IN THE

Supreme Court of the United States

OCTOBER TERM, 1954 [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.

SPECIAL MASTER'S REPORT ON THE MOTION OF THE CALIFORNIA DEFENDANTS TO JOIN AS PARTIES THE STATES OF NEW MEXICO, UTAH, COLORADO AND WYOMING.

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I. STATEMENT.

1.

Under leave granted by this Court, the State of Arizona filed its Bill of Complaint on January 19, 1953.

The California defendants named therein, to-wit, the State of California, Palo Verde Irrigation District, Im-

perial 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, filed their joint Answer on May 19, 1953.

On August 8, 1953, the complainant, State of Arizona, filed its Reply to said Answer.

On July 15, 1954, said California defendants filed an Amendment to their Answer.

Therewith, the California defendants filed a Motion and Supporting Brief to join as necessary parties the States of Colorado, New Mexico, Utah and Wyoming. These four States are *within the Colorado River System,* as that term is defined by Article II(a) of the Colorado River Compact, hereinafter identified and described, and are States of the Colorado River Basin, as that term is defined by Article II(b) of the Colorado River Compact. These States are also signatories to the Colorado River Compact and are defined as States of the Upper Division by Article II(c) of the Colorado River Compact. (The Colorado River Compact is attached hereto as Appendix A.)

The United States of America was granted leave to intervene in this cause on December 31, 1952 (344 U.S. 919).

The State of Nevada, by order of the Court on June 1, 1954, was also granted leave to intervene.

By further order of the Court on June 1, 1954, I, George I. Haight, was appointed Special Master in this case and "directed to find the facts specially and state separately his conclusions of law thereon, and to submit

the same to this Court with all convenient speed, together with a draft of the decree recommended by him."

An organization meeting was held at Phoenix, Arizona on August 5, 1954, which was attended by the respective counsel for the several parties and by the Special Master. At this meeting, a discussion was had as to means for expediting the hearings in this cause, but it was then thought that hearings on the merits should be delayed until the question as to parties should be determined.

In response to the said Motion made by the California defendants, the following briefs were filed by the parties and by the States sought to be joined:

Briefs opposing the Motion were filed by Arizona on August 13, 1954; by the State of New Mexico on December 27, 1954; by the State of Utah on December 27, 1954; and a joint brief by the States of Colorado and Wyoming on December 27, 1954.

On February 7, 1955, the State of Nevada, intervener, filed its brief supporting the California defendants' Motion.

On February 9, 1955, the California defendants filed a reply brief.

The United States of America, intervener, filed no brief with respect to this Motion.

An order of the Supreme Court, entered on February 28, 1955, referred the joinder Motion of the California defendants to the Special Master, with instructions "to hear the parties and report with all convenient speed his opinion and recommendation as to whether the motion should be granted." Such hearings were held in the State-house, Phoenix, Arizona, on April 12-15, 1955. In attend-

ance at these hearings were the several attorneys representing all the present parties to this cause and the attorneys for those States sought to be joined.

Oral arguments were presented by all parties, except the United States of America. Through counsel the desire was expressed to remain silent on this subject (Tr., p. 356).

The arguments made at these hearings were based upon the pleadings and relevant official public documents. Beyond this, no evidence was taken by the Special Master, as it was his opinion that this was unnecessary and also that it would entail a consideration substantially as extensive as that required for a final hearing on the merits.

The Colorado River is a navigable stream, having a total length of 1293 miles. Its head waters are in Colorado and Wyoming. It flows through Western Colorado and Southeastern Utah, enters Arizona on its northern border, flows through the upper part of that state for 292 miles, then along the southeastern corner of Nevada for 145 miles where it is the boundary between Nevada and Arizona, then in a southerly direction forming for 235 miles the boundary between Arizona and California, and then for 16 miles it marks a boundary between Arizona and Mexico. Its delta is in Mexico at the upper end of the Gulf of California. It may be noted that "Lee Ferry" is on the main stream, located in Arizona near its northern border and above the upper end of the Grand Canyon. (See Arizona's Reply to Defendants' Answer, Appendix No. 1.)

The issues presented by the joinder Motion call for the consideration of the various pleadings of Arizona, of the California parties, of Nevada, and of the United States.

Also, attention needs to be given to the Colorado River Compact (H. Doc. 717, 80th Cong., 2d Sess., p. A17 (1948)), the Boulder Canyon Project Act, Act of December 21, 1928, (45 Stat. 1057), the California Limitation Act, (Calif. Stats. 1929, Ch. 16, p. 38), the Mexican Water Treaty, (U. S. Treaty, Ser. No. 994, 59 Stat. 1219 (1945)), and the Upper Colorado River Basin Compact, (Act of April 6, 1949, 63 Stat. 31); also, the briefs and oral arguments of the parties to the cause; and likewise the briefs and oral arguments of the Upper Basin States: Colorado, Wyoming, New Mexico and Utah.

The Colorado River Compact divides the Colorado River Basin into an Upper and a Lower Basin. As will be explained, the States of Colorado and Wyoming are wholly in the Upper Basin. Nearly all of the parts of New Mexico and of Utah are in the Upper Basin. To a slight extent, these two States are in the Lower Basin. In the Special Master's view, with this respect, separate consideration should be given them. In this report we shall first treat the States of Colorado, Wyoming, New Mexico and Utah as of the Upper Basin. Beginning on page 60 of this Report, we shall consider the status of the two latter States to the extent that they are of the Lower Basin.

The Motion is grounded upon the assertion that each of the four States is a necessary and indispensable party (Motion p. 2).

Reason I, summarized, is that the four States are parties to the Colorado River Compact and the Compact's meaning is in issue in this cause. (A summary of that controversy is presented in Exhibit A of the Motion.)

Reason II is that New Mexico and Utah are States of the Upper and Lower Basin and are interested in Lower Basin water.

Reason III is that the absent States are interested in the Boulder Canyon Project Act and the California Limitation Act and that the meanings of these are in controversy between the present parties. This is further treated in the summary of said Exhibit A accompanying the Motion.

Reason IV is the contention that the assertion of claims by the United States "as against the parties to this cause" is adverse to rights derived from or controlled by the Colorado River Compact. It is asserted that these claims of the United States affect all the States of the Colorado River Basin. (This is further treated in the summary attached to the joinder Motion of the California parties.)

We shall first consider the joinder Motion in relation to the Colorado River Compact.

2. The Colorado River Compact.

One of the documents of primary importance with respect to the use of waters of the "Colorado River System" is the "Colorado River Compact" (Appendix No. 1 filed May 19, 1953 with the Answer of the California parties; also Appendix A with this Report). It was approved under the Act of Congress of the United States of America August 19, 1921 (42 Statutes at Large, p. 171). It was negotiated by seven Commissioners, each appointed by the Governor of his State, representing, respectively, the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming. In the negotiations, under presidential appointment, the United States was represented by Herbert Hoover.

This Compact followed years of controversy between the States involved. It was an act seemingly based upon thorough knowledge by the negotiators. It must have been difficult of accomplishment. It was the product of real statesmanship. Its importance and its effect was widely recognized at the time. It became effective seven years later—in 1929. Of this we shall treat in connection with the Boulder Canyon Project Act (see footnote 1).

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[1] The report by Herbert Hoover, who was Chairman of the Colorado River Commission, was addressed to the Speaker of the House of Representatives (H. Doc. 605, 67th Cong., 4th Sess.) and states the following respecting the Colorado River Compact:

> "Frequently in the past just such very serious conflicts have arisen on interstate streams resulting in prolonged and expensive litigation and causing long delays in development. This compact, when approved, will be a settlement of impending interstate controversies and an adjudication of rights to the use of the water in advance of construction, thus eliminating litigation and laying the groundwork for the orderly development of a vast area of desert land, estimated at some 4,000,000 acres; the utilization of river flow now unused in the generation of hydroelectric energy, the possibilities of which are estimated at 6,000,000 horsepower; the construction of dams for the control of floods which annually threaten communities in which over 75,000 American citizens now reside, with property worth more than $100,000,000; the establishment of new homes and new communities, and the creation of a vast amount of new wealth.
>
> The primary purpose of the compact is to make an equitable division and apportionment of the waters of the river. For this purpose the river system is divided into an upper and lower basin, following:
>
> (1) A natural division—the two basins varying in topography, and being separated by a thousand miles of deep canyon; and
>
> (2) Economic lines—the climate, crops, and use of water being different. The lower river has immediate need of works for the control of floods, the development of power, and expansion of irrigation. It has concentrated blocks of irrigable land, while the upper basin,

The Colorado River Compact evidences far seeing practical statesmanship. The division of the Colorado River System waters into Upper and Lower Basins was, and is, one of its most important features. It left to each Basin the solution of the problems of that Basin and did not tie to either Basin the intra-basin problems of the other. The Congressional Record contains many discussions over several years illustrating the importance of the Colorado River Compact. We refer to a part of one of the many, to-wit, the report of the Honorable Carl Hayden, Representative from Arizona, made January 30, 1923, Congressional

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[1] (Continued)
which is the source of water supply, will, because of its colder climate and more scattered acreage, probably be slower of development.

"Due consideration is given to the needs of each basin, and there is apportioned to each seven and one-half million acre-feet annually from the flow of the river in perpetuity, and to the lower basin an additional million feet of annual flow, giving it a total of eight and one-half million acre-feet annually in perpetuity. There is thus allocated about 80 percent of the total natural flow of the river, leaving some 4,000,000 acre-feet unapportioned. While no other waters are definitely allotted by the compact, there is nothing which prevents the States of either basin from using more water than the amount apportioned, any rights to such use being subject to the further apportionment at a later date. This feature is covered by a provision for the creation of a new commission at the end of 40 years, which will have power to make a further apportionment of the water not now dealt with. The compact provides machinery for the settlement, without litigation, of disputes which may arise between the States; it gives agriculture preference over power in the use of the water; it makes navigation subservient to other uses; and it leaves open for international settlement any claims to the use of water in the Republic of Mexico.

Record pages 2710-2713 (see footnote 2), not for the purpose of in any wise construing the terms of that Compact but only to show its importance as of that time. That importance seems to have increased rather than decreased over the years.

