IN THE

Supreme Court of the United States

October Term, [redacted] 1961

No. 10 Original.

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants.*

UNITED STATES OF AMERICA, *Intervener,*

STATE OF NEVADA, *Intervener.*

Reply Brief of the California Defendants in Support of Their Motion to Join, as Parties, the States of Colorado, New Mexico, Utah, and Wyoming

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Reply Brief of the California Defendants in Support of Their Motion to Join, as Parties, the States of Colorado, New Mexico, Utah, and Wyoming

STATUS OF MOTION TO JOIN COLORADO, NEW MEXICO, UTAH, AND WYOMING

On July 15, 1954, the State of California and the other California defendants filed in this Court a motion to join, as parties to this action, the States of Colorado, New Mexico, Utah, and Wyoming. On August 13, 1954, Arizona filed a response in

opposition. On October 7, 1954, the California defendants filed a brief in support of their motion. That brief includes a detailed statement of the case. On December 27, 1954, briefs opposing the motion were filed individually by New Mexico and Utah and jointly by Colorado and Wyoming. Both New Mexico and Utah expressly adopt the joint brief of Colorado and Wyoming. On February 7, 1955, Nevada filed a brief in support of the Motion.

1. Grounds for the Motion

This suit was initiated on the complaint of Arizona. Arizona seeks a decree quieting her claimed title and establishing her alleged rights to the annual beneficial consumptive use of specified quantities of the water of the Colorado River System. The California defendants have traversed the complaint and, in affirmative defenses, have set up claims to the annual beneficial consumptive use of water which are inconsistent with the claims of Arizona. Nevada and the United States, both interveners, have asserted claims inconsistent with those of both plaintiff and defendants.

Issues which must be determined in resolving the controversy between the present parties fall into three closely related categories:

(1) The meaning and effect of the Colorado River Compact to which States opposing this motion are parties.

(2) The meaning and effect of a Statutory Compact between the United States and California of which the States opposing this motion are, like

Arizona and Nevada, third party beneficiaries. The Statutory Compact (evidenced by the Boulder Canyon Project Act and the California Limitation Act) incorporates by reference terms and provisions of the Colorado River Compact, involves interpretations of the Boulder Canyon Project Act, and must be construed *in pari materia* with the Colorado River Compact and the Project Act.

(3) The quantity of water legally and physically available for beneficial consumptive use in the Lower Basin of the Colorado River from the Colorado River System. This involves questions of fact and questions of law, including the meaning and effect of the Colorado River Compact, the Statutory Compact, the Boulder Canyon Project Act, the Mexican Water Treaty, water delivery contracts, statutes, and laws upon which the present parties predicate their claims.

The determination of these claims requires a determination of the amount of the water that is available to the Lower Basin. Most of this water comes from the Upper Basin. Arizona's quiet title action thus operates against the rights of the absent States as well as against the rights of the present parties.

A decree in Arizona's favor would presuppose the following determinations of the rights and obligations of the absent States:

1. That the apportionment of the use of 7,500,000 acre-feet per annum made by Article III(a) of the Colorado River Compact to the Lower Basin is not to be charged with the uses made from Lower Basin tributaries, but may be claimed in its

entirety from the main stream, *i.e.,* from the waters flowing from the four absent States. (Initial California Brief on pending motion, pp. 32-35)

2. That this apportionment by Article III(a) to the Lower Basin is identical with the 75,000,000 acre-feet which the four States are required by Article III(d) of the Compact to let pass Lee Ferry in each ten-year period. The absent States, accordingly, are entitled to no credit against the Mexican Treaty burden with respect to any of that 75,000,000 acre-feet, but are obliged, under Article III(c), to let down additional water to meet one-half of the Treaty burden. (*Ibid.*)

3. That the 1,000,000 acre-feet of "increase of use" permitted to the Lower Basin by Article III(b) of the Compact is apportioned in perpetuity to the Lower Basin, and the right thereto, as against the Upper Basin, is not dependent upon any actual increase in use. (*Id.* at 45-46)

4. That no State may acquire any right in unallocated waters by contract, appropriation or use, but only by virtue of some possible later compact among the seven States under Articles III(f) and III(g) of the Colorado River Compact. This would require Arizona's consent. (*Id.* at 43-45)

5. That the 3,800,000 acre-feet claimed by Arizona is net of all "salvaged" waters; she may use another 1,000,000 or more acre-feet of salvaged water without any charge at all, either to the Lower Basin's allocation under the Colorado River Compact, or to surplus water available for the Mexican Treaty. (*Id.* at 39-41)

6. That consumptive use of water is to be measured, not in terms of the quantities in fact consumed in growing crops or by domestic uses, but in terms of the resulting depletion of the virgin flow of the main stream. (*Id.* at 36-39)

7. That reservoir losses are to be charged against the apportionments made by Article III(a) of the Colorado River Compact. (*Id.* at 46-47)

8. That Arizona effectively ratified the Colorado River Compact, converting it to a seven-state Compact. (*Id.* at 58-59)

9. That the Statutory Compact, although in terms enacted as an accompaniment only to a six-state Compact, continues as an accompaniment of the seven-state Colorado River Compact. (*Ibid.*)

One or more of the present parties—California, Nevada and the United States—disagrees with Arizona on each of these points. Each of these issues involves rights and obligations of the absent States.

2. Briefs Opposing the Motion

The briefs of the absent States opposing the pending motion are notable because in almost no particular do they deny facts or contentions relied on by California in the pending motion and supporting brief. None of the four absent States denies that the controversy turns on disputes, which California's previous brief lists, over construction of the Compacts and Statutes. None of the four absent States denies that its rights

and obligations would necessarily be affected by a resolution of these disputes. None of the four States denies that it is a party to the Colorado River Compact and a joint obligee of the Statutory Compact. None of the four States offers any authority to controvert the universally accepted proposition that joint obligees are indispensable, and, *a fortiori,* necessary parties.

Neither New Mexico nor Utah denies that she has rights in an undetermined share of a "common fund" of water available to the States with territory in the Lower Basin of the Colorado River System. Neither New Mexico nor Utah cites any authority to controvert the universally accepted proposition that claimants to a share in a common fund are indispensable and, *a fortiori,* necessary parties to a suit to determine rights in the fund.

Principal reliance of the four States in opposing the motion rests on two contentions, neither of which is supported by reason or authority. The first contention is that the usual rules for determining necessary parties do not apply to actions between States. The second contention is that because, or so the absent States claim, there is no present use of water in the Upper Basin which conflicts with uses in the Lower Basin, the controversy between present parties and the absent States is not presently justiciable. This brief will show that both contentions are unsound. The rules of compulsory joinder apply with equal force to States and to private litigants. An independently justiciable controversy between present parties and absent parties is not a requirement for compulsory joinder of the absent

parties. Even if an independently justiciable controversy were required, the motion should nevertheless be granted because Arizona's complaint states a controversy which, if justiciable as to present parties, is no less justiciable against the absent States.

ARGUMENT

I.

THE FACT THAT THIS SUIT IS BETWEEN STATES OR THAT THE SUIT IS WITHIN THE ORIGINAL JURISDICTION OF THE SUPREME COURT IS NO REASON FOR DISREGARDING THE USUAL AND PRESCRIBED RULES FOR DETERMINING NECESSARY PARTIES

Rule 9(2) of the Revised Rules of the Supreme Court, effective July 1, 1954, provides that the Federal Rules of Civil Procedure, "where their application is appropriate, may be taken as a guide to procedure in original actions in this court." Rule 19(b) of the Federal Rules provides that necessary parties are those "who ought to be parties if complete relief is to be accorded between those already parties."

New Mexico says that Rule 19 "is not applicable or appropriate in this case." (New Mexico Brief, p. 5.) The brief of Colorado and Wyoming and the brief of Utah are less explicit, but in their insistence that different criteria apply because states are to be made parties, their arguments take a similar position. Succinctly stated, the New Mexico position is: That in original actions in the

Supreme Court, *additional parties* will not be joined even though they "ought to be parties if complete relief is to be accorded between those already parties." The position of the other three States is similar: That *states* will not be joined even though they "ought to be parties if complete relief is to be accorded between those already parties."

Of course there is no authority for such propositions. The law of necessary parties has been shaped by considerations that apply irrespective of the forum for trial or the nature of the parties. Rule 19 merely recognizes and codifies a rule of federal practice which had previously existed. (See authorities cited in the initial California brief on this motion, page 28.) This Court, in the exercise of its original jurisdiction, has consistently cited and applied the rules of necessary and indispensable parties first developed in cases heard on appeal from lower federal courts. See *California* v. *Southern Pacific Co.,* 157 U.S. 229 (1895); *Minnesota* v. *Northern Securities Co.,* 184 U.S. 199 (1902); *New Mexico* v. *Lane,* 243 U.S. 52 (1917); *Arizona* v. *California,* 298 U.S. 558 (1936). A leading and frequently quoted decision in which a judgment was reversed for failure to join a necessary party is *State of Washington* v. *United States,* 87 F.2d 421 (9th Cir. 1936). In that case the absent necessary party was a state. In none of these cases has there been the slightest suggestion that different rules or different considerations apply because the case is within the original jurisdiction of this Court or because the party sought to be joined is a State.

Recently, in the pending case of *Texas* v. *New Mexico,* this Court ordered the Special Master to hear evidence on the indispensability of the United States, and to report to the Court on the issue. 344 U.S. 906 (1952). Since no special instructions were given to the Master, it is apparent that the Court expected him to apply the traditional rules of compulsory joinder. The report of the Special Master does not suggest that he departed from the classic formula in considering the question. (Report of Special Master, *Texas* v. *New Mexico,* No. 9 Original, October Term, 1953.)

Utah concedes that the numerous decisions cited in California's initial brief hold "that in actions upon contracts, decrees construing the terms thereof cannot be entered unless all parties thereto are present in the action." She cites no decision to the contrary, but would limit the effect of the decisions to "their own peculiar set of facts." (Utah Brief, p. 7.) No decision, she says, has applied the rule with respect to compacts in litigation between states. On this view, apparently, all cases between states are unique. The fact is that if Rule 19 and the principle it adopts are inapplicable to this case, the motion must be decided in a legal vacuum, because no other body of precedents or principles exists.

Of the reasons for the rules of necessary parties, the States opposing the pending motion say nothing.

So firmly established is the rule where rights of joint obligees are involved that the rule has become recognized as not only a rule of procedure,

but a part of the substantive law of contracts. The Restatement of Contracts, Section 129 (1932) states it thus:

> An action to enforce a joint right under a contract must be brought by or in the name of all surviving obligees.
>
> *Comment: a.* The persons having a joint right will generally be promisees, but where third party beneficiaries are allowed to enforce a promise, the joint right may be that of such beneficiaries.

For this rule there are at least three reasons. These reasons are: (1) to avoid multiplicity of suits and the unjustified harassment of an obligor; (2) to avoid inconsistent judgments in successive actions involving the same promise; and (3) to avoid a hollow or unenforceable judgment.

