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DECREES IN INTERSTATE WATER SUITS

W. J. WEHRLI*

In only two cases has the Supreme Court of the United States entered decrees making an apportionment of water between states for irrigation use. The first of these is *Wyoming vs. Colorado*, 259 U. S. 419, 42 Sup. Ct. 552, 66 L. Ed. 999, involving the Laramie River, and the second is the North Platte case, *Nebraska vs. Wyoming*, 325 U. S. 589, 65 Sup. Ct. 1332, 89 L. Ed. 1815. In each of these cases the controversy as to the use of water for irrigation purposes arose between states which had adopted the appropriation doctrine.

In the Laramie River case, the Court adopted the rule of priority of appropriation in making equitable apportionment of the supply between Wyoming and Colorado and said:

"We conclude that Colorado's objections to the doctrine of appropriation as a basis of decision are not well taken, and that it furnishes the *only* basis which is consonant with the principles of right and equity applicable to such a controversy as this is. The cardinal rule of the doctrine is that priority of appropriation gives superiority of right. Each of these states applies and enforces this rule in her own territory, and it is the one to which intending appropriators naturally would turn for guidance. The principle on which it proceeds is not less applicable to interstate streams and controversies than to others. Both states pronounce the rule just and reasonable as applied to the natural conditions in that region; and to prevent any departure from it, the people of both incorporated it into their constitutions. It originated in the customs and usages of the people before either state came into existence, and the courts of both hold that their constitutional provisions are to be taken as recognizing the prior usage rather than as creating a new rule. These considerations persuade us that its application to such a controversy as is here presented cannot be other than eminently just and equitable to all concerned."¹

In the North Platte case decided 23 years later, the Court referred to its previous decision and that portion of its opinion quoted above, but then proceeded to say:

"That does not mean that there must be a literal application of the priority rule" * * * "But if an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible. For example, the economy of a region may have been established on the basis of junior appropriation. So far as possible those established uses should be protected though strict application of the priority rule might jeopardize them. Apportion-

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1. 42 Sup. Ct. at p. 559.

ment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits of downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made.”²

Later in the opinion the Court again said:

“Priority of appropriation, while the guiding principle for an apportionment, is not a hard and fast rule.”³

In the Laramie River case the Court unequivocally based its decision of the relative rights of the two states solely upon the doctrine of priority of appropriation. In the later North Platte case, contrary to the argument advanced by Nebraska and supporting the contentions of Wyoming and Colorado, the Court held that a division of water was not to be founded solely upon the respective priorities in the litigant states, but should be determined from consideration of a number of factors. It was recognized that priority of appropriation should be given great weight, but was not held to be controlling.

While it was said in the Laramie River case that priority of appropriation was solely controlling, nevertheless the decree of the Court was an award of a mass allocation to Colorado, the upper state, leaving the remainder of the supply to Wyoming, the lower state. Specifically, the decree enjoined Colorado from diverting in excess of 39,750 acre feet in any year, thereby limiting Colorado's use of the stream to this quantity of water. The balance of the supply goes to Wyoming. The underlying cause which brought about Wyoming's suit against Colorado on the Laramie River was the construction of what is known as the Laramie-Poudre Tunnel for the conveyance of water from the Laramie to the South Platte Basin in Colorado. It was found by the Court that the priority of the Laramie-Poudre Tunnel appropriation was junior to that of all appropriative rights in Wyoming, and that the supply was insufficient for the senior Colorado rights, the Wyoming senior rights and the junior right of the Laramie-Poudre Tunnel. The Court found that only 15,500 acre feet was available for the tunnel appropriation and, including such quantity with the senior Colorado rights, awarded to Colorado the total of 39,750 acre feet. In the intervening drouth years the supply of the Laramie has been far less than the Court considered it to be, and the consequence is that Colorado has received water for the junior right

2. 65 Sup. Ct. at p. 1350.

3. 65 Sup. Ct. at p. 1352.

of the Laramie-Poudre Tunnel in many seasons when Wyoming seniors have been short.