Perhaps a precedent for referring to this is found in *Muller* v. *Oregon,* 208 U.S. 412, 419-420, (1908) where, in

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[2] "(a) The commission, upon analysis, found that the causes of present friction and of major future disputes lay between the lower basin States and the upper basin States, and that very little likelihood of friction lay between the States within each basin; that the delays to development at the present time are wholly interbasinal disputes; and that major development is not likely to be impeded by disputes between the States within each basin. And in any event, the compact provides machinery for such settlements."

"(b) The drainage area falls into two basins naturally, from a geographical, hydrographical, and an economic point of view. They are separated by over 500 miles of barren canyon which serves as the neck of the funnel, into which the drainage area comprised in the upper basin pours its waters, and these waters again spread over the lands of the lower basin."

"(c) The climate of the two basins is different: that of the upper basin being, generally speaking, temperate, while that of the lower basin ranges from semitropical to tropical. The growing seasons, the crops, and the quantity of water consumed per acre are therefore different."

"(d) The economic conditions in the two basins are entirely different. The upper basin will be slower of development than the lower basin. The upper basin will secure its waters more by diversion than by storage, whereas the development of the lower basin is practically altogether a storage problem."

"(e) The major friction at the present moment is over the water rights which might be established by the erection of adequate storage in the lower basin, as prejudicing the situation in the upper basin, and regardless of legal rights in either case."

* * *

"The use of the group method of division was therefore adopted both from necessity, as being the only practical one, and from advisability, being dictated by the conditions existing in the entire basin."

analogy to the discussion of the state of the art in a patent case, reference was made to opinions other than judicial sources.

The major purposes of the Compact are recited in Article I thereof, as follows:

> "The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River System; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies; and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters and the protection of life and property from floods."

Then follows a highly significant provision—one that provides a guide to the conclusions that must be reached with respect to principal questions involved in the joinder Motion under consideration. It reads:

> "To these ends the Colorado River Basin is divided into two Basins, and an apportionment of the use of part of the water of the Colorado River System is made to each of them with the provision that further equitable apportionments may be made."

We consider this preamble important, as to major purposes. The use of waters is to be equitably divided, as we shall see, between the two basins. This, among other results, is to promote comity and to remove causes of controversy.

The two basins are defined in Article II of the Colorado River Compact, paragraphs (f) and (g). For convenience, we quote Article II in its entirety:

> "As used in this compact:
>
> (a) The term 'Colorado River System' means that portion of the Colorado River and its tributaries within the United States of America.

(b) The term 'Colorado River Basin' means all of the drainage area of the Colorado River System and all other territory within the United States of America to which the waters of the Colorado River System shall be beneficially applied.

(c) The term 'States of the Upper Division' means the States of Colorado, New Mexico, Utah and Wyoming.

(d) The term 'States of the Lower Division' means the States of Arizona, California and Nevada.

(e) The term 'Lee Ferry' means a point in the main stream of the Colorado River one mile below the mouth of the Paria River.

(f) The term 'Upper Basin' means those parts of the States of Arizona, Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry.

(g) The term 'Lower Basin' means those parts of the States of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry.

(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."

The States of the Upper Division, Colorado, Utah, Wyoming and New Mexico, is a designation not wholly identical with the "Upper Basin". All of the "Colorado Sys-

tem" and of the "Colorado River Basin" which is within the State of Wyoming is in the "Upper Basin". With respect to the State of Colorado, all of the "Colorado River System" and all of the "Colorado River Basin" within the state are in the "Upper Basin". The principal parts of Utah and of Wyoming which are in the "Colorado River System" and the "Colorado River Basin" are in the "Upper Basin". A relatively small part in area and of water flowing into the main stream of the Colorado River below "Lee Ferry" of the State of Utah and of the State of New Mexico are in the "Lower Basin". With respect to the State of Arizona, a small part in area and of water therein are in the "Upper Basin". These facts will be considered later herein.

California and Nevada, and nearly all of Arizona, are in the "Lower Basin".

Article III of the Colorado River Compact apportions water from the Colorado River System not between States within a Basin, and not between users in a State, but between the Upper Basin and the Lower Basin. This of itself was a great forward step—perhaps the greatest single one in progressing toward a solution of the many problems of water allocation in the Colorado River Basin.

Article III apportions in perpetuity the exclusive beneficial consumptive use of 7,500,000 acre-feet per annum to the Upper Basin and the same to the Lower Basin (paragraph (a)). In addition, the Lower Basin may increase its beneficial consumptive use one million acre-feet per annum (paragraph (b)).

In addition to these apportionments Article III also

1. provides that the Basins deliver water to Mexico in consequence of international treaties;

2. requires the Upper Basin to deliver a minimum of 75,000,000 acre-feet to Lee Ferry over every ten year period;

3. provides that the Basins shall not withhold water which cannot be used;

4. provides for apportionment of surplus water after October 1, 1963; and

5. provides that two or more signatory States may call a meeting to consider apportioning the surplus waters.

Article IV provides:

1. that water used for navigation is to be subservient to others uses of water; and

2. that water in the Colorado River System may be impounded for the purpose of generating hydro-electric power but that such use shall be subservient to domestic uses.

The provisions of Article IV shall not interfere with State control over any waters within its boundary.

Article V provides for the administration of the provisions of the Compact, with the duty of seeing to it that rights are observed and obligations met, as per the Compact.

Article VI provides that in the case of disputes between signatories to this Compact over the use of waters sought to be regulated by the Compact, two or more States may call a meeting of all the signatories. However, this provision is not to limit the States' right to resort to all other legal means.

Article VII provides that the United States' obligations to Indian tribes are unaffected by this Compact.

Article VIII provides that this Compact shall not impair present perfected rights to water in the Colorado River System.

Article IX reserves the right in the signatory States to use any legal method to enforce the terms of this Compact.

Article X provides that upon unanimous agreement of the signatories, this Compact may be dissolved.

Article XI sets out the conditions precedent to the Compact coming into effect, *i.e.* the approval by the legislatures of each of the seven States.

The Compact did not become effective immediately, because the condition set forth in Article XI was not met. In 1928 the Federal Government provided the stimulus needed to activate the Compact.

3. The Boulder Canyon Project Act.

On December 21, 1928, the Congress of the United States (45 Stat. 1057) enacted the Boulder Canyon Project Act providing for the development of Boulder Canyon in the Colorado River Basin. (Page 9, Appendix to the California parties' Answer, vol. 1.)

The Boulder Canyon Project Act provides for

1. the construction of a reservoir dam in Boulder Canyon with a 20,000,000 acre-feet storage capacity and incidental works; and

2. the construction of the All-American Canal in Southern California if either of the following conditions were met:

a. that all seven States who were signatories to the Colorado Compact approve said Compact;

b. or that the State of California and any five other signatory States approve the Compact, and California pass a law limiting its use to 4,400,000 acre-feet per annum of Colorado River System water; and also that arrangements be made whereby the cost to the government for constructing these works would be repaid.

The Colorado River Compact, by reference, was made a part of the Boulder Canyon Project Act, by Section 8(b) of the Boulder Canyon Project Act, which section is as follows:

"Also the United States, in constructing, managing, and operating the dam, reservoir, canals, and other works herein authorized, including the appropriation, delivery, and use of water for the generation of power, irrigation, or other uses, and all users of water thus delivered and all users and appropriators of waters stored by said reservoir and/or carried by said canal, including all permittees and licensees of the United States or any of its agencies, shall observe and be subject to and controlled, anything to the contrary herein notwithstanding, by the terms of such compact, if any, between the States of Arizona, California, and Nevada, or any two thereof, for the equitable division of the benefits, including power, arising from the use of water accruing to said States, subsidiary to and consistent with said Colorado River compact, which may be negotiated and approved by said States and to which Congress shall give its consent and approval on or before January 1, 1929; and the terms of any such compact concluded between said States and approved and consented to by Congress after said date: *Provided,* That in the latter case such compact shall be subject to all contracts, if any, made by the Secretary of the Interior under section 5 hereof to the date of such approval and consent by Congress."

4. The California Limitation Act.

On March 4, 1929, California passed the California Limitation Act to become effective on August 14, 1929 if some State, a signatory to the Colorado River Compact, should fail to approve said Compact. The Act provided that California limit its use of Colorado River System waters to 4,400,000 acre-feet per annum of the water apportioned the Lower Basin by Article III(A) of the Colorado River Compact, "plus not more than one-half of any excess or surplus waters unapportioned by said Compact". (Page 30, Appendix to the California parties' Answer, vol. 1.) Within the Act, it was stated that the reason for passing it was to make it possible to construct the works authorized by the Boulder Canyon Project Act. The United States of America and the States of Arizona, Nevada, Utah, New Mexico, Wyoming and Colorado were named in the Act as beneficiaries thereof.

The State of Arizona failed to approve the Colorado River Compact within the time limit set out in the Boulder Canyon Project Act. Thus the California Limitation Act, and the Colorado River Compact became effective when on June 25, 1929 Herbert Hoover, President of the United States, by Presidential Proclamation declared it so (46 Stat. 3000).

5. The Upper Colorado River Basin Compact.

On October 11, 1948, the States of Arizona, Colorado, New Mexico, Utah and Wyoming entered into the "Upper Colorado River Basin Compact". It received the approval of the Congress of the United States on April 7, 1949 (63 Stat. 31). (Page 52, Appendix to the California parties' Answer, vol. 2.)

The Upper Colorado River Basin Compact incorporates the provisions of the Colorado River Compact. Article I provides:

> "(a) The major purposes of this Compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River System, the use of which was apportioned in perpetuity to the Upper Basin by the Colorado River Compact; to establish the obligations of each State of the Upper Division with respect to the deliveries of water required to be made at Lee Ferry by the Colorado River Compact; to promote interstate comity; to remove causes of present and future controversies; to secure the expeditious agricultural and industrial development of the Upper Basin, the storage of water and to protect life and property from floods.
>
> "(b) It is recognized that the Colorado River Compact is in full force and effect and all of the provisions hereof are subject thereto."

6. The Treaty Between The United States And Mexico.

In 1945, the government of the United States entered into a treaty with the government of Mexico governing the international uses of the Rio Grande and the Colorado Rivers (U. S. Treaty Ser. No. 994, 59 Stat. 1219 (1945)). By virtue of this treaty, the United States is obliged to deliver 1,500,000 acre-feet of Colorado River water per annum to Mexico (Article 10(a)).

II. THE PLEADINGS.*

1. Arizona.

Allegations made by the State of Arizona in its Bill of Complaint and supplemental pleadings are:

1. The California defendants are limited in their use of water from the Colorado River System by virtue of the Colorado River Compact, the Boulder Canyon Project Act, and the California Limitation Act, to 4,400,000 acre-feet per annum (Bill of Complaint, pp. 28-29).