All three considerations apply to the present suit. In the first place, a decree based upon the two Compacts which are in dispute—the Colorado River Compact and the Statutory Compact—will be only a prelude to further controversy and litigation if the decree does not bind all the parties with rights under both Compacts.

In the second place, a decree quieting title in present parties without binding the absent States would be a precarious basis for future expansion and development; there would be continuing concern that a later suit might determine that the decree was based on an overly generous assumption about the amount of water available to the Lower Basin as against the Upper Basin.

Thirdly, a decree construing the Compacts and statutes constituting the "Law of the River," and which binds only three of the seven Colorado River Basin States, simply will not work. It will create the possibility of two Colorado River Compacts, each purporting to apply to the whole River.

This, however, is the result for which the absent States argue. They do not and cannot deny that their rights and obligations are controlled by the Compacts in dispute. They do not deny that the effect of these Compacts must be determined —as to the present parties—in this suit. They say only that the effect of the Compacts, as to them, must be left to future litigation.

Denial of the motion on this basis would be unfair to the defendants because it might involve them in later litigation over the same rights and obligations now in dispute. Denial of the motion on this basis would harm interests within the entire Colorado River Basin because it would prevent an early determination of issues which must be decided before the resources of the Basin can be developed. Denial of the motion on this basis would result in abuse of the processes of this Court, because any decree would be empty and ineffectual if but three of seven affected States were bound.

Only two decisions cited in the briefs opposing the pending motion concern the problem of necessary parties. *Nebraska* v. *Wyoming,* 295 U.S. 40 (1935), and 296 U.S. 553 (1935). The opposing briefs draw an erroneous conclusion

from the first; they are inaccurate with respect to the second.

Both decisions were in the early stages of *Nebraska* v. *Wyoming,* 325 U.S. 589 (1945), which started as a suit by Nebraska against Wyoming over rights to the use of the water of the North Platte River. Wyoming first moved to dismiss Nebraska's Bill of Complaint on the ground that Colorado was a necessary and indispensable party. The Court denied the motion on the ground that the complaint showed no claim by Colorado to rights to the diversion and use of the North Platte. The complaint said only that the North Platte originates in Colorado. 295 U.S. 40 (1935).

Some eight months later, the Court unanimously and without opinion ordered that Colorado be made a party "in accordance with the prayer of the amended and supplemental answer of the State of Wyoming." 296 U.S. 553 (1935). Colorado and Wyoming (page 27) and Utah (page 10) state in their briefs opposing the pending motion that this action was on the basis of an amended complaint by Nebraska alleging out-of-priority diversions depriving Nebraska of water to which she was equitably entitled.

These statements are incorrect. At the time of the decision making Colorado a party, entered December 23, 1935, Nebraska had not amended her complaint and did not do so until, in effect, by replication filed June 12, 1936. As the Court's order clearly indicates, its basis was Wyoming's Amended and Supplemental Answer. That Supplemental Answer, so far as it dealt with Colorado's actions, alleged no present injury by Colorado but recited only contemplated

and threatened diversions by Colorado of waters which were the subject matter of the dispute between Nebraska and Wyoming.[1]

"TWENTIETH

[1] "Defendant says that a portion of the head-waters of the North Platte River are located in the State of Colorado and that approximately thirty per cent of the waters of said river available for use in Nebraska and Wyoming originates in Colorado. Complainant, in this suit, seeks a decree determining the rights of Nebraska and Wyoming to the use of the waters of said river. And defendant says that the waters to be apportioned in this action must, of necessity, involve the waters, extensive in amount, rising in the State of Colorado. Defendant says that the respective rights of Colorado and Wyoming to the use of the waters of the North Platte River have never been determined as between said states, and that the State of Colorado and its citizens now contemplate and for a long time have contemplated and threatened and now threaten the diversion and use in Colorado of waters of the North Platte River, which diversion and use would have the effect of taking from the North Platte River a large quantity of water, to-wit, upwards of 250,000 acre feet per annum, all which water now flows in the channel of the North Platte River into the State of Wyoming, and will of necessity be the subject matter pro tanto of the determination of the rights in this action of the present parties.

"Defendant says that if the present suit is permitted to proceed without making the State of Colorado a party, defendant will be subjected to further litigation with the State of Colorado and its appropriators, involving the waters of the North Platte River which constitute the subject matter of this suit. And defendant says that a proper and equitable allocation of the waters of the North Platte River, as complainant well knows, cannot be made between the present parties upon any equitable basis without at the same time determining the rights, whatever they may be, of the State of Colorado and of its appropriators in said waters. And

(*Footnote Continued on Next Page*)

defendant says that the State of Colorado is a necessary and indispensable party to this action.

* * *

"TWENTY-SECOND

"Defendant says that in 1923 the States of Nebraska and Colorado negotiated and executed what is called the 'South Platte River Compact' between said states, which Compact was later duly approved by the legislatures of said respective states and by the Congress of the United States; that the South Platte and the North Platte Rivers, by their junction at or near the City of North Platte, Nebraska, form the Platte River; and that said Compact distributes and apportions between Colorado and Nebraska the waters of the South Platte River without regard to and without providing for the supply of any waters from the South Platte River for the use of prior appropriators on the Platte River. Defendant says that the effect of said Compact was to relieve the waters of the South Platte River from any and all obligation to contribute to the supply of the waters of the Platte River required for the satisfaction of rights out of the Platte River. And defendant says that in the division of the waters to which the parties hereto may be found by the court to be equitably entitled due regard should be had to the burden which, but for the said South Platte River Compact, would exist and rest upon the South Platte River to contribute its just proportion to the waters required to satisfy appropriaors from the Platte River.

"And defendant says that because of the matters in this article alleged the State of Colorado is a necessary party to this action and to a final determination of the rights of the parties herein.

"WHEREFORE, defendant prays that this court issue its subpoena to the State of Colorado and its Governor and Attorney General, directing that appearance be made by said state before this court at a time to be fixed in said subpoena, and requiring it by an appropriate pleading to show its and its appropriators' interests in the water of the North Platte and South Platte Rivers; that upon final hearing this court find and determine the equitable share of the water of the North Platte River to which the State of Colorado, this defendant and the complainant are respectively en-

(*Footnote Continued on Next Page*)

The opinion on the merits in *Nebraska* v. *Wyoming,* 325 U.S. 589 (1945), is quoted in both the Colorado and Wyoming Brief (page 27) and in the Utah Brief (page 9) for the apparent pur-

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titled; and that the prayer of complainant's Bill of Complaint be denied except to the extent that this defendant has joined therein. And defendant prays for such further, other and different relief as to the court may seem just and equitable."

From Wyoming's Amended and Supplemental Answer filed December 12, 1935.

Nebraska's objections to filing Wyoming's Amended and Supplemental Answer unless Article Twentieth and the Prayer as it related to Colorado were stricken are also instructive. These objections, filed December 13, 1935, may be summarized as follows:

1. The Court had decided on April 1, 1935, that Colorado was not a proper party because Nebraska had asserted no wrongful act of nor asked any relief against Colorado.

2. "Said allegations [Article twentieth] seek to import into this controversy an issue which is extraneous thereto, and foreign to any issue between the State of Nebraska and the State of Wyoming . . . ." (p. 2.)

3. Neither legal nor equitable relief was asked against Colorado.

4. Wyoming's pleading was not a Cross-Bill.

5. The attempt at joinder was made too late.

6. No change had occurred in the subject matter of the controversy.

7. The addition of another party would delay the proceedings.

8. The matter had already been referred to a Special Master and no application was made to enlarge the scope of his reference.

The substance of many of these objections has been raised by the Upper Basin States against the present motion.

pose of showing that allegations of present damage by Colorado uses were the basis of the Court's order making Colorado a party. The implication is that without such allegations a state is not a necessary party. The fact is, however, that *such allegations had not been made when Colorado was ordered into the suit.* The quotations in the opposing briefs from the 1945 opinion are responsive to *Colorado's* motion to dismiss, a motion which was first made after the Master had proceeded on the merits and had heard Nebraska's case. *Nebraska* v. *Wyoming,* 325 U.S. at 592. Colorado was not seeking dismissal on the ground that she was not a necessary or proper party, but on the ground that a case for a decree against Colorado had not been established. The joinder issue, raised by the defendant Wyoming, and which had resulted in impleading Colorado as a party defendant, had been disposed of a decade earlier.

The two 1935 decisions in *Nebraska* v. *Wyoming* are pertinent for three reasons: (1) They are the only instances where this Court has had occasion to rule, in the exercise of its original jurisdiction, on the question of compulsory joinder of States. (2) Wyoming's allegation of threatened harm, quoted in the footnote on page 13, was sufficient basis to require compulsory joinder. (3) This Court gave no indication in deciding the issue of necessary parties that the usual rules do not apply.

The case now before the Court is much stronger than the second *Nebraska* v. *Wyoming* decision for the joinder of absent States. In addition to factors almost identical, the present litigation embraces the determination of rights and liabilities under

the Colorado River Compact, to which all the absent States are parties, and the Statutory Compact of which they are all third party beneficiaries. The Court must decide issues under these Compacts which vitally affect the absent States.

Two other points raised by the absent States in opposition to joinder may be disposed of briefly.

New Mexico states as one reason for her objection to being joined as a party that "It is not contended by California that the four states of the Upper Division are 'indispensable' parties in the sense that the case may not proceed without them." (Pages 5-6) The issue of indispensability of parties arises only when parties sought to be joined are without the jurisdiction of the Court, or when joinder would deprive the Court of jurisdiction. Neither condition prevails here. Any determination that the absent States are indispensable would be outside the issues presented by the motion. However, the absent States would be indispensable if indispensability were in issue. (Initial California Brief, p. 30.) *A fortiori,* they are necessary parties.

The other contention, as stated in the Utah Brief, is that "This is not an action based primarily upon the [Colorado River] Compact." (Page 6.) Similarly, the Colorado and Wyoming brief develops the contention that, because the Colorado River Compact divides the use of water between the Upper and Lower Basins, and not among States, the Upper Basin States are not necessary parties to a suit over the use of Lower Basin water. To this there are three answers:

(1) The issues raised in the Arizona Complaint necessarily involve construction of provisions of the Colorado River Compact, the resolution of which necessarily will affect the rights and obligations of the Upper Basin States under the Compact. The Court must determine the respective rights in water available for use in the Lower Basin. But to do so it must first determine how much water is available to the Lower Basin under the terms of the Colorado River Compact. The size of the pie must be determined before deciding how the pie will be cut. This cannot be done without adjudicating the corresponding rights and obligations of the Upper Basin States.

(2) Arizona's complaint, as her complaint shows, alleges a breach by California of its obligation under the Statutory Compact. The States opposing this motion are third-party beneficiaries of that Compact and must be joined in the action brought by Arizona as joint obligee.