In the North Platte case, Nebraska based its contention squarely on what was conceived to be the inflexible rule laid down in the Laramie River case of an apportionment based solely on priority of appropriations. However, she did not seek the type of decree entered in that case, but contended there should be an interstate administration of the North Platte River, based on priority of appropriation. In other words, Nebraska founded her suit upon the principle that junior appropriators in Wyoming and Colorado should be deprived of water for the benefit of seniors in Nebraska through the operation of a day by day priority administration.

In the North Platte suit, Wyoming contended that all existing uses on all tributaries and from the main stream above Pathfinder Reservoir should be permitted, irrespective of seniority, and that a mass allocation should be made between Nebraska and Wyoming for all uses from the main stream below Pathfinder, including the Kendrick Project. The decree of the Court, as will be more fully hereinafter explained, permits all existing uses from all tributaries and from the main stream above Pathfinder and also from the main stream between Pathfinder and Whelan. The main difficulty of the case arose as to division of the supply between Wyoming and Nebraska in connection with diversions made between Whelan, which is 40 miles west of the Nebraska border, and Tri-State Dam in Nebraska, which is one mile east of the border. In the section between Whelan and Tri-State Dam, divisions are made to supply 326,000 acres, of which 243,500 are in Nebraska and 82,500 in Wyoming. Of this acreage, 295,000 acres are entitled to supplies of storage water either as part of the North Platte project or under Warren Act contracts, and of this land entitled to storage, 228,000 acres are in Nebraska and 67,000 in Wyoming. The 31,000 acres supplied from diversions in this section which do not have storage supplies are almost equally divided between Wyoming and Nebraska, each state having approximately 15,500 acres.

The situation is greatly complicated because the reservoirs which supply this acreage below Whelan are located in Wyoming, and also because of the reservoirs in Wyoming constructed for the use of the Kendrick Project.

Pathfinder Reservoir, with a capacity of 1,045,000 acre feet, located 210 miles upstream from Whalen, is used for the North Platte project and the Warren Act contract canals, and furnishes the storage available for the 295,000 acres having storage rights supplied by diversions between Whelan and Tri-State Dam. Seminole Reservoir, which is about 30 miles upstream from Pathfinder, has a capacity of 1,026,000 acre feet, and was constructed to serve the Kendrick Project along with Alcova Reservoir, about 10 miles below Pathfinder,

which has a capacity of 190,000 acre feet. These upper reservoirs on the North Platte River have a total capacity of 2,261,000 acre feet and are designed to serve the 295,000 acres having storage rights below Whelan, and the Kendrick Project, of about 65,000 acres, or a total acreage of 350,000.

The Court, in making allocation between Wyoming and Nebraska, had to deal with an extremely difficult and complicated situation arising from the storage of large supplies in the upper state for use 250 miles away in the lower state, and the inter-related priorities of reservoirs operating to serve lands with 1904 and senior appropriations, and the Kendrick Project with 1931 and 1934 rights.

Confronted with this problem, the Court entered a decree in the North Platte case providing substantially as follows with reference to Wyoming and Nebraska :

1. Wyoming is enjoined from irrigating more than 153,000 acres from the main stream and tributaries above Pathfinder Reservoir, and from irrigating more than 15,000 acres from the main stream between Pathfinder Reservoir and Whelan.

2. Wyoming is enjoined from storing more than 18,000 acre feet in reservoirs above Seminoe Reservoir.

3. The natural flow supply (storage being entirely omitted) between Whelan and Tri-State Dam is divided 75% to Nebraska and 25% to Wyoming, and each state enjoined from using more than its allotted share.

4. Wyoming is enjoined from diverting water into the Casper Canal for the Kendrick Project, with a priority of 1934, or from storing water in Seminoe or Alcova Reservoirs, with respective priorities of 1931 and 1936, otherwise than in accordance with the rule of priority in relation to senior appropriations of Nebraska lands supplied by the French, Mitchell, Garing, Tri-State and Ramshorn Canals, all of which divert at or above the Tri-State Dam in Nebraska, and limitations in second feet and acre feet are fixed for such canals so that no diversion or storage in Wyoming is prohibited except when said canals are confined to the respective limitations.