2. Presently, the California defendants are using 5,430,000 acre-feet per annum of water from the Colorado River System (Bill of Complaint, pp. 28-29).

3. The State of Arizona is entitled to use 3,800,000 acre-feet of water from the Colorado River System (Bill of Complaint, p. 26).

4. Due to the California defendants' excessive use of Colorado River System water, the State of Arizona's right to use water of the Colorado River System is being injured (Bill of Complaint, p. 27).

5. That the State of Arizona is a party to the Colorado River Compact and a beneficiary of the California Limitation Act, and may therefore enforce the terms of these and related documents on the California defendants (Bill of Complaint, p. 19).

6. That this case is one in which the United States Supreme Court should recognize the original jurisdiction vested therein (Bill of Complaint, p. 6).

The prayer of Arizona's Complaint seeks the following relief:

1. That the State of Arizona's title to the use of 3,800,000 acre-feet per annum of Colorado River Sys-

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* Under this heading the complete Pleadings are not given. However, the parts to which reference is made are thought sufficient to permit the development of the subject matters involved on the joinder Motion.
The Special Master has carefully studied the pleadings in their entirety.

tem water to be forever quieted (Bill of Complaint, p. 21).

2. That the California defendants' title to Colorado River System waters be declared not to exceed 4,400,000 acre-feet per annum (Bill of Complaint, p. 18).

3. That the California defendants be enjoined from asserting any claims to Colorado River System water which will conflict with the State of Arizona's right to 3,800,000 acre-feet of said water per annum (Bill of Complaint, p. 30).

4. That the respective rights to excess water in the Lower Basin to be declared, and each State within the Lower Basin be decreed entitled to a certain percentage thereof (Bill of Complaint, p. 30).

5. That beneficial consumptive use be measured in terms of main stream depletion (Bill of Complaint, pp. 30-31).

6. That evaporation losses in main stream reservoir to be charged against the apportionment of each State in the same proportion that the State uses water in the Lower Basin (Bill of Complaint, p. 31).

7. Any further relief which may be proper (Bill of Complaint, p. 31).

2. California Parties.

In its answer to the Bill of Complaint filed by the State of Arizona, the California defendants present four affirmative defenses. They are as follows:

The first affirmative defense is:

"Defendants Have the Right to the Beneficial Consumptive Use of 5,362,000 Acre-feet per Annum of Waters of the Colorado River System Under the Colorado River Compact, the Boulder Canyon Project Act, the Statutory Compact Between the United States and

California, and the Contracts of the Secretary of the Interior Executed Pursuant Thereto." (California parties' Answer, p. 1)

The second affirmative defense is as follows:

"Arizona Is Estopped and Precluded From Asserting the Interpretations of the Colorado River Compact, the Statutory Compact, and the Defendants' Contracts Alleged in the Bill of Complaint." (California parties' Answer, p. 39)

The third affirmative defense is:

"Defendants Have Appropriative Rights to the Beneficial Consumptive Use of Not Less Than 5,362,000 Acre-feet of Colorado River System Water per Annum, Senior to the Claims Made by Arizona in the Bill of Complaint." (California parties' Answer, p. 46)

The fourth affirmative defense is:

"The United States Is an Indispensable Party." (California parties' Answer, p. 54).

This fourth defense is now withdrawn since the United States was given leave to intervene and will be bound by any decree or judgment which the Court renders herein.

A traverse is made admitting, denying and alleging, as set forth on pages 55 to 70 of the Answer.

The prayer is found on page 80 of the Answer. The California parties filed no cross bill.

3. The United States.

The United States of America, in its Petition for Intervention, made the following allegations:

1. The United States of America has a right to the use of an undetermined amount of Colorado River System water by virtue of:

a. Its guardianship over Indian tribes entitled to waters (Petition for Intervention, p. 23).

b. Its interest in fish, wildlife, flood control and navigation in the Colorado River (Petition for Intervention, p. 24).

c. The need of National Parks and other governmental departments (Petition for Intervention, p. 11).

d. The duties it has under international treaties to deliver Colorado River System waters (Petition for Intervention, p. 12).

2. That the United States of America's right to the use of Colorado River System waters may be impaired by rights asserted by the parties to this cause.

The United States prays that its interests and rights be declared, and that the parties to this cause have their rights declared so that the conflicting rights do not impair one another.

It should be noted at this juncture that it is the opinion of the Master that the claims made by the United States should be concisely developed and for this reason it will be necessary for the Master to conduct a pre-trial conference, at which time this and other helpful specificities may be set forth for the purpose of expediting the consideration on the merits.

4. Nevada.

The State of Nevada, in its Petition for Intervention, made the following allegations:

1. That at the present time, the States of the Lower Basin, as defined by the Colorado River Compact, are entitled to use only the 7,500,000 acre-feet per annum apportioned to the Lower Basin by Article III(a) of the Colorado River Compact (Petition for Intervention, pp. 13-14).

2. The State of Nevada is presently entitled to use 539,000 acre-feet per annum of the waters allocated

the Lower Basin by Article III(a) of the Colorado River Compact (Petition for Intervention, p. 10).

3. In 1963, when the Lower Basin shall become entitled to use the 1,000,000 acre-feet per annum apportioned to the Lower Basin by Article III(a) of the Colorado River Compact, Nevada will have the right to use 900,000 acre-feet per annum of Colorado River System water (Petition for Intervention, p. 13).

III. THE LAW APPLICABLE.

The resolution of this question of whether or not the absent States should be joined to this cause depends upon whether or not they are "necessary parties".

By virtue of the pleadings on the merits of this cause, the areas of controversy have been drawn. The Special Master, it should be noted, makes no determination of facts. Such determinations are unnecessary on this joinder Motion. To undertake them on the Motion would be time consuming for all. Some of the principal matters to be considered on this joinder motion include:

1. The Colorado River Compact.
   (a) Is Arizona a party thereto?
   (b) The interpretation of certain terms, and provisions of said Compact.
2. The Boulder Canyon Project Act.
3. The claims of the United States of America, Intervener.
4. The status of the States of New Mexico and Utah as States of the Lower Basin as well as of the Upper Basin.
5. The California Limitation Act.

1. The General Rules Regarding Necessary Parties.

The California defendants, to support their contention that the Upper Basin States are necessary parties, say that the case of *Shields* v. *Barrow,* 17 How. 130 (U.S. 1855) is applicable. In that case, the court, at page 139, set forth this definition of parties:

> "The court here points out three classes of parties to a bill in equity. They are: 1. Formal parties. 2. *Persons having an interest in the controversy,* and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." (Emphasis added)

The reasons urged by the proponents of the Motion to find the absent States necessary or indispensable parties under these definitions in test are:

1. Rule 9(2) of the Revised Rules of the Supreme Court makes the Federal Rules of Civil Procedure applicable to cases of original jurisdiction of this Court. Rule 9(2) says:

> "The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appro-

priate, may be taken as a guide to procedure in original actions in this court."

2. Rule 19 of the Federal Rules of Civil Procedure adopts the test of necessary parties set forth in *Shields* v. *Barrow* (quoted *supra* at page 23). Rule 19 says:

"*Necessary Joinder of Parties.*—(a) *Necessary Joinder.* Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

"(b) *Effect of Failure to Join.* When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

"(c) *Same: Names of Omitted Persons and Reasons for Non-Joinder to be Pleaded.* In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted."

Rule 9(2) provides first that "the *form* of pleadings and motions in original actions shall be governed as far as may be by the Federal Rules of Civil Procedure". There has been no variance from this broad advice in the instant proceeding. The remaining part of the rule provides "in other respects these rules, *where their application is appropriate, may be taken as a guide* to procedure in original actions in this Court" (Emphasis added). In this we find no intent to abandon, to limit, or to vary the general principle applied by this Court, beginning at least as early as the case of *Louisiana* v. *Texas,* 176 U.S. 1 (1900), to the effect that parties must not only have a real interest in the subject matter of a dispute involving sovereign States, but also that the dispute must concern a presently "justiciable controversy." Of the long line of this Court's opinions adhering to this principle, we shall select a few for comment later in this report. It is quite unnecessary to comment on the reasons for committing controversies between States to the Supreme Court by the Constitutional Convention. However, the statement in *Missouri* v. *Illinois,* 180 U.S. 208, 241 (1900), that it is a substitute for war is amply supported by that history.

As to Rule 19 of the Rules of Civil Procedure, it is not made applicable by Rule 9(2) if it conflicts with the principles governing controversies between States to which reference is made above. Also, we comment, that, as pointed out later in this Report, the States of the Upper Division, in respect to the Upper Basin, have no joint interest with the present parties in the subject matter—to-wit, the allocation of the waters of the Lower Basin; and also, complete relief to the present parties can be given without the presence of the States of the Upper Basin, as Upper Basin States.

The opponents of this Motion say that in this case a proper test as to who are necessary parties is whether or not as to them is there a "present justiciable controversy". The opponents maintain that this is true as a policy on the basis of past decisions rendered by this Court in interstate litigation, a number of which are cited in the Briefs and Arguments in the joinder Motion. Indicative of this rule is the following quotation from *Colorado* v. *Kansas,* 320 U. S. 383 (1943) at pages 393-4:

> "In such disputes as this, the court is conscious of the great and serious caution with which it is necessary to approach the inquiry whether a case is proved. Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the action of a state, for the burden on the complaining state is much greater than that generally required to be borne by private parties. Before the court will intervene the case must be of serious magnitude and fully and clearly proved. And in determining whether one state is using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one state or the other must be weighed as of the date when the controversy is mooted."

IV. THE APPLICATION OF THE GENERAL RULE TO THIS CASE.

1. The Colorado River Compact.

The California defendants maintain that the following rules apply to litigation in which a contract is the subject of litigation, and that these rules apply in this case because an interstate compact is no more than a contract between States. The rules and their authorities are:

(a) All parties to a compact must be joined. *Niles-Bement-Pond Co.* v. *Iron Moulders Union,* 254

U.S. 77 (1920); *Gregory* v. *Stetson,* 133 U.S. 579 (1890); *National Licorice Co.* v. *N.L.R.B.,* 309 U.S. 350 (1940); *Gauss* v. *Kirk,* 198 F. (2d) 83 (CA DC, 1952).

