI of the Colorado Constitution provides as follows:

"Sec. 5. Water, Public Property: The water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the State, subject to appropriation as hereinafter provided."

"Sec. 6. Diverting unappropriated water: Priority: The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes."

Decisions of the Supreme Court of the United States in passing upon the federal acts above cited have supported the principle of dedication of the waters of nonnavigable streams to the public for appropriation and use under state laws.

In California, Oregon Power Company v. Beaver Portland Cement Company, 295 U. S. 142, the Court holds that the effect of the Desert Land Act was to sever the water from the land and that a grantee in a patent would only take (295 U. S. 162):

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

The Court further held that the nonnavigable waters on

the public domain became "publici juris, subject to the plenary control" of the states, in language as follows:

"What we hold is that following the act of 1877, if not before all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states * * * with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain."

In Ickes v. Fox, 300 U. S. 82, the Court held:

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

Referring to the Desert Land Act in this same decision the following language was used:

"Acquisition of the government title to a parcel of land was not to carry with it a water right; but all nonnavigable waters were reserved for the use of the public under the laws of the various arid-land states."

Provisions similar to those contained in the Colorado Constitution, above quoted, are embodied in the Constitutions of Wyoming and other irrigated land states and these constistitutions in one form or another have been approved by the National Congress.

It is, therefore, clear that by the Reclamation Act of 1902 and other federal enactments, the Congress has recognized the well established principle that the water of nonnavigable streams is dedicated to the public for appropriation and use under the state laws; and may I repeat that because of the fugitive nature of water the control, under state laws, of its

appropriation and use is tantamount to ownership and the academic discussions by the Government of the origin of these rights is without legal force.

QUINN: Thank you, Judge Stone, for such an able discussion on the subject of the Federal claim. We yet have a little time for discussion from the floor.

MR. HYATT: Judge Stone, do you know the reason for this particular position taken by the Attorney General? I haven't heard those letters you referred to. Would like to ask what position you recommend this Association to take, if any? This Association is very much interested in this subject. Do you advise a resolution advocating attitude of the various states?

STONE: In answer to your question, the matter may be approached in two ways; namely: First, by passing an appropriate resolution expressing the views of this association; and, second, the several arid states interested in this matter may find it advisable to file briefs in the pending litigation on the North Platte as friends of the Court, and in such briefs cover only the opposition to the position of the Government that it owns all unappropriated water in the nonnavigable streams of the West. The states probably do not have such an interest in the pending litigation that a petition of intervention would be entertained by the Court.

MR. HYATT: Judge Stone, in submitting a brief would it be necessary for a state to submit the matter to the legislature?

STONE: Probably I should not attempt to answer that question, but may I suggest that in one state it was the Attorney General's suggestion that the matter was of sufficient importance that the legislature should be asked to authorize the filing of the brief covering the question in the Supreme Court and make sufficient appropriation for such purpose.

MR. MCCLURE: There is a question of upholding constitutional rights of Wyoming and Colorado; also rights that exist under the Reclamation Act. In granting authority to certain federal agencies to appropriate water under state laws that are in operation, what effect would that have on federal agencies that have in the last year secured statutes to go ahead and make use of waters?

There might be some infringement on water rights claimed by another federal agency not tied down definitely under Congressional acts. We should see to it that all water development of any kind by a federal agency recognizes the state laws. In the final analysis the welfare of the states and those who sell water under these projects require the state laws, rules and regulations are followed and I believe that can be brought about by the Court.

HUMPHREYS: I would like to ask Judge Stone whether or not the states of Wyoming and Colorado and several others attempted to influence the Attorney General to such an extent that he did go forward with your request and change his position in face of intervention. Perhaps this is a dangerous time to pass resolutions. Perhaps we should rely on the papers which are now on file in the Supreme Court of the United States. These letters, I believe, are the immediate results of pressure—pressure not sufficient to withdraw its claim if any water is open for adjudication under it. I believe the Reclamation Bureau regrets that this position was ever taken. The Reclamation Bureau has cooperated with these states in the matter of water rights and reclamation projects for construction.

STONE: The Attorney General of the three states of Nebraska, Wyoming and Colorado consulted with the Solicitor General and other federal officials on this matter. I shall not attempt to set forth those discussions but it is clear that after they were had the Government in the last briefs filed in the case continued to claim ownership in all unappropriated water of the North Platte.

CRAMER: I have been connected with the federal government for a long time. In our department we are required before licensed to use water to see that the licensee complies with the state laws and determine what is the most important use of the water, whether essential to irrigation or domestic uses.