The general effect of this decree is to leave all present uses in Wyoming above Whelan unaffected, as the 153,000 acres permitted above Pathfinder is somewhat in excess of the acreage actually irrigated, which, according to the testimony in the case, is 149,400, and the 15,000 acres permitted to be irrigated from the main stream between Pathfinder and Whelan exceeds the 14,000 which the testimony shows to be actually irrigated at present. The 18,000 acre feet of permitted storage above Seminoe represents the capacity of existing reservoirs. There is no regulation whatever of use upon tributaries below Pathfinder, nor any limitation imposed at any point as to the amount of water that may be used in any season, or upon any quantity of land. Exclusive of the Laramie River, there is irrigated from

the North Platte and tributaries in Wyoming, 325,000 acres. Use upon this land is unaffected by the decree except as to the 15,500 acres irrigated from the private canals below Whelan, which does not have storage rights. The 67,000 acres irrigated in Wyoming below Whelan which has a storage supply is unaffected by the decree, as only a part of its demand can be furnished from natural flow, and it will have the same storage available in the future as in the past, but the 15,000 acres without storage rights will be short of water in years of low runoff, as 25% of the natural flow which was allocated to Wyoming will not be adequate. There is about the same acreage in Nebraska irrigated from diversions above Tri-State Dam which does not have storage rights, and which will be in the same situation.

With reference to the percentage division of the natural flow supply in the Whelan-Tri State Dam section, it should be pointed out that the Court found that if this supply were apportioned between Wyoming and Nebraska on the basis of acreage, 27% would go to Wyoming and 73% to Nebraska, and if upon the basis of requirement in acre feet, 23% would go to Wyoming and 77% to Nebraska. The division actually made was an exact compromise between these figures, and is wholly favorable to Wyoming, since, due to shorter canals and consequently less loss in transit, the Wyoming land requires less water than that in Nebraska.

The evidence clearly disclosed that during the drouth period from 1931 to 1940, the Wyoming acreage below Whelan without storage, and also that of Nebraska, supplied by diversions above Tri-State Dam, obtained water in excess of the natural flow available, and consequently these lands were obtaining storage water without paying therefor. It was the conclusion of the Special Master, affirmed by the Court, that the storage appropriators should be protected and canals without storage confined to the use of natural flow. This will result in compelling these natural flow appropriators in both Wyoming and Nebraska to obtain storage in seasons of low runoff, although if there is a return to plentiful conditions of supply such as existed before 1931, there will be sufficient natural flow.

The Court determined that the decision in the Laramie River case between Wyoming and Colorado was binding and conclusive, and that there should be no regulation of use upon the Laramie and its tributaries for the benefit of Nebraska. Nebraska contended that since she was not a party to this litigation, she was not bound by the decree, and that junior appropriators in the Laramie Basin should be regulated for the benefit of Nebraska seniors. The total irrigated in the Laramie Basin in Wyoming is about 180,000 acres, and this acreage is unaffected by the decree.

Colorado is enjoined from irrigating more than 135,000 acres in the North Platte Basin in that state, from storing more than 17,000 acre feet during any one season, and from transporting more than

60,000 acre feet out of the basin in any period of ten consecutive years, or, in practical effect, 6,000 acre feet annually. The 135,000 acres represents slightly more than the 131,800 acres presently irrigated in the Basin in Colorado; the 17,000 acre feet of storage covers the existing reservoir capacity, and the 6,000 acre feet of annual exportation is what is required for existing uses. Therefore, the decree has the effect of limiting Colorado to present uses. While Colorado, as hereinafter pointed out, finally contended the suit should be dismissed, she also early in the case claimed that she should be permitted to export as much as 180,000 acre feet out of the basin, and finally contended for only 12,000 acre feet. She also contended for an additional development within the basin of approximately 34,000 acres. In connection with the restriction upon the exportation by Colorado to the South Platte Basin of 6,000 acre feet annually, it may be observed that at one time, in endeavoring to reach a compact with Colorado, Wyoming offered to permit an annual exportation of 30,000 acre feet, and Colorado then contended for 200,000.