(b) Parties having interdependent rights and obligations under a compact must be joined. *Commonwealth Trust Company of Pittsburgh* v. *Smith,* 266 U.S. 152 (1924); *Independent Wireless Telegraph Co.* v. *Radio Corporation of America,* 269 U.S. 459 (1926); *Metropolis Theatre Co.* v. *Barkhausen,* 170 F. (2d) 481 (1948), cert. denied 336 U.S. 945 (1949) and others.

(c) All parties having interests in water from a river common to them all must be joined. *Arizona* v. *California et al.,* 283 U.S. 423 (1931); *Arizona* v. *California et al.,* 292 U.S. 341 (1934); *Arizona* v. *California et al.,* 298 U.S. 558 (1936); *California* v. *Southern Pacific Co.,* 157 U.S. 229 (1895); *Minnesota* v. *Northern Securities Co.,* 184 U.S. 199 (1902); *Railroad Company* v. *Orr,* 18 Wall. 471 (U.S. 1873).

The California defendants say that these rules are applicable because (1) a construction of the Compact will be necessary for a determination on the merits of this cause; (2) the absent States' rights and obligations are defined in the same article in the Compact (Article III (a), (b), (c), (d), (f) and (g)) as the rights and obligations of the present parties; and (3) the Compact deals with the Colorado River System in which all the parties are interested, and in order to make any determination of rights to Colorado River System water which will be effective, all the parties having an interest therein must be joined.

The opponents to this Motion argue that to join the Upper Basin States would be to disregard long established

precepts of this Court which have been laid down in prior interstate litigation. These precepts and their authorities are:

(a) The test with respect to joinder of parties in interstate litigation set forth in *Colorado* v. *Kansas,* 320 U.S. 383 (1943) (quoted *supra* at page 26).

(b) Before the Court will grant relief against a State the complaining State must show an existing or presently threatened injury of serious magnitude. *Missouri* v. *Illinois,* 200 U.S. 496 (1906); *New York* v. *New Jersey,* 256 U.S. 296 (1921); *North Dakota* v. *Minnesota,* 263 U.S. 365 (1923); *Connecticut* v. *Massachusetts,* 282 U.S. 660 (1931) and others.

(c) A potential threat of injury is insufficient to justify an affirmative decree against a State. *Alabama* v. *Arizona,* 291 U.S. 286 (1934).

(d) The judicial power does not extend to the determination of abstract questions. *New York* v. *Illinois,* 274 U.S. 488 (1927); *United States* v. *West Virginia,* 295 U.S. 463 (1935).

(e) The Court will not give advisory opinions or pronounce declaratory judgments. Its jurisdiction will not be exerted in the absence of absolute necessity. *Arizona* v. *California et al.,* 283 U.S. 423 (1931); *United States* v. *West Virginia, supra; Massachusetts* v. *Missouri,* 308 U.S. 1 (1939).

(f) It is beyond the judicial function to predetermine the rights of sovereignties pregnant with future controversies. The courts deal with concrete legal issues, not abstractions. *United States* v. *Appalachian Electric Power Company,* 311 U.S. 377 (1941).

The opponents to this Motion submit that these rules are a bar to the joinder of the Upper Basin States be-

cause (1) there is no relief sought from the Upper Basin; (2) there is no allegation that the Upper Basin is not abiding by the terms of the Compact; and (3) the interpretations of these various Articles can have no effect on the Upper Basin because they are not presently using their entire appropriation of water under Article III(a). The division of the Basins made by Article I of the Compact insulates the Upper Basin States from any interest in the division of Lower Basin water.

It is the Master's opinion, after thorough consideration of the complete, and able briefs and oral arguments heard upon this Motion, that in coming to a conclusion there must be kept in view the questions as to what, if any, legal interest the Upper Basin States have in the present litigation and whether or not as to them any justiciable controversy exists.

In considering the many authorities cited by the parties and by the States sought to be joined, we have endeavored to keep in mind the admonition of Chief Justice Marshall given in the case of *Cohens* v. *West Virginia,* 6 Wheat. 264 (U.S. 1821) at pages 399-400:

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

The Colorado River Compact is a controlling feature in this case. It is a long established rule that in construing any instrument it must be considered as a whole, (*Neilson* v. *Lagow,* 53 U.S. 98 (1851)). Also, it is an oft-quoted rule that several writings executed by the same parties relating to the same subject matter may be read together as parts of one transaction (*Bailey* v. *Hannibal & St. Joseph Railway Co.,* 84 U.S. 96 (1872)). For these reasons, the Colorado River Compact and all the documents which incorporate its provisions may be considered in determining the question of the interest herein of the Upper Basin States and whether or not as to them a justiciable controversy exists.

Article I of the Colorado River Compact provides:

> "The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River System; to establish the relative importance of different beneficial uses of water; *to promote interstate comity; to remove causes of present and future controversies;* and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters and the protection of life and property from floods. *To these ends the Colorado River Basin is divided into two Basins, and an apportionment of the use of part of the water of the Colorado River System is made to each of them with the provision that further equitable apportionments may be made.*" (Emphasis added)

From a reading of this Article, together with all other relevant documents, it must be considered that it was the intent of those relying thereon to avoid litigation if possible.

The proponents of this Motion rely on many cases to substantiate their argument. All of these have been considered.

The case of *Shields* v. *Barrow,* 17 How. 130 (U.S. 1855) is the basis for their argument as to the rule of law which must be followed in deciding whether or not these absent States must be joined to this action. It was a case in which private parties were the litigants.

The proponents cite cases in which the doctrine of *Shields* v. *Barrow* has been followed.

The *Shields* case on page 139 gives a definition of necessary parties:

> "Persons having an interest in the controversy, and who ought to be made parties, in order that the Court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties. . . ."

The proponents of this Motion cite the following cases: *Railroad Company* v. *Orr,* 18 Wall. 471 (U.S. 1873); *McArthur* v. *Scott,* 113 U.S. 340 (1885); *Gregory* v. *Stetson,* 133 U.S. 579 (1890); *Commonwealth Trust Company of Pittsburgh* v. *Smith,* 266 U.S. 152 (1924); and *California* v. *Southern Pacific Co.,* 157 U.S. 229 (1895). With the exception of one, each of these cases did not involve a State as a party. In the case of *California* v. *Southern Pacific Co.,* 157 U.S. 229 (1895), the Court dismissed the Bill of Complaint because this was not a cause within its original jurisdiction, saying on pp. 261-262:

> "It was held at an early day that Congress could neither enlarge nor restrict the original jurisdiction of this court (*Marbury* v. *Madison*), 5 U.S. 1 Cranch, 137, 173, 174 [2:60, 72] and no attempt to do so is suggested here. The jurisdiction is limited and manifestly intended to be sparingly exercised, and should not be expanded by construction. What Congress may

> have power to do in relation to the jurisdiction of circuit courts of the United States is not the question, but whether, where the Constitution provides that this court shall have original jurisdiction in cases in which the state is plaintiff and citizens of another state defendants, that jurisdiction can be held to embrace a suit between a state and citizens of another state and of the same state."

Next are cited cases in which the definition of indispensable parties set out in *Shields* v. *Barrow,* 17 How. 130 (U.S. 1855) at page 139 was followed, that definition being:

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

These cases are *Niles-Bement-Pond Co.* v. *Iron Moulders Union,* 254 U.S. 77 (1920); *Minnesota* v. *Northern Securities Co.,* 184 U.S. 199 (1902); *Barney* v. *Baltimore,* 6 Wall. 280 (U.S. 1868) and *Arizona* v. *California,* 298 U.S. 558 (1936).

Arizona v. *California,* 298 U.S. 558 (1936) was a suit in which Arizona sought to have its rights to water in the Colorado River System declared. This Court denied the petition to file the Bill of Complaint for two reasons. They were (1) because Arizona's Bill of Complaint set forth no justiciable controversy, and (2) the United States was an indispensable party and had not been joined, and could not be joined without its consent. This case supports the doctrine that in litigation between States a justiciable controversy must exist to induce this Court to take it under its original jurisdiction. In the instant case, the necessary parties have been joined.

Niles-Bement-Pond Co. v. *Iron Moulders Union,* 254 U.S. 77 (1920) was a case involving private parties. This case followed the *Shields* case test of indispensability. However, at page 80 of the opinion, the Court said:

> "There is no prescribed formula for determining in every case whether a person or corporation is an indispensable party or not. . . ."

This indicates that judgment must be used in applying the rules respecting who are necessary or indispensable parties in controversies between Sovereign States.

The proponents of this Motion cite cases in which the rule of *Shields* v. *Barrow,* 17 How. 130 (U.S. 1855) was followed, and in which it has been said that all parties to a contract must be joined in litigation dealing with the contract if an effective decree is to be entered. *Niles-Bement-Pond Co.* v. *Iron Moulders Union,* 254 U.S. 77 (1920); *Gregory* v. *Statson,* 133 U.S. 579 (1890). It is urged that this rule can be logically followed to the conclusion that all parties to a Compact must be joined when that Compact is in litigation, because of the statement in *Green* v. *Biddle,* 8 Wheat. 1 (U.S. 1823) that a Compact is no more than a contract between States.

Although a Compact may be no more than a contract between States, it does not follow that all the parties to the Colorado River Compact must be parties here.

The Compact, by its terms, provides two separate groups in the Colorado River Basin. Each of these is independent in its sphere. The members of each group make the determinations respecting that group's problems. To destroy this arrangement made by the Colorado River Compact and to make the members of one group parties to the controversies of another group would be to deny the arrangement to keep the two groups separate and apart. The many

cases which have been cited in support of the Motion do not bear upon this plain fundamental consideration. Save for some justiciable controversy existing between these two groups or between members of one group in respect to members of another group, there can be no sound reason for joining in a controversy within one group members of another group on the ground that in the making of the separation by the Colorado River Compact the members of both groups were parties thereto.

By Article I of the Colorado River Compact, the Upper and Lower Basins are separated for the purposes stated, one of them being that of avoiding litigation. One cannot rely upon an instrument such as the Colorado River Compact and avoid its terms. The proponents of the Motion rely upon the Colorado River Compact and say that the Upper Basin States should be joined because they were parties to it. It cannot be that this may be done when the instrument itself forbids it. Later in this report it will be observed that there are small parts, respectively, of Utah and New Mexico that are within the Lower Basin. As to these, we give special attention, beginning on page 60 of this report.