(3) Because claims of the United States are asserted independently of the Colorado River Compact, they are necessarily claims against the Colorado River System as a whole.

The States opposing the pending motion do not deny that the questions of interpretation of the Colorado River Compact, analyzed in detail in California's initial brief on the motion, are involved in the present controversy. They do not deny that they are joint obligees, with Arizona and Nevada, of the Statutory Compact. They do not deny that a determination of issues which must be decided in the suit among the present parties

necessarily affects their rights and obligations. Were private individuals or corporations situated as the absent States are with reference to the present litigation, their joinder would clearly be necessary. That the absent parties are States provides no reason for changing the rules.

II.

AN INDEPENDENTLY JUSTICIABLE CONTROVERSY BETWEEN PRESENT PARTIES TO THE SUIT AND THE FOUR ABSENT STATES IS NOT REQUIRED FOR THEIR JOINDER

The four absent States argue that they cannot be joined as parties unless an independently justiciable controversy exists between them and the present parties. This the California defendants deny. If there is a justiciable controversy among the parties now before the Court, the absent States must be joined because, in the language of Rule 19(b) of the Federal Rules of Civil Procedure, they "ought to be parties if complete relief is to be accorded between those already parties."

The tests of compulsory joinder have been developed by the federal courts without any suggestion that a separately justiciable controversy is required as to parties sought to be joined.[1] Federal

[1] Only one case has been discovered which expressly discusses a concept of "justiciable controversy" in the context of compulsory joinder: *Samuel Goldwyn, Inc.* v. *United Artists Corp.*, 113 F.2d 703 (3d Cir. 1940). In that case, the court said that the parties sought to be joined were neither necessary nor indispensable because their legal inter-

Rule 19 makes no such requirement. To superimpose a requirement of an independently justiciable controversy as to parties sought to be joined would undermine the strength of those rules and the sound judicial policy on which they are based—to fully and effectively dispose of a case or controversy before the court.

The only requirement for justiciability which the absent States argue is lacking is that which may best be described as "ripeness for judicial determination." The requirement is based on a number of considerations: avoiding decision of a feigned controversy, avoiding decision where only abstract questions are presented, avoiding

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ests would not be affected. Hence, reasoned the court, issues as to the third parties were not "cognizable" or "justiciable." The court was unquestionably correct in its view that parties whose legal interests could not be affected by any possible judgment or decree should not be joined. In the present case, however, legal interests of the absent States clearly would be affected by any decree that is entered. This the absent States do not deny. Their only contention is that issues as to them are not yet ripe for judicial determination, and hence do not now constitute a "justiciable controversy." This is completely different from the concept of "justiciable controversy" in the *Goldwyn* case where the term was used to mean "affecting legal interests." The sense in which the court in the *Goldwyn* case used "justiciable controversy" is made clear by the manner in which it distinguished three leading Supreme Court decisions on compulsory joinder, all three of which are cited in the initial California brief: *Niles-Bement-Pond Co.* v. *Iron Moulders Union,* 254 U.S. 77 (1920); *Minnesota* v. *Northern Securities Co.,* 184 U.S. 199 (1902); *Northern Indiana R.R.* v. *Michigan Central R.R.,* 15 How. 233 (U.S. 1854). The court in the *Goldwyn* case distinguished each of these three cases on the ground that the legal interests of the absent parties (as in present case) would have been materially affected.

decision of a controversy that may never require determination. See *Public Service Comm'n of Utah* v. *Wycoff Co.*, 344 U.S. 237 (1952). Where issues not ripe for decision in a separate and independent suit against absent parties must in any event be determined in a controversy between other parties which is justiciable, the reasons behind the "ripeness" rule do not militate against compulsory joinder. The controversy between those already parties insures the necessary "concrete" and "immediate" clash of interests, and avoids all of the hazards which courts have tried to avoid in delimiting the "ripeness" requirement for a justiciable controversy.

The point could be illustrated by many examples from the present suit. One of the issues between present parties is the definition of "beneficial consumptive use" in the Colorado River Compact. If the absent States are right, a separate suit by or against them would not now be sufficiently concrete for adjudication. However, because the beneficial consumptive use issue will be determined in the present suit in any event, all the reasons for the ripeness requirement are satisfied. To say that parties who cannot sue or be sued cannot be joined to another suit is to say, in effect, that the Colorado River Compact must be construed, not by one decree, but by two, separated in time by thirty years or so. If ever there were a situation which demanded the opposite result, this is it.

Many federal cases indicate, without expressly discussing the problem, that a separately justiciable controversy is unnecessary to a determination that absent parties are necessary or indispensable:

Minnesota v. *Northern Securities Company,* 184 U.S. 199 (1902). The State of Minnesota brought an original action to enjoin the Northern Securities Company from acquiring the stock of and exercising control over two parallel and competing railroads in Minnesota. There was no cause of action against the railroads and no relief against them was sought. Moreover, there was no controversy between the railroads and the Northern Securities Company. Nevertheless, they were held to be indispensable parties because their rights necessarily would have been affected by the litigation.

Northern Indiana Railroad v. *Michigan Central Railroad,* 15 How. 233 (U.S. 1854). The complainant sought to enjoin the defendant from infringing plaintiff's franchise by constructing and operating a certain railroad line. Defendant claimed a right to construct the road by reason of its contract with a third railroad, New Albany. Although there was no cause of action apparent between the New Albany railroad and the original parties to the action, the Court held that New Albany was indispensable because the validity of its franchise and its contract with the defendant Michigan Central necessarily would be determined.

Mallow v. *Hinde,* 12 Wheat. 193 (U.S. 1827). The action involved a dispute over the ownership of real property. The plaintiff's title was based on a contract executed by the beneficiary of a trust, and the defendant claimed a title based on a contract executed by the trustee. Because the validity of these contracts necessarily would have to be determined, both the beneficiary and the trustee were held to be indispensable. There was no indi-

cation of a presently justiciable controversy between them and the original parties.

Keegan v. *Humble Oil & Refining Company,* 155 F.2d 971 (5th Cir. 1946). The validity of an oil lease was in issue. Owners of royalty interests under the lease were held to be indispensable even though no present cause of action existed between them and the original parties. They were indispensable because their legal interests necessarily would have been affected by the litigation. Cancellation of the lease would have destroyed their royalty interests in the lease.

That an independently justiciable controversy is not required as to all parties is even more clearly demonstrated in a series of cases involving declaratory judgment actions on liability insurance policies. There is abundant authority that insurance companies in suing the insured for a declaratory determination of non-liability must join the injured party even though the liability of the insured to the injured party has not been established, and will not be established in the declaratory judgment action. *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.,* 312 U.S. 270 (1941); *Central Surety & Ins. Corp.* v. *Norris,* 103 F.2d 116 (5th Cir. 1939);[1] *Central Surety & Ins. Corp.* v. *Caswell,*

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[1] The court in reversing the judgment which dismissed third party tort claimants said: "The interest of Ruddell and Rosser [the tort claimants] in the question the Insurance Corporation is trying to get adjudicated by a declaratory judgment is real and substantial though not immediate. They ought to be retained as parties to be heard on it and to be bound by the result." 103 F. 2d at 117.

91 F.2d 607 (5th Cir. 1937).[1] This is so even though the injured party has no action against the insurance company until the insured's liability is established.[2]

The principle that an independently justiciable case or controversy is unnecessary as to all parties is firmly established in cases involving intervention. In *Securities and Exchange Commission* v. *United States Realty & Improvement Company,* 310 U.S. 434 (1940), the Court permitted the SEC to intervene to contest the propriety of a Chapter XI bankruptcy proceeding even though there was no basis for any independent action involving the SEC. There was a dissenting opinion which was confined to issues of statutory construction; the Court's constitutional power was not even discussed. See CLARK, CODE PLEADING, Sec. 65 (2d ed. 1947); Berger, *Intervention by Public Agencies in Private Litigation in the Federal Courts,* 50 YALE L. J. 65 (1940).[3]

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[1] "[W]e assume the District Court reached the conclusion that a case of actual controversy between the insurer and the passengers was not presented and therefore as to them the court was without jurisdiction . . . . The injured passengers have a material interest in the outcome of the suit. Appellant has the right to have its obligations to them as well as the insured determined. The passengers are necessary and proper parties. The judgment dismissing the suit as to them was wrong." 91 F.2d at 608-09.

[2] In a few states direct action statutes permit injured parties to sue insurance companies directly. See *Watson* v. *Employers Liability Assurance Corp.,* 348 U.S. 66 (1954). Comment, *Consent and the Constitution,* 5 STAN. L. REV. 514 (1953).

[3] Compare 28 U.S.C. § 2403 (1952) which requires the court to allow the United States to intervene in any action

Although the tests of permissive intervention and compulsory joinder differ, any constitutional requirement of an independently justiciable controversy would necessarily apply with equal force to both situations. If the absence of an independently justiciable controversy is no bar to intervention, it is no bar to compulsory joinder. That there is any constitutional barrier to intervention by the absent States in the present litigation is inconceivable. Nevada, a Lower Basin State, has already been granted permission to intervene in the present action. *Arizona* v. *California,* 347 U.S. 985 (1954). This leaves no doubt that New Mexico and Utah, also Lower Basin States, could intervene. The present suit is the fourth interstate suit involving the Colorado River, and it is the first in which all seven States of the River Basin were not initially named as parties. *Arizona* v. *California,* 283 U.S. 423 (1931); 292 U.S. 341 (1934); 298 U.S. 558 (1936).

The foregoing authorities demonstrate that a separately justiciable case or controversy is not necessary between all parties before a federal court. Once a court has a justiciable case or controversy before it, the judicial power granted by Article III of the Constitution of the United States includes the power to deal with all issues and parties necessary to an effective disposition of the case. Chief Justice Marshall said in *Osborn* v. *Bank of the United States,* 9 Wheat. 738, 823 (U.S. 1824):

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involving the constitutionality of a statute of the United States affecting the public interest. See *United States* v. *Johnson,* 319 U.S. 302 (1943).