Heretofore I pointed out the apparent conflict between the decision in the North Platte case and that in the Laramie River suit; decree in the latter having been determined solely upon the basis of application of the priority doctrine, while in the former other factors were recognized. There is another point upon which the North Platte decision makes a wide departure from previous decisions of the Supreme Court. Colorado finally contended the North Platte suit should be dismissed because Nebraska had failed to prove that either Colorado or Wyoming had damaged her. Wyoming, while stoutly resisting Nebraska's claim as to damage, did not urge dismissal of the suit, being of the opinion that an affirmative decree would be of greater benefit than a dismissal. Referring to the Colorado position, the Court said:

"The argument is that the case is not of such serious magnitude and the damage is not so fully and clearly proved as to warrant the intervention of this Court under our established practice."⁴

Reference was made to the Arkansas River case, *Colorado vs. Kansas*, 320 U. S. 383, 64 S. Ct. 176, 88 L. Ed. 116, decided little more than a year before the North Platte case, wherein relief was denied, the Court saying:

"The prayer of Kansas for an apportionment in second feet or acre feet cannot be granted. In our former decision we ruled that Kansas was not entitled to a specific share of the waters as they flowed in a state of nature, that it did not then appear that Colorado had appropriated more than her equitable share of the flow, and that if Kansas were later to be accorded relief, she must show additional takings working serious injuries to her substantial interests. This was in accord with other decisions in similar controversies."⁵

4. 65 Sup. Ct. at p. 1346.

5. 64 Sup. Ct. at p. 180.

In the North Platte case the Court found that there was no evidence of present injury to Nebraska, and in that connection said:

“The various statistics with which the record abounds are inconclusive in showing the existence or extent of actual damage to Nebraska.”⁶

But *Wyoming vs. Colorado*, supra, was referred to, in which there was no proof of damage. The Court then said that the natural flow supply of the stream was over-appropriated and that where the claims to the water of a river exceed the supply, a controversy exists appropriate for judicial determination. There was a sharp dissent by Mr. Justice Roberts, joined in by Justices Frankfurter and Rutledge, their position being that in the absence of proof of damage, the Court ought not interfere. Since Justice Jackson did not sit in the case, it is a five to three decision, the majority opinion having been delivered by Justice Douglas. In his dissenting opinion, Mr. Justice Roberts said:

“I am sure that, on the showing in the present record, none of the states is entitled to a declaration of rights. The precedent now made will arise to plague this court not only in the present suit but in others. The future will demonstrate, in my judgment, how wrong it is for this court to attempt to become a continuing umpire or a standing Master to whom the parties must go at intervals for leave to do what, in their sovereign right, they should be able to do without let or hindrance, provided only that they work no substantial damage to their neighbors.”⁷

While it seemed quite firmly established by a number of decisions that the Court would not interfere in a suit between states unless there was clear and convincing proof of damage of serious magnitude, my opinion is that the Court was right in entering an affirmative decree in the North Platte case. It seems to me but little different than controversies relative to boundaries between states.

An open decree was entered in the North Platte suit. Any party may at any time apply for modification or revision or for the entry of any supplementary decree that may be deemed necessary or proper. Certain specified causes for an application for further relief are enumerated, which, however, is not an exclusive enumeration. Among them is any change in conditions making modification of the decree or the granting of further relief necessary or appropriate. Only the future can tell if this judgment will remain a permanent adjudication of rights between the litigant states, or whether it is only the first step in a solution of the controversy. As in other cases involving the use of water for irrigation purposes, we may anticipate harmony as long as the supply is plentiful, and be as equally sure of conflict when there is a shortage.

The focal point for determination of adequacy of supply on the

6. 65 Sup. Ct. at p. 1347.

7. 65 Sup. Ct. at p. 1369.

North Platte is at Pathfinder Reservoir. Reduced to present conditions of development, the average annual runoff at Pathfinder for the 35 year period, 1895 to 1929, was 1,397,000 acre feet; the 45 year average from 1895 to 1939 was 1,302,000, and the 50 year average, 1895 to 1944, was 1,259,000. But the unfortunate and significant fact is that the 15 year average from 1930 to 1944 was only 936,000. Compared to what may be considered a fairly long term mean from 1895 to 1939, the supply of the past 15 years for which information is available, 1930 to 1944, shows an annual average deficiency of about 400,000 acre feet.