The cases of *Independent Wireless Telegraph Co.* v. *Radio Corporation of America,* 269 U.S. 459 (1926); *Metropolis Theatre Co.* v. *Barkhausen,* 170 F. (2d) 481 (CCA 7, 1948), cert. denied 336 U.S. 945 (1949); *Franz* v. *Buder,* 11 F. (2d) 854 (CCA 8, 1926), cert. denied 273 U.S. 756 (1927) have been cited for the proposition that parties having interdependent rights and obligations under a compact must be joined.

These were not cases between States falling under the original jurisdiction of this Court. There was no such

relationship of the parties as we find in the instant cause. As far as we know, the situation here is unique with respect to the fact that the entire Colorado River System is divided into two independent Basins. It may be compared to a case where four sovereigns make an agreement with three other sovereigns under which a division between the two groups is made of territory common to all, with provision made for the settlement of problems arising in one group to be settled by that group. It is because this Colorado River Compact seems so important to the attainment of allocations with respect to Colorado River waters that for convenience we have attached to this report the complete text of said Compact (Appendix A).

The cases of *Arizona* v. *California,* 283 U.S. 423 (1931); *Arizona* v. *California,* 292 U.S. 341 (1934); *Arizona* v. *California,* 298 U.S. 558 (1936) and *Railroad Company* v. *Orr,* 18 Wall. 471 (U.S. 1873) are cited to substantiate the proposition that all parties having an interest in the subject matter of the litigation must be joined. This rule cannot apply to this cause, because by Article III of the Colorado River Compact there was apportioned to each basin a given amount of water, and it is impossible for the Upper Basin States to have any interest in water allocated to the Lower Basin States, which is the subject matter of this litigation.

This cause was initiated by Arizona, as a Lower Basin State to quiet its title to waters of that Basin.

The caution with which the Supreme Court approaches interstate litigation, is illustrated by a long line of opinions given over many years.

In *New York* v. *New Jersey,* 256 U. S. 296 (1921), the State of New York sought to permanently enjoin the

State of New Jersey from discharging sewage into New York harbor. The opinion written for the Court by Mr. Justice Clarke contains the following observations with respect to the exercise of the Court's original jurisdiction in interstate litigation (p. 309):

> "Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the threatened invasion of rights must be of serious magnitude, and it must be established by clear and convincing evidence."

The case of *Alabama* v. *Arizona,* 291 U. S. 286 (1934) considered an application by Alabama for leave to file a Bill of Complaint in this Court against the State of Arizona. That Complaint sought to have a statute of the State of Arizona which prohibited the sale of goods produced by convict labor declared unconstitutional.

In denying leave to file, this Court, in an opinion written for it by Mr. Justice Butler, made the following pronouncements with respect to the circumstances under which it will exercise its original jurisdiction in interstate litigation (pp. 291-292):

> "This court may not be called on to give advisory opinions or to pronounce declaratory judgments. *Muskrat* v. *United States,* 219 U. S. 346, 55 L. ed. 246, 31 S. Ct. 250; *Willing* v. *Chicago Auditorium Asso.* 277 U. S. 274, 288, 72 L. ed. 880, 884, 48 S. Ct. 507, and cases cited; *Nashville, C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249, 261, 262, 77 L. ed. 730, 734, 735, 53 S. Ct. 345, 87 A. L. R. 1191. Its jurisdiction in respect of controversies between States will not be exerted in the absence of absolute necessity. *Louisiana* v. *Texas,* 176 U. S. 1, 15, 44 L. ed. 347, 353, 20 S. Ct. 251. A State asking leave to sue another to prevent the enforcement of laws must allege, in the complaint offered for filing, facts that are clearly sufficient to call

for a decree in its favor. Our decisions definitely establish that not every matter of sufficient moment to warrant resort to equity by one person against another would justify an interference by this court with the action of a State. *Missouri* v. *Illinois,* 200 U. S. 496, 520, 521, 50 L. ed. 572, 578, 579, 26 S. Ct. 268; *New York* v. *New Jersey,* 256 U. S. 296, 309, 65 L. ed. 937, 943, 41 S. Ct. 492; *North Dakota* v. *Minnesota,* 263 U. S. 365, 374, 68 L. ed. 342, 345, 44 S. Ct. 138. Leave will not be granted unless the threatened injury is clearly shown to be of serious magnitude and imminent."

In the case of *Connecticut* v. *Massachusetts,* 282 U. S. 660 (1931), Connecticut instituted suit to enjoin the State of Massachusetts from diverting water from the watershed of the Connecticut River. This Court, in an opinion written by Mr. Justice Butler, pointed out some of the circumstances under which the Court will not exercise its original jurisdiction in interstate litigation. On page 669 it is said:

"The governing rule is that this court will not exert its extraordinary power to control the conduct of one State at the suit of another, unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence. *New York* v. *New Jersey,* 256 U. S. 296, 309, 65 L. ed. 937, 943, 41 S. Ct. 492; *Missouri* v. *Illinois,* 200 U. S. 496, 521, 50 L. ed. 572, 579, 26 S. Ct. 268. The burden on Connecticut to sustain the allegations on which it seeks to prevent Massachusetts from making the proposed diversions is much greater than that generally required to be borne by one seeking an injunction in a suit between private parties."

In the case of *Massachusetts* v. *Missouri,* 308 U. S. 1 (1939) there was considered a Motion for leave to file a Bill of Complaint by Massachusetts which sought to have determined which State, Massachusetts or Missouri, had

the right to levy an inheritance tax upon the estate of a Massachusetts resident whose estate was situated in the State of Missouri.

This Court, in an opinion written for it by Chief Justice Hughes, denied the motion. The first reason given for the refusal is as follows (p. 15):

> "The proposed bill of complaint does not present a justiciable controversy between the States. To constitute such a controversy, it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence."

The Supreme Court of the United States long has been circumspect in taking cases in which sovereign states are the parties, as was expressed by *Colorado* v. *Kansas,* 320 U. S. 383 (1943), quoted *supra* at page 26; *New York* v. *New Jersey,* 256 U.S. 296 (1921); *Missouri* v. *Illinois,* 200 U.S. 496 (1906); *North Dakota* v. *Minnesota,* 263 U.S. 365 (1923); *Connecticut* v. *Massachusetts,* 282 U.S. 660 (1931); and many others.

On the joinder Motion before us, both sides place reliance upon the Nebraska-Wyoming-Colorado litigation. They arrive at different conclusions respecting this Court's opinions and action thereon. The Nebraska-Wyoming-Colorado litigation involves three cases, to-wit: *Nebraska* v. *Wyoming,* 295 U. S. 40 (1935); *Nebraska* v. *Wyoming,* 296 U. S. 553 (1935); and *Nebraska* v. *Wyoming,* 325 U. S. 589 (1945). The parties have thoroughly treated these in oral arguments and briefs. Nebraska, with leave, filed a Bill of Complaint in this Court seeking to quiet its rights to waters of the North Platte River. It joined

Wyoming as the sole defendant. Wyoming moved to dismiss the Bill of Complaint. One of the reasons submitted was the fact that the North Platte River was common not only to Nebraska and Wyoming, but also to Colorado. For this reason, Colorado was said by Wyoming to be a necessary party.

The Court considered this argument in *Nebraska* v. *Wyoming,* 295 U. S. 40 (1935). The opinion states (p. 43):

> "Colorado is said to be an indispensable party, because the bill discloses that the North Platte rises in that state and drains a considerable area therein. The contention is without merit. Nebraska asserts no wrongful act of Colorado and prays no relief against her. We need not determine whether Colorado would be a proper party, or whether at a later stage of the cause pleadings or proofs may disclose a necessity to bring her into the suit. It suffices to say that upon the face of the bill she is not a necessary party to the dispute between Nebraska and Wyoming concerning the respective priorities and rights of their citizens in the waters of the North Platte River."

Wyoming's motion to dismiss was denied.

Wyoming then filed an Amended and Supplemental Answer, which charged contemplated and threatened diversions by Colorado of waters from the North Platte River, which was the subject matter of the controversy. Indicative of the allegations made by Wyoming is the following quotation from the Twentieth Count of its Amended and Supplemental Answer:

> "* * * Defendant says 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 of 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." (Emphasis added)

The Amended and Supplemental Answer averred not only that Colorado was then threatening to divert upwards of 250,000 acre-feet per annum of waters of the North Platte River, to which the States of Nebraska and Wyoming asserted rights, but also pleaded that the sum of the claims asserted to North Platte River waters by the States of Nebraska and Wyoming, plus the present and threatened diversions by the State of Colorado, were greatly in excess of the total supply of water available in the North Platte River to meet the claims and diversions.

After the filing of Wyoming's Amended and Supplemental Answer, this Court, in a memorandum decision, joined the State of Colorado as a party to the cause (*Nebraska* v. *Wyoming,* 296 U. S. 553 (1935)). This joining of the State of Colorado indicates no reversal of the Court's position, respecting the legal principles on which the first decision was grounded. Rather, the Court, when making the decision to join the State of Colorado, was considering a new set of allegations—allegations which disclosed a present justiciable controversy existing between the State of Wyoming and Nebraska and the State of Colorado.

In the instant case, we do not have a situation paralleling that which was considered by the Court when it

joined Colorado as a party because (1) by the division into the Upper and the Lower Basins made by Article I and the apportionments made by Article III, the Upper Basin States are foreclosed from asserting any claim to water available to the present (Lower Basin) parties; (2) there is no allegation here that the Upper Basin States are threatening to infringe any rights to the use of water which the present parties now possess; and (3) there is no allegation in any pleading that the Upper Basin States are failing to meet, or are threatening not to meet, the delivery obligations to the Lower Basin States. For these reasons, the facts as presented in this cause are similar to those presented to the Court when it declared Colorado not to be a necessary party. In the cause before us, the Upper Basin States in their Upper Basin capacities should not be joined. This is because of lack of interest in the Lower Basin waters and because no justiciable controversy exists.

In *Nebraska* v. *Wyoming,* 325 U. S. 589 (1945), this Court made a determination on the merits of the Nebraska-Wyoming-Colorado litigation. In this opinion, the Court confirmed the view that when Colorado was made a party to the cause, it was because the Court then found a present justiciable controversy existing between the State of Colorado and the States of Nebraska and Wyoming. As evidence of this finding, the following is quoted from that opinion at page 610:

> "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."