> We think, then, that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

The principle is at the basis of the familiar doctrine of ancillary jurisdiction. Merely to catalogue instances in which the principle has been applied would require a treatise on the jurisdiction of federal courts. See 3 MOORE, FEDERAL PRACTICE, Pars. 13.15, 14.26 (2d ed. 1948); HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953): *Note on Pendent Jurisdiction,* pp. 802-809; *Note on Class Actions and Intervention,* pp. 929-937; *Note on Third-Party Practice,* pp. 942-943; *Note on Separate and Independent Claims or Causes of Action,* pp. 1044-1048.[1]

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[1] A few illustrative cases are *Brooks* v. *United States,* 119 F.2d 636 (9th Cir.), *cert. denied,* 313 U.S. 594 (1941) (federal district court in Arizona may decide rights in waters of Gila River in New Mexico incidental to a determination of water rights in Gila River in Arizona, although there is no independent jurisdictional basis for a determination of the rights in New Mexico); *Phelps* v. *Oaks,* 117 U.S. 236 (1886) (jurisdiction based on diversity of citizenship retained after the intervention of a party who destroyed complete diversity); *Stewart* v. *Dunham,* 115 U.S. 61 (1885) (class action removed to federal court because of diversity; jurisdiction retained after intervention of a member of the class of same citizenship as defendant); *Hurn* v. *Oursler,* 289 U.S. 238 (1933) (federal claim for copyright infringement joined with state claim for unfair competition; jurisdiction over the federal claim held to include the power to decide the state claim); *Siler*

If this Court were to decide that an independently justiciable controversy were required in order to join additional parties, it would add a new and uncertain qualification to present rules of joinder. Such a qualification resting on constitutional grounds would import uncertainty as to jurisdiction into all multi-party situations. Denial of the motion on this ground would undermine the salutary principle that the power to decide a case is the power to decide it completely.

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v. *Louisville & Nashville R.R.*, 213 U.S. 175 (1909) (jurisdiction based on federal question, but case disposed of on issue of state law); *Moore* v. *New York Cotton Exchange*, 270 U.S. 593 (1926) (federal court has ancillary power to decide compulsory counterclaim for which there is no independent ground for federal jurisdiction); *Kelly* v. *Pennsylvania R.R.*, 7 F.R.D. 524 (E.D. Pa. 1948) (federal court has ancillary jurisdiction over third party complaint for which there is no independent ground for federal jurisdiction).

In *Oklahoma* v. *Texas*, 258 U.S. 574, 581 (1922), an original action, the Supreme Court reflected this basic principle of ancillary jurisdiction in the following statement:

> It long has been settled that claims of property or funds of which a court has taken possession and control through a receiver or like officer may be dealt with as ancillary to the suit wherein the possession is taken and the control exercised,—and *this although independent suits to enforce the claims could not be entertained in that court.* (Emphasis added.)

III.

THE CONTROVERSY PRESENTED BY THE PLEADINGS IS JUSTICIABLE AS TO THE FOUR ABSENT STATES

The dominant argument of the absent States opposing this motion is that there is no justiciable controversy between them and the present parties. Two reasons are given: That the controversy is solely a Lower Basin dispute, and that because there is no physical shortage of water now, the issues are not now justiciable. Both these reasons are unsound.

A. The Controversy Is Not Solely a Lower Basin Dispute

1. *Arizona's prayer to quiet title to 2,800,000 acre-feet of III(a) water from the main stream presupposes a determination that the Lower Basin has title, as against the Upper Basin, to 7,500,000 acre-feet of main stream water under Article III(a) of the Colorado River Compact.*

Arizona derives her claim on the main stream to 2,800,000 acre-feet per annum of the 7,500,000 acre-feet of uses apportioned by Article III(a) to the Lower Basin by a process of subtraction:

(1) Arizona first asserts that the 7,500,000 acre-feet is all physically present in the main stream, flowing at Lee Ferry,[1] and identified with the 75,000,000 acre-feet which Article III(d) requires the four States of the Upper Division to let pass Lee Ferry in each ten-year period.[2] This is the

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[1] Reply to California's Answer, par. 8, p. 16.

[2] *Id.* at par. 11, p. 18.

hinge of her whole case. She denies that the uses on the Gila are chargeable under Article III(a), and identifies them with the increase of use permitted to the Lower Basin by Article III(b).[1]

(2) Arizona concedes to California 4,400,000 acre-feet per annum, and to Nevada 300,000 acre-feet per annum, of the 7,500,000 acre-feet apportioned to the Lower Basin by Article III(a) and which she says is to be found flowing at Lee Ferry.[2]

(3) On this argument, there is left a residue of 2,800,000 acre-feet of III(a) water, in the main stream, to which Arizona seeks to quiet title.[3]

Putting aside for the moment all other questions —such as whether California and Nevada are in fact limited to the quantities Arizona concedes, or whether uses shall be measured in one way or another—it is clear that Arizona cannot quiet title to a residue of 2,800,000 acre-feet of III(a) water on the main stream unless, in fact, the initial figure of 7,500,000 acre-feet of III(a) water at Lee Ferry is correct.

If it is, then, by hypothesis, the absent States of the Upper Division are at once confronted by the obligation in Article III(c), which states that the Mexican burden shall be "supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b)," but if such surplus shall prove insufficient, "the States of the Upper

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[1] *Id.* at par. 8, p. 17.

[2] *Id.* at par. 37(b), p. 28.

[3] *Id.* at par. 41, p. 33.

Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d)." Since, on Arizona's hypothesis, the 75,000,000 acre-feet delivered under Article III(d) contains no surplus, but is identified with the Lower Basin's apportionment under Article III(a), the four absent States of the Upper Division must add enough water to meet the deficiency in the Mexican burden. As this burden is fixed by treaty at a minimum of 1,500,000 acre-feet per annum, measured at the Mexican boundary, the effect of Arizona's prayer is to add at least 750,000 acre-feet per year, or 7,500,000 acre-feet in ten years, or ten per cent, to the burden on the States of the Upper Division imposed by Article III(d).

In short, Arizona's suit is necessarily an action to quiet title in the Lower Basin to 7,500,000 acre-feet per annum of III(a) water at Lee Ferry, as against the four absent States of the Upper Division. That step must be accomplished before she can find title to herself in 2,800,000 acre-feet of III(a) water in the main stream, even if she wins every point against California and Nevada.

On the interpretation of California and Nevada, however, the uses on the Gila River System are chargeable to the Lower Basin's apportionment under Article III(a), which provides that the water apportioned to each Basin "shall include all water necessary for the supply of any rights which may now exist," which, of course, includes the very old rights on the Gila. That being so, the California defendants say there is no relationship whatever between the obligation of the States of

the Upper Division under Article III(d) to deliver 75,000,000 acre-feet during each ten-year period at Lee Ferry, and the apportionment of uses made by Article III(a) to the Lower Basin. If this is true, then, to the extent that the apportionment of 7,500,000 acre-feet per annum is represented by uses of the waters of the Gila River System or other tributaries in the Lower Basin, the 75,000,000 acre-feet delivered under Article III(d) includes an equivalent quantity of waters of some category other than those apportioned by Article III(a). On any theory of measurement, this equivalent quantity amounts to several million acre-feet in each ten-year period. The California defendants say that this component of the waters passing Lee Ferry is excess or surplus waters unapportioned by the Colorado River Compact, covered in part by the Lower Basin's right to increase its use under Article III(b), and available for use by California under the terms of the Statutory Compact as well as available for satisfaction of the Treaty burden.

In any event, it is quite apparent that the status of the 75,000,000 acre-feet minimum guaranteed at Lee Ferry affects the rights not only of the Lower Basin States under Articles III(a) and III(b) of the Colorado River Compact and the right of the State of California under the Statutory Compact to the use of excess or surplus waters, but also the correlative obligation of the Upper Division States under Article III(c) to bear one-half the deficiency of the Mexican burden. It is impossible to determine that deficiency without first determining whether the 75,000,000 acre-feet includes any excess or surplus waters available in part for discharge of that

burden, as California says, or whether the 75,000,000 acre-feet is all apportioned to the Lower Basin under Article III(a), as Arizona says.

The net effect of the decree which Arizona seeks would be to quiet title in the Lower Basin to 75,000,000 acre-feet at Lee Ferry per ten-year period as water apportioned to the Lower Basin under Article III(a). If this suit is justiciable against California, it is manifestly justiciable against the absent States of the Upper Division—the four obligors under Articles III(c) and III(d). It is against them that Arizona must quiet that title.

Other issues of interpretation of the Colorado River Compact which require a determination affecting the four absent States are catalogued in the "Summary of the Controversy" (Exhibit A to the pending motion), *e.g.*, "whether, if excess or surplus waters are appropriated (or contracted for) in the Lower Basin, their release from storage in the Upper Basin may be required" (*Id.* at p. 19) under Article III(e), as the California defendants contend, or whether such waters may be retained in the Upper Basin for power generation. Compare the discussion of this point by Governor Ed Johnson of Colorado, p. 54 *et seq.* of the present brief.

2. *Arizona's contention that the six-state Colorado River Compact, to which she was not a party, has been superseded by a seven-state Compact, to which she is a party, raises a justiciable issue with all parties to the six-state Compact.*

Another critical and clearly justiciable issue in the pending suit is whether Arizona is a party to the Colorado River Compact. The Compact is a

contract which became effective by Presidential proclamation in 1929. Arizona was not a party. This situation continued for at least 15 years. Arizona asserts that in 1944 she ratified what thereby became a seven-state Compact. A new party cannot be imported into a contract without the consent of all of the existing parties. "In making a contract, parties are as important an element as the terms with reference to the subject-matter. . . . A new party could no more be imported into the contract and imposed upon [an existing party] without its consent, than a change could be made in like manner in the other pre-existing stipulations." *First National Bank of Quincy* v. *Hall,* 101 U.S. 43, 50 (1880). Whether Arizona, by her unilateral action in 1944, could become a party to a contract concluded and effective in 1929 cannot be determined in this suit without the presence of all of the original parties.

California contends that her obligation under the Statutory Compact, evidenced by the California Limitation Act, is conditioned upon existence of a six-state Colorado River Compact and the absence of a seven-state Colorado River Compact. She was required by the Boulder Canyon Project Act to assume the burdens of the Limitation Act because, and only because, Arizona refused to ratify the Colorado River Compact and the four absent States refused to acquiesce in a six-state Compact unless it should be accompanied by a limitation upon California's rights. The federal statute, the state statute, and the Presidential proclamation are explicit as to the mutually exclusive character of the six-state and seven-state settlements, as to the fact that the Limitation Act should become operative only in the

absence of a seven-state agreement, and as to the six-months time limit for the crystallization of one result or the other. This issue—whether the tardy ratification of a seven-state agreement by Arizona, fifteen years after expiration of the time stipulated in the Project Act, was unilaterally effective, and whether, if so, the Statutory Compact continues effective—is equally justiciable as to all six States which are beneficiaries of the Statutory Compact. It cannot be litigated without the presence of all six of those States.

3. Arizona's allegations that California has breached the Statutory Compact raise a justiciable controversy with all six co-beneficiaries.

Arizona alleges that California has breached its obligations under the Statutory Compact. (Arizona Complaint, pars. XXVI, XXVII.) California's obligation under that Compact is a single and indivisible promise to the United States for the express benefit of the six other States of the Colorado River Basin, of which Arizona is but one. If California has broken that promise, a justiciable controversy necessarily is raised between her and all six co-beneficiaries.

California by that Compact agrees to limit her consumptive uses so that they

> shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin states by paragraph "a" of article three of the said Colorado river compact, plus not more than one-half of any excess or surplus waters unapportioned by

> said compact, such uses always to be subject to the terms of said compact. (Chap. 16, Calif. Stats. 1929, p. 38.)