The headgate requirement of the Kendrick Project is 168,000 acre feet, and the consumptive use annually is about 122,000. Therefore, it can readily be seen that the deficiency of the past 15 years would furnish more than double the demand of the Kendrick Project. Water was first supplied to the lands of the Kendrick this past summer, and there is now available in storage about 200,000 acre feet, which, due to an anticipated slow development, will probably take care of the project for another three to five years, without additional storage. If runoff conditions continue as they have been since 1930, there can be no further development on the North Platte, and it seems that only partial use can be made of the Kendrick Project, the facilities of which are now completed for the irrigation of 35,000 acres. If, however, we return to conditions of plentiful supply as they existed from 1895 to 1930, an abundance of water can be conserved for all uses, including the Kendrick Project, by existing reservoir capacity.

I have not heretofore mentioned the position of the United States in the North Platte case. The government intervened, claiming first that it owned all of the unappropriated water of the North Platte River by reason of having acquired it through the various cessions of territory from foreign powers, and contending that it had never parted with its title; or, second, that it was entitled to an appropriation for its reservoirs. Both contentions were denied by the Court. As to the first, the Court said that the question was not actually involved, since the Government throughout had proceeded in accordance with the reclamation law in obtaining its appropriations under applicable Wyoming statutes, and the appropriative rights actually belonged to the landowners. As to the second contention, it was held that the United States, as to its storage rights, was an appropriator of the State of Wyoming and represented by the State as any other appropriator.

Summarizing the decision in the North Platte case, it may be said that the claims of the United States were denied, as was also Colorado's application for dismissal of the suit. Colorado is restricted to present uses, as is also Wyoming, upon tributaries and the main stream above Pathfinder and upon diversions from the main stream between Pathfinder Reservoir and Whelan. While the restrictions

imposed upon Colorado and upon Wyoming as to the tributaries and main stream above Pathfinder, and as to the main stream between Pathfinder and Whelan, are in the form of injunctions against additional development, the actual effect is to permit all present existing uses, thereby allowing the diversion upon junior as well as senior rights. While no exact determination can be made, in my opinion the allowable 153,000 acres above Pathfinder in Wyoming, and 15,000 acres from the main stream between Pathfinder and Whelan, includes approximately 75,000 acres on rights junior to the 1904 priority of Pathfinder and likewise junior to the senior Nebraska rights, which are supplied by diversions between Whelan and Tri-State Dam. There is also a substantial amount of acreage in Colorado junior to the Pathfinder priority and the senior Nebraska rights. The result is that this junior acreage in both Colorado and Wyoming can be supplied with water without regulation or control, for the benefit of either the senior Nebraska natural flow rights or the Pathfinder storage right of 1904, which largely supplies Nebraska land. An additional point not heretofore mentioned is that the Court found Nebraska did not need and was not entitled to any natural flow supply for any diversion below Tri-State Dam.

The decree will set at rest the insistent demand Nebraska has made for many years past that the North Platte and tributaries should be administered inter-state on a priority basis, and juniors in Wyoming deprived of water for the benefit of Nebraska seniors. It will also eliminate the demands heretofore made, and frequently met, for natural flow supplies for Nebraska canals below Tri-State Dam.

The North Platte suit was commenced in October, 1934, and was terminated by the decree of the Court entered October 8, 1945. The case was heard before M. J. Doherty, an attorney of St. Paul, who was appointed as Special Master. The record comprises 29,500 pages of testimony and about 1,285 exhibits. The opinion of the Court covers 40 pages. The result of the litigation and this extensive record is compressed into a decree less than 5 pages in length as it appears in 89 Law Edition.

Considering the decisions in the Laramie and North Platte cases, it is clear that in any future case involving apportionment of water between states for irrigation use, the Court will not make a division based solely upon priorities of the appropriative rights in the litigant states, nor will it be confined to any fixed formula such as the mass allocation which was adopted in the Laramie River case. It is equally clear that the Court will adopt such means as may be reasonably necessary for the solution of the particular problem, and that additional complexities may be solved by new or varying formulae. It is also apparent that the Court may enter an affirmative decree, although there is no proof of damage to the agriculture or industry of the complaining state.