2. Prior Arizona v. California Litigation.

The California defendants seek to support their view that these absent States should be joined by pointing out that prior to this case, Arizona had started three other suits involving the Colorado River Compact, and in each of them all of the parties to the Compact were named as defendants.

The suits were:

1. *Arizona* v. *California et al.*, 283 U. S. 423 (1931) to enjoin construction of Hoover Dam and the All-American Canal, to invalidate the Colorado River Compact, and to declare unconstitutional the Boulder Canyon Project Act. On defendants' Motion, the Bill of Complaint was dismissed.

2. *Arizona* v. *California et al.*, 292 U. S. 341 (1934) to perpetuate the testimony of the negotiators of the Colorado River Compact. The Motion for leave to file the Bill was denied.

3. *Arizona* v. *California et al.*, 298 U. S. 558 (1936) for a Motion for leave to file a Bill of Complaint against the parties of the Colorado River Compact seeking an equitable apportionment of Colorado River System water.

In the foregoing cases, Arizona joined the other six States who are members of the Colorado River Compact. In this we find nothing in the nature of a *quasi estoppel* against the complainant here, and nothing controlling with respect to who are necessary or indispensable parties in the instant cause. Also, none of the suits progressed far enough for the named defendants to question the propriety of their joinder. The question here is—are the Upper Basin States necessary parties in the cause before us?

The California defendants contend that the Upper Basin States are necessary parties to this cause because the Colorado River Compact, to which they are parties, will be necessarily construed in the consideration of the merits of this cause. With respect to this contention the case of *Hinderlider* v. *La Plata River & Cherry Creek Ditch Company,* 304 U.S. 92 (1938) is of interest. In that case, the States of Colorado and New Mexico entered into a Compact, approved by the United States, apportioning the use of waters of the La Plata River. Under the terms of the Compact, the State Engineer of each State was given the duty of administering the water so apportioned within the boundaries of his own State.

The La Plata River & Cherry Creek Ditch Company, a water user in Colorado, sued Hinderlider, the State Engineer of Colorado, for unlawfully depriving the Ditch Company of water. The suit was instituted in the District Court of Colorado. Hinderlider's defense was the Compact. The trial court held the Compact unconstitutional and void. This decision was affirmed by the Supreme Court of Colorado.

The case came to the United States Supreme Court for review of the ruling of the Colorado Supreme Court (101 Col. 73, 70 P. (2d) 849).

This Court, on pages 110-111, had the following to say about the necessity that the two States, who were the parties to the Compact, be parties to the cause because the validity and effect of the Compact were being considered:

> "It has been suggested that this Court lacks jurisdiction to determine the validity and effect of the Compact because Colorado and New Mexico, the parties to it, are not parties to this suit and cannot be made so. The contention is unsound. The cases are

many where title to land dependent upon the boundary between States has been passed upon by this Court upon review of judgments of federal and of State courts in suits between private litigants."

3. Claims Of The United States Of America, Intervener.

The California defendants urge the view that the United States of America, as an intervener in this cause, has the same rights as an original party to determine the scope of the controversy. It is the Master's view that there is no need to answer this, because even were it so, this is disposed of by the fact that the United States here asserts no rights against the Upper Basin States as to Upper Basin waters.

We find that the United States, as an intervener, does not attempt, even were it allowable so to do, to enlarge the scope of this cause. The United States is asserting rights solely to the use of water in the Lower Basin. Its Petition of Intervention sets forth the following (p. 25):

> "General Claims of the United States of America in the Colorado River System *in the Lower Basin*
>
> "The United States of America asserts claims, *as against the parties to this cause,* of *rights to the use of water in the Colorado River* and its tributaries. . . . " (Emphasis added)

The parties were and are Lower Basin States.

4. The California Limitation Act.

The California defendants urge that the joinder of these Upper Basin States may be premised upon the fact that these absent parties are co-beneficiaries of the California Limitation Act. The Master here relies upon what already has been said about the Colorado River Compact

and the circumstances under which it was enacted. These are set out above in Sec. 13(a) of the Boulder Canyon Project Act, quoted *infra,* on page 47, and Article I of the Colorado River Compact, quoted on page 30. From these, it will be seen that these Upper Basin States could not sue as beneficiaries of the California Limitation Act, due to the separation of basins made by Article I of the Colorado River Compact, whereby the Upper Basin States, after making delivery at Lee Ferry, have no further interest in the water, and how or by whom it is utilized in the Lower Basin. This view is enforced by the fact that California gets its waters from the Lower Basin, and obviously the limitation which it is under with respect to waters from the Colorado River System are waters of the Lower Basin. As heretofore pointed out, no claim is made that the Upper Basin is not performing its obligations with respect to the delivery of waters to the Lower Basin.

5. Considerations Of The Colorado River Compact, Which Are Claimed By The Proponents Of The Motion To Be Sufficient To Require The Joinder Of The Upper Basin States, Present The Question: Is The State Of Arizona A Member Of The Colorado River Compact?

This question is raised by the pleadings of this cause. (California defendants' Answer, p. 40). Arizona did not ratify the Compact within the time prescribed by Sections 4 and 13(a) of the Boulder Canyon Project Act. Due to Arizona's failure to ratify, the California Limitation Act became effective, as did the Colorado River Compact. In 1944, the Arizona Legislature passed an act ratifying the Compact (Ch. 5, 17th Legislature; Session Laws of Arizona, 1944, pp. 427-428). This question is one

which arises and is supplemented to two main questions on the merits: (1) If Arizona is not a party to the Colorado River Compact, may she now enforce it, or allege any interpretation thereof? (2) If Arizona is now a party to the Compact, does this revoke the California Limitation Act?

The California defendants maintain that this question raises a justiciable controversy between the present parties and the four absent States, because (1) the absent States are members of the Compact, (2) a Compact is no more than a contract, and (3) parties to a contract cannot have new parties added to that contract, anymore than could new provisions be added to it, in litigation to which they are not parties.

The Upper Basin opponents to this Motion are parties to the Compact, but deny that the question of Arizona's status respecting the Colorado River Compact is sufficient to grant the joinder motion because (1) to them it is immaterial whether or not Arizona is a party, and (2) their obligations and rights will not be affected regardless of the determination of this question since they are controlled by the Compact.

Arizona pleads that it is a party to the Compact. The proponents of the Motion deny this. No one has questioned the membership of the Upper Basin States in the Colorado River Compact or their rights and obligations thereunder. No one charges them with any failures of performance. How the waters of the Lower Basin are apportioned and whether in that apportionment Arizona technically or in equity is a party to the Colorado River Compact can be of no interest to them as Upper Basin States. The Court can do complete justice between the present parties without affecting the rights of the Upper Division States with

regard to the waters of the Upper Basin. Further, we call attention to the provisions of Articles VIII and IX of the Compact and Section 13(a) of the Boulder Canyon Project Act following:

> "Article VIII. *Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact.* Whenever storage capacity of 5,000,000 acre feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.
>
> All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate." (Emphasis added)
>
> "Article IX. Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of its provisions."

Section 13(a) of the Boulder Canyon Project Act provides:

> "The Colorado River compact signed at Santa Fe, New Mexico, November 24, 1922, pursuant to Act of Congress approved August 19, 1921, entitled 'An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes,' is hereby approved by the Congress of the United States, and the provisions of the first paragraph of article 11 of the said Colorado River compact, making said compact

binding and obligatory when it shall have been approved by the legislature of each of the signatory States, are hereby waived, and this approval shall become effective when the State of California and at least five of the other States mentioned, shall have approved or may hereafter approve said compact as aforesaid and shall consent to such waiver, as herein provided."

The joinder of these Upper Basin States is not necessary when based upon an assertion of the existence of controversy among the Lower Basin States as to Arizona's status in relation to the Compact because (1) this is a suit by a State to quiet title to water of the Lower Basin; (2) the Compact does not apportion water among the States—but only between the Basins; (3) by considering Article VIII of the Compact it is clear that, regardless of how this question is resolved, it will not determine Arizona's right to waters of the Colorado River System. The only part of the Colorado River System involved here in which it has an interest is the Lower Basin; (4) the Compact does not provide for any change in the Upper Basin's rights or obligations whether or not Arizona becomes a party to said Compact; (5) should resolution of this question have a bearing on whether or not Arizona becomes a party to said Compact; or not, is a matter of concern to water users in the Lower Basin only.

6. Is There A Direct Relationship Between The Provisions Of Article III(d) That The States Of The Upper Basin Shall Not Deplete The Flow Of Water At Lee Ferry Below 75,000,000 Acre-Feet In Each Ten Year Period, And The Apportionment Of 7,500,000 Acre-Feet Per Annum To The Lower Basin By Article III(a)?

This question is raised by the pleadings. It has a relation to the question of whether or not the use of Gila

River water by Arizona is to be charged to the 7,500,000 acre-feet per annum apportioned to the Lower Basin by Article III(a), or the 1,000,000 acre-feet per annum given the Lower Basin by Article III(b).

The California defendants say that this question, by virtue of the fact that it must be resolved in a determination of the merits, forms a justiciable controversy between the present parties and the Upper Basin States. The reasoning advanced by the California parties is, that if Arizona's view is followed, the use of Gila River waters will be charged to the apportionment made by Article III(b). Arizona also claims right to 2,800,000 acre-feet per annum from the main stream. Thus, if Arizona gets 2,800,000 acre-feet per annum from the main stream, California 4,400,000 acre-feet per annum from the main stream, and Nevada 300,000 acre-feet from the main stream, it will use the entire 75,000,000 acre-feet the Upper Basin delivers at Lee Ferry over every ten year period. The effect of this will be that in order for the Lower Basin States to use the 7,500,000 acre-feet per annum to which they are entitled by Article III(a) of the Colorado River Compact, the Upper Basin must deliver 7,500,000 acre-feet per year at Lee Ferry. The California defendants contend that this is different than the 75,000,000 acre-feet the Upper Basin is obliged to deliver at Lee Ferry in each ten year period, as per Article III (d) of the Compact and that should Arizona's view be followed on a decision on the merits, it would increase the Upper Basin's delivery burden.

The Upper Basin States, and Arizona say that this question does not now constitute a justiciable controversy, and therefore is not a basis for joining these absent States because (1) the Upper Basin, as stated by counsel, is not

now using more than one-third of the 7,500,000 acre feet per annum apportioned to it by Article III(a) of the Compact, and there is no indication that the uses shall increase in the near future; also there is no averment that the Upper Basin is using more than its share; (2) so long as the Upper Basin does not use its entire apportionment or more than its share, there will be more than enough water delivered at Lee Ferry to meet all needs; and (3) there is no need at present to decide this question.