The breach alleged is that California claims rights in "excess or surplus waters unapportioned by said Compact," has made contracts with the United States for the storage and delivery of such excess or surplus waters, and has built works to use them, whereas (says Arizona) no state can acquire any rights in excess or surplus waters unless and until a new compact, to be made after October 1, 1963, apportions them. The questions of whether excess or surplus waters are open to appropriation, or may be salvaged and stored by the United States and disposed of by Government contract, or are withheld from all states until all (including Arizona) agree on a new compact, are manifestly questions equally affecting all seven States. If California has breached the Statutory Compact in asserting and using the rights to excess or surplus waters given her on the face of the Statutory Compact (and California denies that she has), the breach is against all beneficiaries of that Compact, not Arizona alone.

B. The Assumption as to Water Availability Relied on by the Absent States Is Incorrect. In Any Event, the Facts Are Not Properly the Subject of Judicial Notice and Should Be Determined Only After Hearing

The absent States argue that the present controversy is not justiciable as to them because there is no imminent shortage of water which will affect them. They declare that 7,500,000 acre-feet of

water is apportioned for annual beneficial consumptive use in the Upper Basin of the Colorado River, and that after presently contemplated projects are in operation beneficial consumptive use in the Upper Basin will be an estimated 4,200,000 acre-feet per annum. (Colorado and Wyoming Brief, p. 36.) "The unused portion of the Upper Basin apportionment," say the absent States, "is flowing into the Lower Basin and will continue so to flow until Upper Basin use increases to the amount of its apportioned share." (*Id.* at p. 8.)

The statement that present and immediately contemplated beneficial consumptive uses will total only 4,200,000 acre-feet per annum is not meaningful because "beneficial consumptive use" is in controversy in the present litigation as to its definition, its method of measurement, its relation to reservoir evaporation losses, as well as a number of other aspects. The controversies over "beneficial consumptive use" involve approximately two million acre-feet of water per annum throughout the entire Colorado River Basin. (See initial California Brief, p. 38.)

The argument of the absent States assumes that whatever water is apportioned by the Colorado River Compact is at all times physically available. The assumption is, unfortunately, incorrect. How much water is physically available is a difficult and complex problem to which answers vary, but in any case it is not a subject for judicial notice. A view contrary to the assumption by the absent States in their briefs, was recently expressed by Governor Ed C. Johnson of Colorado:

> Under the Seven State Compact the Upper States must deliver at Lee Ferry in each ten year period 75 million acre-feet to the Lower States and 7½ million acre-feet to Mexico before they can use one drop of water themselves beyond what they used before the Seven State Compact was ratified. In the current ten year period that will leave only 3,250,000 acre-feet per year for their total use. In the previous ten year period they would have had 4,150,000 acre-feet a year. In 1902 the Upper Basin States under this formula would have had no water at all.[1]

C. Present Use of Water in Dispute Is Not Necessary to Constitute a Justiciable Controversy

In *Nebraska* v. *Wyoming,* 325 U.S. 589 (1945), Colorado argued that because water was passing unused down the North Platte River during the irrigating season, there was no justiciable controversy. Colorado's demands related at least in part to future rather than to present uses. The Court said, at page 609:

> The claim of Colorado to additional demands may not be disregarded. The fact that Colorado's proposed projects are not planned for the immediate future is not conclusive in view of the present over-appropriation of natural flow. The additional demands on the river which those projects involve constitute a threat of further depletion.

In the instant case, as in *Nebraska* v. *Wyoming,* natural flow is overappropriated. (Answer of

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[1] The full text of Governor Johnson's statement, made on December 20, 1954, is annexed as an appendix to this brief.

Defendants to Arizona Complaint, par. 3; *Problems of Imperial Valley and Vicinity,* SEN. DOC. No. 142, 67th Cong., 2d Sess. (1922), p. 5.)

At page 610 in the same opinion the Court explained the basis for the doctrine that claims to water in excess of supply create a justiciable interstate controversy:

> But where there is not enough water in the river to satisfy the claims asserted against it, the situation is not basically different from that where two or more persons claim the right to the same parcel of land. The present claimants being States we think the clash of interests to be of that character and dignity which makes the controversy a justiciable one under our original jurisdiction.

The principle is clearly applicable to the instant case. That the States opposing the present motion have claims to the use of water which conflict with claims of present parties to this suit, they do not deny. The only matter in doubt is not whether but when the actual shortage will take place. If the figures of Governor Johnson, quoted on page 37, *supra,* are correct, the shortage may take place very soon.

D. The Requirements for a Justiciable Controversy Do Not Change When States Are Parties

The absent States argue that usual requirements for a justiciable controversy are inapplicable to litigation between states. The cases cited in their briefs, however, contribute nothing toward proving such an exception. The reason for doubt-

ing the existence of an exception applicable to states is compelling.

If the issues between the absent States and the present parties are nonjusticiable, the reason can only be that they do not present a case or controversy within the meaning of Article III, Section 2 of the United States Constitution. What the argument necessarily means, if valid, is that the words "case" and "controversy" in the Constitution have one meaning as to private persons, another meaning as to states. The distinction would import endless and unnecessary confusion, and is without any support in the decisions.

So far as they are pertinent in this connection at all, the cases cited by the States opposing the motion stand for the propositions that between states more material injury must be shown to justify relief than in cases between other types of litigants and that a case against a state must rest on clearer proof. Both of these are considerations relevant to the decree or final disposition of litigation. They have nothing to do with jurisdiction or joinder of parties.

Colorado v. *Kansas,* 320 U.S. 383 (1943), is a clear example. This case is cited or quoted in the Colorado and Wyoming Brief at pages 17 and 31, in the Utah Brief at pages 7-8, 9, 11, 13, 16, 19, and 21. The fact that the quoted language from this case has nothing to do with the jurisdictional issue of justiciable controversy is clearly shown by the history of the litigation. Jurisdiction to determine this dispute over the right to use waters of the Arkansas River was determined in *Kansas* v. *Colorado,* 185 U.S. 125 (1902), when the Court

overruled Colorado's demurrer to Kansas' complaint. After hearing, this Court determined that the plaintiff had not established a basis for relief. 206 U.S. 46 (1907). This was an adjudication on the merits and constituted an exercise of jurisdiction. So likewise did the decision in 1943, when the roles as plaintiff and defendant were reversed and a Kansas water users' association was an added party defendant. The Utah Brief recognizes this situation when it describes the two States, after 1907, as "operating under a 'decree of the court' subject to a reopening at a future time when present injury existed." (Page 8.) The exercise of jurisdiction presupposes that the controversy was justiciable. Peculiarities based on the nature of states as parties go to the decision on the merits, and not to justiciability and jurisdiction.

What is true of *Colorado* v. *Kansas* is also true of a number of other cases cited by the absent States; they have nothing to do with jurisdiction or joinder of parties.[1]

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[1] *Missouri* v. *Illinois,* 200 U.S. 496 (1906), Colorado and Wyoming Brief page 18, Utah Brief pages 11, 20, New Mexico Brief page 6. The jurisdictional matters had been disposed of in *Missouri* v. *Illinois,* 180 U.S. 208 (1901), when demurrer to the complaint had been overruled. Dismissal of the bill without prejudice in 1906 was clearly an adjudication on the merits after a careful review of complex evidence and a weighing of equities. What is said about judicial restraint in matters between states has nothing to do with the test of a justiciable controversy.

Connecticut v. *Massachusetts,* 282 U.S. 660 (1931), Colorado and Wyoming Brief pages 18, 32, Utah Brief pages 11, 21, New Mexico Brief page 6. The decision was a denial of an

In *Arizona* v. *California,* 283 U.S. 423 (1931), the first decision by this Court in the Colorado River litigation, the Court did refuse to take jurisdiction. Arizona's bill against California,

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injunction sought by Connecticut to prevent Massachusetts from diverting water from the watershed of the Connecticut River for storage and use in the Boston metropolitan area. The decision after careful review of the evidence was an exercise of jurisdiction, and necessarily a determination that there was a justiciable controversy.

New York v. *New Jersey,* 256 U.S. 296 (1921), Colorado and Wyoming Brief page 18, Utah Brief page 11, New Mexico Brief page 6. This was a suit to prevent New Jersey from discharging sewage into the New York harbor. Again, the dismissal after a careful review of the evidence constituted an exercise of jurisdiction and a necessary determination that there was a justiciable controversy. The decree was without prejudice to renewal of an application for an injunction.

North Dakota v. *Minnesota,* 263 U.S. 365 (1923), Colorado and Wyoming Brief page 18, Utah Brief page 11, New Mexico Brief page 6. North Dakota sought to enjoin activities in Minnesota which allegedly caused flooding and destruction in the plaintiff state, and also to recover money damages on behalf of North Dakota citizens. The bill was dismissed without prejudice because proof of the causal connection between the works in Minnesota and floods in North Dakota was lacking. Money damages for North Dakota citizens were held forbidden by the Eleventh Amendment. Again, the case shows an exercise of jurisdiction and the presence of a justiciable controversy.

Washington v. *Oregon,* 297 U.S. 517 (1936), Colorado and Wyoming Brief page 18, Utah Brief page 11, New Mexico Brief page 6. Washington's bill for an equitable apportionment and injunctive relief against Oregon, relating to the waters of the Walla Walla River, was dismissed on the merits after a careful review of the evidence. Again, there was an exercise of jurisdiction connoting the presence of a justiciable controversy.

Colorado, Nevada, New Mexico, Utah, Wyoming, and the Secretary of the Interior seeking to restrain the building of Hoover Dam was dismissed. The Court pointed out that Arizona's complaint showed 9,000,000 acre-feet of unappropriated water available and no prospect of interference with Arizona's right to appropriate it. Since 1931 there have been a number of significant changes in circumstances: a protracted dry period since that date; increased uses throughout the Basin; execution of a Treaty guaranteeing Mexico 1,500,000 acre-feet per annum; purported ratification of the Colorado River Compact by Arizona and the negotiation of purported water delivery agreements by the Secretary of the Interior with Arizona. In the 1931 case all the parties but Arizona agreed there was no justiciable controversy[1]; today everyone agrees that a justiciable controversy among present parties to the suit exists.[2]

In other cases cited in one or more of the briefs of the absent States, in which no justiciable controversy was found, the reasons for finding

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[1] Motion of Ray Lyman Wilbur, Secretary of the Interior, to Dismiss the Bill of Complaint, p. 2; Motion to Dismiss filed by California, Colorado, Nevada, New Mexico, Utah, and Wyoming, p. 1.