Of course, there is a possibility that the question may arise in the future. That future is likely to be a distant one.

This question does not now raise a justiciable controversy between present parties and the Upper Basin States because (1) it is clear from Article VIII of the Colorado River Compact that the Upper Basin States, by virtue of the erection of the Hoover Dam are "insulated" from further claims by Lower Basin States; (2) Article III(c) of the Compact makes it apparent that the Mexican supply shall come from surplus waters of the Lower Basin and there is no allegation that such surplus does not exist; (3) there is no present foundation for the question "How shall Mexican commitments be made up in case a surplus fails to exist?"; (4) it is clear that in any instance the Upper Basin cannot use more than 7,500,000 acre-feet per annum (Article III(a) of the Compact) and they cannot withhold water not used (Article III(e) of the Compact) and therefore the provision of Article III(d) would come into effect only in time of drought; and (5) it will be noted upon Plate 1 of the California defendants' Appendixes to their Answer that there are more sources of supply of water to the Lower Basin than the Gila River and the water delivered at Lee Ferry by the Upper Basin. There is no problem in the relationship so long as all parties' rights are satisfied.

There follows a series of questions raised by the pleadings on the merits of this cause which pertains to rights, and conversely, to obligations. These questions should be resolved on final hearing.

7. Does The Provision Of Article VIII Of The Compact That "Present Perfected Rights Are Unimpaired By This Compact" Mean Unimpaired Both As To Quantity And Quality, Or Quantity Alone?

The California defendants state that this question presents a basis for joining the Upper Basin States because it will affect their delivery obligations.

This does not now raise a justifiable controversy because there is no allegation anywhere that the quality of the water delivered at Lee Ferry by the Upper Basin States, if material, is unsuitable for the uses mentioned in Article IV of the Compact. Until such time, if ever, that such fact exists, there is no question calling for decision.

8. How Shall "Beneficial Consumptive Use" (Article II Of The Compact) Be Measured?

The California defendants say the resolution of this question requires the joinder of the Upper Basin States because (1) how can we be sure that they are not using their entire apportionment unless the term is defined; (2) the total flowage in terms of the entire Colorado River System cannot be determined in terms of "beneficial consumptive use" unless these absent parties are joined; and (3) the same interpretation of this term must be followed throughout the entire Colorado River System.

The opponents of the Motion say that this question does not form a basis for joining them because (1) they are not presently using their entire apportionment, as per Article III(a) of this Compact, and do not plan to do so in the

immediate future; and (2) whatever decision is made of this problem the Upper Basin States will follow it.

We find no warrant in this for joining the Upper Basin States, with respect to that Basin because (1) how "beneficial consumptive use" shall be measured in each Basin is a question for each Basin to determine so long as the Colorado River Compact endures. The quantities of water for the Upper Basin and its obligations to deliver are fixed by the Colorado River Compact; (2) what matter how the individual Basins measure "beneficial consumptive use" so long as it is possible to interpolate the two methods; and (3) as long as the Upper Basin is not using its entire apportionment (here no party alleges that it is), how can it be said that they are interested in the system used in the Lower Basin?

9. How Shall Evaporation Losses In Reservoirs Be Charged?

With respect to evaporation, the water delivered at Lee Ferry to the Lower Basin has been specified as to quantities and relates to the 7,500,000 acre-feet per annum or unused waters of the Upper Basin, or waters to meet any possible deficiency in the supply to the Republic of Mexico. This permits of no question of evaporation before Upper Basin waters reach the point of delivery at Lee Ferry, and the Upper Basin cannot be charged with evaporations occurring in the Lower Basin after that delivery.

The Upper Basin States, with respect to the waters of the Upper Basin, are privileged under the Colorado River Compact to make allocations of the beneficial use of water among the States or users in that Basin. They have done this by the Upper Colorado River Basin Compact of April 7, 1949. The States having rights to water of the Lower Basin have had this same opportunity and have not arrived at an allocation of waters by agreement. The Upper

Colorado River Basin Compact settles many matters that might have been controversial among the Upper Basin interests, and to now disregard this action and other actions that may follow under the Upper Colorado River Basin Compact, unless wholly necessary under sound legal and equitable principles, would be an act that plainly, under oft announced policies of this Court, should not be taken. These observations are also pertinent to the next question respecting the allocation of water to Indians, the wards of the United States.

The question of how Lower Basin waters shall be divided among the Lower Basin States is one for final hearing.

10. Shall The Use Of Colorado River System Waters By Indians Be Charged To The States In Which Such Uses Are Situated?

This question is a question to be resolved in each Basin. How it is done in one Basin has no relationship to how it is done in the other.

Article VII of the Colorado River Compact provides—

> "Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes."

Article VIII of said Compact bears upon this. It provides that "Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact." It also provides that when "storage capacity of 5,000,000 acre feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III."

After these provisions, Article VIII also provides that "all other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate."

From this, it appears that the rights of the Indian tribes in the Upper Basin shall be satisfied solely from waters of the Upper Basin, and the rights of Indian tribes in the Lower Basin shall be satisfied solely from water appropriated to that Basin.

The question of how Lower Basin waters shall be divided among the Lower Basin States is one for final hearing.

11. Does The Term "Per Annum", As It Is Used In Article III(a) And (b) Of The Compact Mean "Each Year", Or An Average Over A Period Of Years?

This question arises over Arizona's contention, denied by the California defendants, that use "per annum" should be averaged over a number of years.

The California defendants state that should Arizona's interpretation of the term be held to be the correct interpretation on the decision on the merits, the Upper Basin States would have a right to use excess waters in coming years to make up for that part of their apportionment not now used by them, thus diminishing the supply available to the Lower Basin. For this reason, the California defendants state that a justiciable controversy between the present parties and the absent parties does exist and they should be joined.

The opponents to this Motion point out that (1) the Upper Basin States are not presently using more than one-third of the apportionment made to them by Article III(a) of the Compact; (2) it is uncertain when, if ever, the States of the Upper Basin will use their entire apportionment; (3) only when the Upper Basin is using its entire apportionment will this question arise there; and (4)

it is not feasible to determine a question when facts do not exist from which the question is raised.

In interpreting the provision of the Colorado River Compact respecting the delivery by the Upper Basin of 7,500,000 acre-feet of water per annum (Article III(a)) and the other provision found therein respecting the requirement to deliver 75,000,000 acre-feet in a 10 year period commencing after the October 1st following the effective date of the Compact (Article III(d)), these must be considered together, and when so considered, they are not in opposition. The obvious meaning would seem to be that in referring to the 7,500,000 acre-feet per annum, and bearing in mind possible droughts, this requirement would be met by an average delivery over the 10 year period of 75,000,000 acre-feet. There is nothing necessary to be now decided on this Motion that will make any difference if some other interpretation is given, because on any interpretation there is no charge made by anyone that the Upper Basin is not fully performing.

12. Is The Apportionment Made By Article III(b) To The Lower Basin Made In Perpetuity, Or Is It Dependent Upon Appropriation And Use?

The State of Arizona contends that this is an apportionment in perpetuity to cover its uses of Gila River water. The California parties maintain that the use of this water is subject to apportionment and use. The State of Nevada maintains that this water may not be used until 1963. The California defendants maintain that the Upper Basin States should be joined to this action because of the interest they have in this water which, depending upon how this question is resolved, may or may not be available to them in the future.

The opponents to this joinder Motion say that this is insufficient upon which to base joinder, because the

argument is grounded on speculation and conjecture due to the fact that the conditions that would have to exist before the Upper Basin States would derive any benefit from the determination of this question do not now exist, and in any event, could not exist prior to October 1, 1963, as per Article III(f) of the Compact.

The Upper Basin States should not be joined on account of the question here presented because (1) insofar as it relates to the Upper Basin States it is a question of intra-basin apportionment of waters within the Upper Basin, a problem not involved in this litigation; (2) inter-basin apportionment is to be considered in 1963, at the earliest; it is not feasible to decide questions before they arise; and (3) regardless of whether or not this apportionment by Article III(b) is one in perpetuity or solely dependent upon apportionment and use, as is contended by the California defendants, the absent States have no present interest in it, and as to them no justiciable controversy now exists.

13. How Shall "Salvaged Water" Be Charged Under The Colorado River Compact?

The present parties of Nevada, Arizona and the California defendants all express different ideas on this question, with Arizona saying that such uses shall not be charged, Nevada saying such uses are chargeable in certain areas, and the California defendants saying that all such uses are chargeable.

The California defendants state that the Upper Basin States are interested in this in two respects: (1) The determination will involve the interpretation of "beneficial consumptive use" which must be uniform throughout the entire Colorado River System, and (2) Whether or not such uses are to be charged will affect the amount of surplus water available, thus affecting the Upper Basin's delivery obligations for the Mexican supply.

The absent parties say that this question should not necessitate their joinder in this cause because (1) this is solely a Lower Basin dispute; (2) when the uses in the Upper Basin necessitate resolution of this question, it can be done then; (3) this question is at present an intra-basin, not an inter-basin controversy; and (4) regardless of how "salvaged water" shall be charged, the Upper Basin is not using its entire apportionment.

The raising of this question does not require the joining of the absent States because (1) insofar as Upper Basin States are concerned, this will not be germane to them until they are using their entire apportionment, which is not within the foreseeable future; there is no charge that they are using their share of water; (2) by Article III(b)(1) of the Upper Colorado River Basin Compact these States have resolved this question for themselves; and (3) there is no requirement or necessity for having the same definitions of "salvaged water" or of "beneficial consumptive use" in both Basins, and there is nothing to show that such definitions are in any wise preventing the full performance by the Upper Basin States of their inter-basin obligations.

14. Arguments Relating To The California Limitation Act.

On the hearing on the merits, the effect of the California Limitation Act necessarily will be considered.

The California defendants urge that since the Act must be construed, it is necessary to join the four absent States because they, as co-beneficiaries of this Act, may at any time seek to enforce this Limitation Act. It is also urged that to save the California defendants from multiple and vexatious litigation, the absent States should be joined. It is argued, too, that the absent States have an interest in

the Limitation Act because it restrains the California defendants from extending their use of Colorado River System water past 4,400,000 acre-feet per annum.