[2] Arizona Motion for Leave to File Bill of Complaint and Bill of Complaint, p. 5; California Answer to Bill of Complaint, par. 74; Nevada Answer to United States Petition of Intervention, par. XVIII; United States Brief in Support of Motion for Leave to Intervene, p. 29 *et seq.*

absence of a justiciable controversy are clearly inapplicable to the present case.[1]

Only one other group of cases cited by the absent States requires notice. New Mexico cites two decisions on pages 6 and 7 of its brief for the proposition that "The exercise of original jurisdiction in an interstate case is not man-

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[1] In *Alabama* v. *Arizona,* 291 U.S. 286 (1934), the plaintiff State was denied leave to file its bill of complaint to restrain the operation of the prison-made-goods statutes of five States. A number of grounds are given in the opinion, among them the fact that the bill on its face did not show an injury justifying relief.

In *Massachusetts* v. *Missouri,* 308 U.S. 1 (1939), Massachusetts was denied leave to file a complaint against Missouri to prevent application of Missouri taxes with respect to property left by a Massachusetts domiciliary and held by Missouri trustees. No justiciable controversy in such a case is presented when a state is the party litigant, at least where the property is adequate to meet all taxes assessed by the states in question.

In *New York* v. *Illinois,* 274 U.S. 488 (1927), the Court granted a motion to strike one paragraph from the complaint of New York in an action against Illinois to prevent lowering the level of the Great Lakes. The paragraph concerned New York's right to use the waters of the Niagara and St. Lawrence Rivers for power, but alleged no plans to do so.

In *United States* v. *West Virginia,* 295 U.S. 463 (1935), the Court dismissed an action to restrain the building of a dam in the New and Kanawha Rivers, and to declare the rivers navigable. No controversy was stated with West Virginia which purported to be merely the licensor of the corporate defendants who were building the dam. Dismissal of the State deprived the Court of original jurisdiction over the corporate defendants.

United States v. *Appalachian Electric Power Co.,* 311 U.S. 377 (1940), is cited merely for its dictum, at page 423, that the Court will not decide abstract propositions.

datory." *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945); *North Dakota* v. *Chicago & Northwestern R.R.*, 257 U.S. 485 (1922). Neither of the two cases was an interstate case, although a state was plaintiff in both. Neither case stands for this proposition, even by way of dictum. The proposition for which the two cases actually stand is stated in *Georgia* v. *Pennsylvania Railroad, supra,* at 464-65:

> The Court in its discretion has withheld the exercise of its jurisdiction where there has been no want of another suitable forum to which the cause may be remitted in the interests of convenience, efficiency and justice.

This principle has no application to suits between two or more states. In such cases the United States Supreme Court is the only forum available.

In sum, what the cases cited by the opposing briefs show is that different criteria control the granting of relief against states, but not the exercise of jurisdiction. The California defendants believe that not only should the Court take jurisdiction but should grant a decree settling the controversy.

IV.

CLAIMS OF THE UNITED STATES MATERIALLY AFFECT THE FOUR ABSENT STATES AND ARE NOT DISPOSED OF BY THE UPPER COLORADO RIVER BASIN COMPACT

The United States in its petition of intervention has asserted a number of different claims to the use of water of the Colorado River System. These claims include rights:

(1) To store water for the servicing of water delivery contracts which aggregate nearly 8,500,000 acre-feet per annum of the water stored in Lake Mead;

(2) To comply with international obligations arising from the Mexican Treaty of 1944;

(3) To fulfill the Government's obligations to Indians and Indian tribes;

(4) To protect the interest of the United States in fish and wildlife, flood control and navigation;

(5) To meet the needs of the National Park Service, the Bureau of Land Management, and the Forest Service;

(6) To service contracts for generation and delivery of electric power.

The issues these claims present are as justiciable against States of the Upper Basin as against States of the Lower Basin. As the initial California brief on the pending motion developed in some detail, these claims involve the States opposing the pending motion in several ways:

(1) Their disposition will affect obligations of those States to make water available to the Lower Basin;

(2) Each category of claims involves questions of law in common to all of the States of the Colorado River Basin;

(3) A determination that Indian rights are outside and superior to rights under the Colorado River Compact would render the Compact unworkable.

Utah replies that the "complete answer" is Article VII of the *Upper* Colorado River Basin Compact of 1948. (Utah Brief, pp. 18-19.) The same position is taken by Colorado and Wyoming. (Colorado and Wyoming Brief, p. 33.) Article VII provides that water uses by the United States are charged to the State in which such uses occur.

Although California agrees that the principle in Article VII of the Upper Colorado River Basin Compact is sound, that principle is not accepted by the United States in this suit. (See par. XXVII and par. XXXVII of the United States Petition of Intervention, relating to Indian rights.) The *Upper* Colorado River Basin Compact, although consented to by Congress, does not bind the United States. Congress can subject the United States to an interstate compact, and did so in the Boulder Canyon Project Act, which approved the Colorado River Compact. (See Boulder Canyon Project Act, Secs. 8, 13, 18, Appendix No. 2 to the California Answer, Appendix Vol. I, p. 9.) It did not do so in approving the *Upper* Colorado

River Basin Compact. 63 STAT. 31 (1949). The Report of the House Committee on Public Lands on the Resolution which granted consent to the Upper Basin Compact explicitly recognized that "the Upper Colorado River Basin Compact is binding only upon the States which are signatory thereto . . . ." (See Extract from Report, Appendix No. 32 to California Answer, Appendix Vol. II, p. 89.)

Even without the declaration in the legislative history Article VII of the Upper Basin Compact would not bind the United States. An interstate compact is not a statute of the United States. *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.,* 304 U.S. 92 (1938). The function of an interstate compact is to establish rights between States, not between States and the United States.

Furthermore, the Upper Basin Compact does not even purport to apply to the Lower Basin rights and obligations of New Mexico and Utah with respect to the United States.

V.

LOWER BASIN RIGHTS OF NEW MEXICO AND UTAH ARE NOT DE MINIMIS

Utah in her brief, at pages 15-16, says:

> The interests of the State of Utah in the waters of the Lower Basin are certainly *de minimus* [*sic*]. Their maximum rights and claims to the waters of the Lower Basin do not equal in magnitude even 2½ percent of the water allocated by the Compact to the

> Lower Basin exclusive of surplus or unappropriated water. Clearly applicable here is the statement of this court in *Colorado* v. *Kansas,* 320 U.S. 383, 88 L. Ed. 116 at page 124: "Before the court will intervene the case must be of serious magnitude and fully and clearly proved."

Of the authority cited, it is necessary to say again what was said under point III of this brief. Magnitude of the injury and clarity of proof are matters that become pertinent after the Court has assumed jurisdiction. In any case, Utah's *de minimis* is hard to reconcile with the facts.

It is not clear whether Utah refers to 2½ per cent of 7,500,000 acre-feet of water or to 2½ per cent of 8,500,000 acre-feet. In the first case, the quantity is 187,500 acre-feet. In the second instance it is 212,500 acre-feet. One acre-foot of water is 43,560 cubic feet, or 325,850 gallons. 187,500 acre-feet is about 61 billion gallons. One acre-foot will supply the domestic needs of five or six persons for one year. The quantity that Utah says is "certainly *de minimis*" would supply the yearly needs of a city of 1,000,000 persons, or five cities with the population of Salt Lake City. The beneficial consumptive use of water for irrigation prevailing in southern Utah averages around two acre-feet per acre per year. (United States Bureau of Reclamation, Region 3, *Water Supply of the Lower Colorado River Basin* [1952], p. 105). Thus, the quantity of water claimed by Utah is enough to irrigate approximately 100,000 acres.

In *Wyoming* v. *Colorado,* 259 U.S. 419 (1922), the Court's decree (259 U.S. at 496) had been entered only a few months when it had to be modified to recognize the right of Colorado to a "relatively small amount of water" appropriated before 1902 from Deadman Creek. 260 U.S. 1 (1922). This relatively small amount continued to be a problem and fourteen years later was determined to be 2,000 acre-feet per year. 298 U.S. 573 (1936). The entire water supply in controversy in *Wyoming* v. *Colorado* was determined to be 288,000 acre-feet per annum. 259 U.S. at 496. In *Nebraska* v. *Wyoming,* 296 U.S. 553 (1935), Colorado was joined as a party on the basis of Wyoming's allegation that Colorado's claims were "upwards of 250,000 acre feet per annum." (See footnote 1, p. 13 *supra.*)

Recent legislation authorized the so-called "second barrel" of an aqueduct to furnish an additional eighty cubic feet per second of capacity for San Diego, California. 65 STAT. 404 (1951). This capacity amounts to a maximum, at full utilization, of some 58,000 acre-feet per annum. This brief statute is laced, in five separate places, with disclaimers that the facility in any way increases the rights of San Diego to the use of Colorado River water, all at the insistence of counsel for the Upper Basin States. *Hearing No. 44 before Committee on Armed Services on H.R. 5102,* 82d Cong., 1st Sess. (1951), p. 1889. This 58,000 acre-feet for San Diego is less than one-third of what Utah now calls *de minimis.*

Utah also says that she is now negotiating with Arizona for a distribution by compact of her share of Lower Basin water. (Utah Brief, p. 20.) She also says that her presence in this suit would

be "absolutely to preclude the possibility of an amicable settlement of Utah's rights by compact and by negotiations." *Id.* at p. 16. New Mexico says, without further explanation, that "[I]t is not in the best interest of New Mexico at this time and in the present suit to be compelled to litigate and have determined the exact magnitude of this equitable share in terms of acre feet of [Lower Basin] water." (New Mexico Brief, p. 5.)

Why Utah is negotiating a compact to settle interests she regards as *de minimis* is not explained. Nor does she explain how, in a compact with Arizona, she can establish her share in water to which five States and the United States assert claims. Utah does not explain why her joinder would foreclose any possibilities for negotiation that now exist. No reason is apparent why pendency of litigation should interfere with any negotiations.

CONCLUSION

The Upper Basin States in their briefs impugn the motives of the California defendants in filing the pending motion.[1] California's sole purpose in

[1] The Upper Basin States quote statements by California representatives before Congressional Committees that the problems of the Lower Basin could be litigated without affecting the legal rights of the Upper Basin States. For Upper Basin response at that time see *Hearings before a Subcommittee of the Senate Committee on Interior and Insular Affairs on S. J. Res. 145,* 80th Cong., 2d Sess. (1948) p. 198: "We feel that any matter which involves the interpretation or application of the Colorado River compact necessarily involves every State which is signatory to that compact. In fact, we feel that in any litigation each of the signatory States would be an indispensable party to the litigation." To the same effect see pp. 183, 184-85, 187, 189, 302.

seeking to join the absent States is to assure a decree that will settle with finality the vital issues affecting the waters of the Colorado River System. California too dislikes litigation, but prefers a single case to a series of cases. Especially does she wish to avoid future litigation in which a decree in this case would be *res judicata* as to three States and the United States, but not as to the four absent States.

The absent States must be made parties because Arizona, California, Nevada, and the United States have joined in asking this Court to resolve a controversy which deeply affects the welfare and future of the entire Colorado River Basin. The compacts and laws which this Court must construe and apply if it is to resolve that controversy constitute the Law of the River. All of the States of the Colorado River Basin have participated in making that law, all are deeply affected by it. To avoid uncertainty, confusion, and endless controversy there must be but one Law of the River. To that end, it is necessary that Colorado, New Mexico, Utah, and Wyoming be made parties to this suit.

Colorado, New Mexico, Utah and Wyoming urge they should not be joined in this suit because there is water in the Upper Basin not yet being used. If the Upper States are not joined for the reason that the water in the Upper Basin is not yet being used, a judicial decision will be impossible until water in dispute is actually unavailable to communities that have become dependent upon it. Decisions could be made only when costly projects would be rendered useless for lack of water.

To so hold, for whatever reason, would be to decide that waste, privation, and human suffering are requisites to judicial decision. The California defendants do not believe that this is or ever will be the law. The issues which must be decided are as sharply delineated today as they will be in either the near or the distant future. The controversy is actual and real; the need for decision is pressing.

For the reasons stated in this brief and the initial brief, the defendants respectfully urge that the motion be granted.

Respectfully submitted,

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APPENDIX

STORAGE BELOW THE STATE OF COLORADO IS NOT THE ANSWER[1]

By Ed C. Johnson
United States Senator, Colorado

Interested persons on the Eastern and Western Slopes of Colorado have expressed confidence in me, as Governor, to resolve the very controversial water problem that plagues both slopes. This is a tremendous responsibility and challenge but its vital nature demands my acceptance. Accordingly, I shall do my utmost to work out something which will benefit both slopes and injure neither.

However, before we begin the task of allocating Colorado's share of the water of the Colorado River System, we first must take stock of the quantity and the location of the water that is available to us. There are very serious misconceptions, widely held, in regard to the burdens placed on this state by the specific provisions of the Seven State Compact and the official interpretations with respect to them. These limitations should be understood clearly by all parties concerned, since they are basic to any plan to develop the Upper Colorado River Basin. It is with that purpose in mind that I have prepared this document. If my conclusions are in error I want to be show wherein the error lies.

---

[1] This statement was issued on December 20, 1954, while Governor Johnson was United States Senator and Governor-elect of Colorado. It is reproduced as an extension of remarks of Representative John P. Saylor, of Pennsylvania. 101 Cong. Rec. A168-A171 (January 13, 1955).

Either the Seven State Compact specifically denies to the Upper Basin the right to withhold water which it cannot use for agricultural and domestic purposes or it does not deny us such a right. Either it denies to the Upper Basin the right to withhold water to develop power or it does not deny us that right. Let us look at the document which has been ratified by the Legislatures of seven states for the correct answers to these pertinent questions.

Here is that irrevocable record:

Article II

> (h) The term "domestic use" shall include the use of water for household, stock, municipal, mining, milling, industrial, and other like purposes, but shall exclude the generation of electrical power.

Article III

> (e) The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses.

The Honorable Herbert Hoover, Secretary of Commerce of the United States, was appointed by the President to serve as Chairman of the Seven State Compact Commission as the Official Representative of the Government of the United States, pursuant to an Act of Congress. He was the Chairman of the Colorado River Commission that drafted and signed the Seven State Colorado River Compact. In answer to the question propounded by Congressman Hayden these points in

the compact were interpreted officially by him on January 27, 1923, before any state had ratified the Compact, as follows:

> *Question 14.* Can paragraph (d) of Article III be construed to mean that the States of the upper division may withhold all except 75,000,000 acre-feet of water within any period of 10 years and thus not only secure the amount to which they are entitled under the apportionment made in paragraph (a) but also the entire unapportioned surplus waters of the Colorado River?
>
> *Answer.* No. Paragraph (a) of Article III apportions to the upper basin 7,500,000 acre-feet per annum. Paragraph (e) of Article III provides that the States of the upper division shall not withhold water that cannot be beneficially used. Paragraph (f) and (g) of this article specifically leave to further apportionment water now unapportioned. There is, therefore, no possibility of construing paragraph (d) of this article as suggested.
>
> *Question 19.* Why is the impounding of water for power purposes made subservient to its use and consumption for agricultural and domestic purposes, as provided in paragraph (b) of Article IV?
>
> *Answer.*
>
> (a) Because such subordination conforms to established law, either by constitution or statute, in most of the semiarid States. This provision frees the farmer from the danger of damage suits by power companies in the event of conflict between them.
>
> (b) Because the cultivation of land naturally outranks in importance the generation of power, since it is the most important of human activities, the foundation upon which all other industries finally rest.

(c) Because there was a general agreement by all parties appearing before the commission, including those representing power interests, that such preference was proper.

Question 20. Will this subordination of the development of hydroelectric power to domestic and agricultural uses, combined with the apportionment of 7,500,000 acre-feet of water to the upper basin, utterly destroy an asset of the State of Arizona consisting of 3,000,000 horsepower, which it is said could otherwise be developed within that State if the Colorado River continues to flow, undiminished in volume, across its northern boundary line and through the Grand Canyon?

Answer.

(d) The compact provides that no water is to be withheld above, that cannot be used for purposes of agriculture. The lower basin will therefore receive the entire flow of the river, less only the amount consumptively used in the upper States for agricultural purposes.

On December 15, 1922, Honorable Delph E. Carpenter, Commissioner for Colorado, reported to Governor Oliver H. Shoup his analysis of this compact which he helped to formulate. His comments and observations are especially pertinent. In this official report he said:

> "Power claims will always be limited by the quantity of water necessary for domestic and agricultural purposes. The generation of power is made subservient to the preferred and dominant uses and shall not interfere with junior preferred uses in either basin."

On March 20, 1923, Delph E. Carpenter in a joint letter to Colorado Senator M. E. Bashor and Colorado Representative Royal W. Calkins said among other things:

> All power uses in both basins are made subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes.

The interpretation of Honorable W. S. Norviel, Commissioner for Arizona, published January 15, 1923, contains this language:

> "The third principle established by the compact was to fix a time when the remainder of the water unallotted and unused might be apportioned.
>
> The fourth principle fixes a preference in agricultural uses over power.
>
> The fifth principle, that the upper states shall not withhold water that cannot be reasonably applied for agricultural uses."

Senator Hayden, Arizona, propounded 19 questions to Honorable A. P. Davis, Director United States Reclamation Service, to which the Director made the following replies on January 30, 1923:

> *Question 10.* Is it true that, if the Colorado River compact is adopted, all of the water that Arizona will ever get out of the main river will be enough to irrigate only 280,000 acres of land, of which 130,000 acres are now embraced in the Yuma project and 110,000 acres in the Parker project?
>
> *Answer.* The Colorado River compact does not attempt to divide the water of the river

between individual States. Except for rights already initiated by California and Nevada, there is nothing in the compact that will prevent the State of Arizona from taking from the river all the water that it can put to beneficial use.

Question 19. Any further comment that you may care to make relative to the approval of the Colorado River compact by the Arizona State Legislature will be appreciated.

Answer. The Colorado River compact provides that the lower basin shall be guaranteed an average of 7,500,000 acre-feet of water annually from the upper basin and all of the yield of the lower basin, and that any water not beneficially used for agricultural and domestic uses shall likewise be allowed to run down for use below.

It should be noted that these official interpretations were made before the compact was ratified by any State except Nevada and were not disputed by Colorado or any other State at the time it ratified the compact. Most certainly we are bound hand and foot by them.

At the time the Seven State Compact was adopted and ratified, it was contemplated that a treaty would be negotiated later between the United States and Mexico which would allocate to Mexico certain quantities of water defined in acre-feet, out of the Colorado River System. Furthermore, it spelled out just how that burden should fall upon the Lower Basin and the Upper Basin. The compact specified that to the extent there is surplus water in the Colorado River System, such surplus water would be utilized and

the balance of the burden would be shared equally by the Upper and Lower Basins.

Article III

> (c) If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).
>
> (d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

If the Upper Basin States build Storage Reservoirs at the Glen Canyon and Echo Park sites as is now contemplated, the water withheld thereby will of necessity, be surplus water since the Upper States cannot use it for agricultural or domestic purposes, and the Upper States, therefore, must deliver such water to Mexico as is

allocated to her under the provision of the Seven State Compact.

Senator Hayden asked Chairman of the Commission, Herbert Hoover, about this and was answered as follows:

> *Question 15.* Does paragraph (d) of Article III in any way modify the obligation of the States of the upper division, as expressed in paragraph (c), to permit the surplus and unapportioned water to flow down in satisfaction of any right to water which may hereafter be accorded by treaty to Mexico? Within any year of a 10-year period, could the States of the upper division shift to the States of the lower division the entire burden of supplying such water to Mexico.
>
> *Answer.*
>
> (a) No. It is provided in the compact that the upper States shall add their share of any Mexican burden to the delivery to be made at Lee Ferry, whenever any Mexican rights shall be established by treaty. By paragraph (c) of Article III, such an amount of water is to be delivered in addition to the 75,000,000 acre-feet otherwise provided for.
>
> (b) In the face of the specific provision of Article III (c) that the burden of any deficiency must be "equally borne," I can see no possibility of placing upon the lower division the entire burden. If the surplus is sufficient, there is no burden on anyone. If it is insufficient the plain language is that it must be equally shared, with the equally plain provision that the upper division must furnish its half.

Delph Carpenter in his official report to Governor Shoup said:

> "Any waters necessary to supply lands in the Republic of Mexico (hereafter to be determined by international treaty) shall be supplied from the surplus flow of the river. If the surplus is not sufficient, any deficiency shall be borne equally by the upper basin and the lower basin. * * *"

I am certain that Mr. Carpenter would have added, had he thought such a doubt were to be raised, "Water held in the Upper Basin to generate power and which for physical reasons could not be used by the Upper Basin for agricultural or domestic purposes is surplus water to the Upper Basin." Such an interpretation must be crystal clear to any student of the Seven State Compact and the official interpretations of its provisions.

The Upper and Lower Basins were each apportioned from the Colorado River System the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, and in addition the Lower Basin was given the permission to increase its beneficial consumptive use of an extra million acre-feet per annum of surplus water. However, the 7,500,000 acre-feet awarded to the Lower States had a very clear priority over the 7,500,000 acre-feet awarded to the Upper States. In reality, the compact gave the Lower States 7,500,000 acre-feet of water per annum and the Upper States that much water if there should be any water left in the River, provided the Upper States used that water only for domestic or agricultural purposes.

Article III

(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a) the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum.

But here is the catch in this award:

(d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

The following quotes from the questions by Senator Hayden and answered on January 27, 1923, by Chairman of the Commission Herbert Hoover leave nothing to the imagination with respect to the extra one million acre-feet of surplus water awarded the Lower Basin. The extra million acre-feet is to be met out of surplus waters over and above the 7,500,000 acre-feet allocated annually to each of the two basins and it does not take priority over the Upper States award of 7,500,000 feet provided they use all of their

7,500,000 for agricultural and domestic purposes. If the Upper Basin stores water for power purposes at least a million acre-feet per annum must go to satisfy this demand.

Question 6. Are the 1,000,000 additional acre-feet of water apportioned to the lower basin in paragraph (b) of Article III supposed to be obtained from the Colorado River or solely from the tributaries of that stream within the State of Arizona?

Answer. The use of the words "such waters" in this paragraph clearly refers to waters from the Colorado River system, and the extra 1,000,000 acre-feet provided for can therefore be taken from the main river or from any of its tributaries.

Question 22. Does the Colorado River Compact apportion any water to the State of Arizona?

Answer. No, nor to any other State individually. The apportionment is to the groups.

It should be noted, and I repeat, that Secretary Hoover's official interpretations were made before the compact was ratified by any state; furthermore it was not disputed by any of them when they did ratify it.

On December 15, 1922, Colorado Commissioner Delph E. Carpenter in his official report to the Governor of Colorado, the Honorable Oliver H. Shoup, submitted several tables explaining the allocation of the water of the Colorado River System.

Table 4 reads as follows:

Table 4

	Acre-feet
"Upper Division Allocation, includes present consumption	7,500,000
Lower Division Allocation, includes present consumption	7,500,000
Lower Division permissible increase in water consumption	1,000,000
Total allocated or permitted	16,000,000
Unallocated surplus (estimated)	4,500,000
Estimated average annual water supply	20,500,000"

Mr. Carpenter also said in this report:

> "At any time after 40 years, if the development in the Upper Basin has reached 7,500,000 acre-feet annual beneficial consumptive use or that of the Lower Basin has reached 8,500,000 acre-feet, any two States may call for a further apportionment of any surplus waters of the river, * * *."

On March 20, 1923, Colorado Commissioner Delph E. Carpenter in a joint letter to Colorado Senator M. E. Bashor and Colorado Representative Royal W. Calkins said, among other things:

> Paragraph (b), Article III permits the lower basin to increase its annual beneficial consumptive use of water 1,000,000 acre-feet. The two paragraphs permit an aggregate annual beneficial consumptive use of 8,500,000 acre-feet, and no more. The words "per annum", as used in paragraph (b) are not synonymous with the word "annually." No cumulative increase is intended by that paragraph.

On February 10, 1923, Colorado Commissioner Delph E. Carpenter addressed a telegram to the Honorable Herbert Hoover, Chairman, Colorado River Commission and received a prompt reply. On February 13, 1923, he addressed a telegram to the Honorable R. T. McKisick, Deputy Attorney General, Sacramento, California, and that same day received a reply.

These exchanges of telegrams are pertinent to an understanding of this phase of the compact and are inserted here.

Telegram

CAPITOL BUILDING
Denver, Colo., February 10, 1923

HON. HERBERT HOOVER,
Chairman, Colorado River Commission,
Washington, D. C.:

Do you concur with me that the intent of the commission in framing the Colorado River Compact was as follows:

That paragraph (b) of Article III means that the lower basin may increase its annual beneficial consumptive use of water 1,000,000 acre-feet and no more?

DELPH E. CARPENTER

Washington, D. C., February 12, 1923

DELPH E. CARPENTER,
State Capitol, Denver, Colo.:

I concur with you, and shall so advise Congress in my report, that the intent of the Commission in framing the Colorado River Compact was as follows:

Paragraph (b) of Article III means that lower basin may acquire rights under the compact to annual beneficial consumptive use of water in excess of the apportionment in paragraph (a) of that article by 1,000,000 acre-feet and no more. There is nothing in the compact to prevent the States of either Basin using more water than the amount apportioned under paragraphs (a) and (b) of Article III, but such use would be subject to the further apportionment provided for in paragraph (f) of Article III and would vest no rights under the present compact.

HERBERT HOOVER

Denver, Colo., February 13, 1923.

R. T. MCKISICK,
Deputy Attorney General,
Sacramento, Calif.:

Do you concur with me that intent of Commission in framing Colorado River Compact was as follows:

That paragraph (b) of Article III means that the lower basin may increase its annual beneficial consumptive use of water 1,000,000 acre-feet and no more?

DELPH E. CARPENTER

Sacramento, Calif., February 13, 1923

HON. DELPH E. CARPENTER,
State Capitol, Denver, Colo.:

Am of opinion that paragraph (b) of Article III permits increase of annual beneficial consumption use of water by lower basin to 8,500,000 acre-feet total or 1,000,000 in excess quantity apportioned each basin in perpetuity

by paragraph (a), Article III, and no more. When both paragraphs are read together no other construction tenable. "Per annum" not synonymous with "annually."

R. T. McKisick

Sacramento, Calif., February 15, 1923

Delph E. Carpenter
Denver, Colo.:

My interpretation of Article III and VIII well expressed in McKisick's wire of the thirteenth.

W. F. McClure
Seven State Compact Commissioner
for California

Utah Commissioner, R. E. Caldwell in his report to the Utah Senate, among other things said:

> The Lower Basin States, for the most part, when they divert their water, wholly consume it and they get no credit for use of return flow for it does not exist, and they are, therefore, limited to the diversion of 8,500,000 acre-feet and are held strictly to the requirement of "consumptive beneficial use" of such as they do divert.

In the report to the Governor of California by Honorable W. F. McClure, Commissioner for California, made January 8, 1923, appears this statement:

> In conclusion permit me to add that the terms of the compact do full justice to the

> states in interest, and the equitable division and apportionment of the use of the waters of the Colorado River System whereby the Lower Basin is allocated 7,500,000 acre-feet per annum, with an allowable increase of 1,000,000 acre-feet per annum by reason of the probably rapid development upon the lower river, and fully guarantees to California an ample water supply to adequately care for the enormous future growth of the Imperial Valley and adjacent territory.

The Honorable Herbert Hoover, who, as I have said, was the chairman of the commission that drafted and approved by its unanimous vote the Seven State Compact, said:

> "The Lower Basin will, therefore, receive the entire flow of the river, less only the amount consumptively used in the Upper States for agricultural purposes."

The Honorable A. P. Davis, Director of the Reclamation Bureau, on January 30, 1923, announced that:

> "The Colorado River Compact provides that the Lower Basin shall be guaranteed an average of 7,500,000 acre-feet of water annually from the Upper Basin and all of the yield of the Lower Basin, and that any water not beneficially used for agricultural and domestic uses (in the Upper Basin) shall likewise be allowed to run down for use below."

This data proves conclusively that the extra 1,000,000 acre-feet of water per annum allocated to the Lower Basin is to be acquired from the

surplus and otherwise unallocated water of the Colorado River System. The same is true of the 1,500,000 allocated annually by treaty to the United States of Mexico.

I am compelled to keep emphasizing that whatever water is stored in the Glen Canyon and Echo Park reservoirs will be surplus to the agricultural and domestic needs of the Upper Basin, and must be delivered to the Lower Basin to satisfy the award of 1,500,000 acre-feet to Mexico and 1,000,000 acre-feet to the Lower Basin. Furthermore, should the Lower Basin require an additional supply of water for agricultural and domestic purposes the water stored in these reservoirs must be released.

Under the Seven State Compact the Upper States must deliver at Lee Ferry in each ten year period 75 million acre-feet to the Lower States and 7½ million acre-feet to Mexico before they can use one drop of water themselves beyond what they used before the Seven State Compact was ratified. In the current ten year period that will leave only 3,250,000 acre-feet per year for their total use. In the previous ten year period they would have had 4,150,000 acre-feet a year. In 1902 the Upper Basin States under this formula would have had no water at all.

The Reclamation Bureau estimates that the proposed Storage Reservoirs in the Upper Colorado Basin will cost the Upper Basin 880,000 acre-feet annually in evaporation. It will be charged to the Upper Basin as consumptive use. Colorado's portion of that loss would be 400,000 acre-feet.

Water still does not run up hill, and storage down the river from Colorado to generate electric energy, frowned upon by the Seven State Compact, cannot secure for us one drop of water, but to the contrary, will cost us 400,000 acre-feet annually in evaporation, which under the Upper Colorado Basin Compact will be charged to Colorado as consumptive use.

Colorado is close to the bottom of the barrel insofar as Colorado River water is concerned. Colorado has a record of lavish generosity to all of her neighbor States. Now at this late date it will be state suicide unless she looks after her own interests with courage and wisdom. She positively cannot afford the loss of 400,000 additional acre-feet. She cannot afford to agree to a storage plan whose certain effect will be to create additional surplus water out of the Upper Basin's meager supply, which under the Seven State Compact must go to the Lower Basin. Colorado must insist that the 42 reservoirs surveyed in the high country of Colorado be authorized simultaneously with the authorization of the Storage Plan and which will give Colorado an absolute right to the water which is developed.

The Hill report prepared pursuant to a contract with the Colorado Legislature indicates there is something over a million acre-feet of unappropriated water in the Colorado River System in Colorado. However, the Hill report did not charge Colorado with the burden of Colorado's portion of the priority commitment to Mexico, which under the Seven State Compact cannot be less than 375,000 acre-feet. And, another thing,

if Glen Canyon and the Echo Park reservoirs are built, Colorado's portion of the Mexican burden becomes not less than 750,000 acre-feet annually. Had Mr. Hill recognized these binding and irrevocable priorities and the evaporation of the down-river storage plans, which is to be charged to Colorado as "consumptive use" of 400,000 acre-feet, he could not have shown any unappropriated water whatsoever in Colorado for Colorado.

Colorado has entered into irrevocable compacts with all of the States to the East, West, North, and South. In each of these compacts Colorado has been generous to a fault. Now most of her water is lost forever, and yet her neighbors are asking her to surrender more and more of this most precious resource. The time has come when Colorado's dwindling supply must be guarded jealously and protected fully. That is a responsibility which I, as Governor of Colorado, must assume.

Who will say that the Glen Canyon Dam in the State of Arizona and the Echo Park Dam on the Colorado-Utah border are not extraordinary dams from an engineering point of view. Glen Canyon is the sort of project that makes an engineer's mouth water, and the Reclamation Bureau is a Bureau of engineers. Who will say that these projects will not be of incalculable value to the Lower Basin. Glen Canyon, which will collect 100,000 acre-feet of silt a year, will extend the life of the Hoover Project 500 years, but what I want someone to tell me is, "Why should they

be built with Upper Colorado Basin Funds at the water expense of the State of Colorado?"

There is only one route remaining for us to take. We must put our water to beneficial use in our own state if we are to gain any right to it. That is the plain language of the Seven State Compact. It states that condition without equivocation. The Reclamation Bureau has explored 42 reservoir sites high up on the Colorado River System in Colorado. We cannot, we dare not settle for less than their authorization now. Congressional authorization does not mean immediate construction, but it will give to these proposed reservoir sites an official priority. Colorado contributes 72 per cent of the water of the Upper Colorado River Basin. Is it asking too much that we be allowed to use less than one-fourth of what we produce? If that is wrong, then I am wrong.

ED C. JOHNSON