Opponents of the Motion traverse these views. We find that there is nothing in the California Limitation Act to warrant the joining of the four absent States. This is because:

(1) The Colorado River Compact makes an apportionment of the uses of water between Upper and Lower Basins. Since these absent Upper Basin States have no interest in the allocation of Lower Basin water in which California shares, there is no reason to fear that they may institute an action based on the California Limitation Act.

(2) These absent States have not sought to give an interpretation of the California Limitation Act relevant to or affecting California's interest in Lower Basin water. The Upper Basin water which flows to Lee Ferry is wholly lost to the Upper Basin States when it passes Lee Ferry.

(3) Regardless of what interpretation is given to the California Limitation Act, it cannot affect the Upper Basin's delivery obligations since those are fixed as set forth in the Colorado River Compact.

(4) The California Limitation Act relates to Lower Basin water. There is no allegation or claim by any party that the Upper Basin States have failed, or that they threaten to fail, or ever will fail, to deliver to the Lower Basin all of the water they are committed to deliver under the Colorado River Compact.

15. Arguments Based Upon The Pleading And Prayer Of The United States Of America, Intervener, On The Merits Of The Cause.

The California defendants, in a view to which the State of Nevada, Intervener, subscribes, contend that the United States of America, in its Petition for Intervention, asserts claims to Colorado River System water, and that this is a basis for joining the absent States because the rights of the absent States will be affected by any decree in which the United States is granted title to the use of any Colorado River System water.

The opponents of the Motion submit that the claims made by the United States of America, in its Petition for Intervention, are insufficient on which to base joinder because (1) the United States is asserting rights only in the Lower Basin, and (2) that the Upper Basin States are not using all the water to which they are entitled and it therefore will not affect them in any way. However this may be, it is not alleged by anyone that the Upper Basin States are taking more than their share.

We find that the United States, as an intervener, even were it allowable so to do, does not attempt to enlarge the scope of this cause. The United States is asserting rights solely to the use of water in the Lower Basin. Its Petition for Intervention sets forth the following (p. 25):

> "GENERAL CLAIMS OF THE UNITED STATES OF AMERICA IN THE COLORADO RIVER SYSTEM *IN THE LOWER BASIN.*
>
> "The United States of America asserts claims, *as against the parties to this cause,* of *rights to the use of water in the Colorado River* and its tributaries. . . ." (Emphasis added)

The parties to this cause were and are Lower Basin States.

The Upper Colorado River Basin Compact, to which all these absent States are parties, as is the United States, specifically provides for the use of water by the United States in the Upper Basin by Articles VII and XIX.

We find that the claims of the United States to Lower Basin waters made in this cause furnish no ground for joining the absent States.

This report, in the foregoing pages, has treated the States of Wyoming, Colorado, Utah and New Mexico in their capacities as Upper Basin States. We now turn to the question of whether or not Utah and New Mexico should be joined as parties to the instant litigation in their capacities as and to the extent that they are Lower Basin States.

V. UTAH AND NEW MEXICO IN THEIR CAPACITIES AS LOWER BASIN STATES AND WITH RESPECT TO LOWER BASIN WATERS.

It has been said in some of the briefs and arguments that this is a suit upon the Colorado River Compact. In our view, it is a suit filed to quiet Arizona's title to the use of a certain part of Lower Basin water. The share claimed is set forth in the Complaint. To conclude what Arizona's rights may be involves a consideration of equities; of the Colorado River Compact; of water rights to which the Compact is subservient; of rights subservient to said Act; of the California Limitation Act; of the powers and actions of the Secretary of the Interior of the United States, including contracts made by said Secretary; and other matters relevant. It will require a consideration not only of Arizona's rights but of those of the California parties, and of Nevada and the United States of America, the two interveners. Arizona's Bill of Complaint includes specific prayers and a prayer for general relief, which,

of course, should not be overlooked. The California parties ask to be protected in what they urge and set forth as their equitable share to the use of the waters involved. Nevada, a Lower Basin State, is similarly interested. It seeks a determination of what it deems to be its equitable shares of Lower Basin waters. The United States of America seeks a determination of the extent of its rights so that it may meet its obligation with respect to Indian tribes, and with respect to other responsibilities which it bears.

As it has been pointed out above in this report, these controversies relate to the use of waters of the Lower Basin. That New Mexico and Utah each has an interest in such waters is averred by California (Defendants' Answer, page 23), by Arizona (Bill of Complaint, page 20), and by Nevada (Petition of Intervention on Behalf of Nevada for Leave to Intervene, page 15). It cannot be gainsaid that such interests exist in these two States in their respective capacities as States of the Lower Basin. How much Lower Basin water is there to be allocated among the several claimants? Who can now finally answer this? Under the Colorado River Compact, the Upper Basin is given its part—7,500,000 acre-feet per annum. That basin has the duty of delivering to the Lower Basin 7,500,000 acre-feet per annum, which duty presumably can be done by providing at least 75,000,000 acre-feet in 10 year periods. Thus recognition of annual averages reconciles these provisions, as they should be reconciled to give meaning to all provisions. If correct the Upper Basin must not withhold water not consumptively used by it. The Upper Basin is said to use at present only 2,500,000 acre-feet of its 7,500,000 acre-feet share. The remainder passes on to the Lower Basin. The Lower Basin also has water that flows from within that Basin to the Colorado

River below Lee Ferry. To learn how much, will require evidence which it is hoped may be based on reasonably accurate measurements, and perhaps there may be offered some well-grounded opinion evidence.

The Colorado River Compact provides that the Upper Basin and the Lower Basin are each to receive 7,500,000 acre-feet annually in perpetuity. A minimum of 1,500,000 acre-feet goes to the Republic of Mexico under its treaty with the United States of America (U. S. Treaty, Ser. No. 994, 59 Stat. 1219 (1945) Article 10(a)). At the time the Colorado River Compact was agreed upon by the Commissioners representing the seven Colorado River States and the United States but before it became effective, the quantity of water available was considered sufficient to meet all of the then fixed demands and requirements, with a surplus of 4,000,000 to 6,000,000 acre-feet per annum. (See the Report by Herbert Hoover, Chairman of the Colorado River Commission, addressed to the Speaker of the House of Representatives, H. Doc. 605, 67th Cong., 4th Sess.) The estimate used was a compromise between these two extremes—5,000,000 acre-feet. The Mexican Treaty, made afterwards, reduced the surplus over the fixed requirements to 3,500,000 acre-feet per annum. When, at the hearing on the merits in the instant case, the then presently available data is presented as to the volume of waters in the Lower Basin, we shall be confronted with the question, shall only the allocations to the United States, to Arizona, to California, and to Nevada be made? Shall the extent of the rights of Utah and New Mexico to Lower Basin waters be reserved for consideration in some other future proceeding or shall we wait until the Lower Basin allocations of water to New Mexico and Utah are made (if ever) by agreement of the Lower Basin parties? If

such delaying program were undertaken, what shall be the reservations of water for these two States in their Lower Basin capacities in terms of quantity? Such a delaying course will prevent final allocations of water to the present parties. As a practical matter, we are of the opinion that these allocations of Lower Basin water to New Mexico and Utah should be made in this presently pending cause. However, do we find here a justiciable controversy involving Utah and New Mexico as Lower Basin States? Obviously, these interests of Utah and New Mexico in an allocation of the waters involved are adverse to the interests of the present parties. Plainly, if allocations of water are made among the present parties, and if allowances are made to these two States without the presence of both or without the agreement of each, the decree will be invalid because of the absence of Utah and New Mexico. There is a now pending controversy involving a division or allocation of the waters that come to or are otherwise in the Lower Basin. There can be no final valid determination of the rights of the present parties to Lower Basin water without determining the equitable shares to which New Mexico and Utah are entitled. They should be joined herein.

Counsel for New Mexico, in speaking of New Mexico's interests in Lower Basin water, stated (Tr., p. 326):

> "The acreage presently being irrigated is less than 10,000 acres, a figure which is infinitesimal compared to the claims of Arizona and California . . . not including the Indians, so, as I understand it, the Indians have about 6,000, so that would be the full extent of the present uses as I am informed by my engineers of use made on the Gila and its tributaries in New Mexico."

It was also urged that there was no justification to bring a State like New Mexico into this litigation when no alle-

gation has been made as to any interference with anybody's rights who are parties to the suit, including the United States. The full facts should be given on the taking of evidence. It is likely that they can be quickly adduced.

On p. 327 of the transcript it was said, in regard to San Juan County, that water from the San Juan River was allocated to New Mexico. This relates to Upper Basin waters and refers to the Upper Colorado River Compact.

On p. 353 of the transcript, counsel for Utah stated, in presenting the *de minimis* point urged by both Utah and New Mexico, that he did not wish to leave the impression that the 52,000 acre-feet of Lower Basin water now used in Utah is not important. It was stated that "It is all important to the people that live in that section of Utah, and we will fight for that water and our rights to it to the last ditch; but compared with the lawsuit which has evolved between Arizona and California, it means nothing." New Mexico, with equal propriety, has not undertaken to yield its rights.

It was pointed out that Arizona, in its Complaint, has recognized the rights of Utah and New Mexico to their equitable share, whatever they may be, and also said that "Arizona doesn't know what it might be, Utah doesn't know what it might be, New Mexico doesn't know what it might be; but they recognize it." (Tr., p. 353). It is also said that "California recognizes it." We wish to say that counsel for Utah and New Mexico were each commendably frank and helpful on this question. But it is plain that to proceed to a final determination of the present suit, Utah and New Mexico must come in and be bound regarding the allocations to them, respectively, of waters of the Lower Basin if a valid decree as to the

present parties is expected. We are of the opinion that this is, of necessity, a justiciable controversy involving rights of both Utah and New Mexico, and though relatively small volumes of water are involved, as has been stated, nevertheless for the New Mexico dwellers in their area and the Utah dwellers in theirs, it is a matter of high importance. We find Utah and New Mexico but solely with respect to Lower Basin waters each to be an indispensable and necessary party.

It is recognized that Utah has an area of 82,346 square miles, with a population, according to the last census, of 688,862; and that New Mexico has an area of 121,511 square miles, with a population, according to the last census, of 681,187. Bringing these states into this litigation will plainly be a burden upon them that they would like to escape. The Special Master does not overlook this. There have been some endeavors, according to the pleadings and the oral argument, to negotiate Lower Basin settlements in respect to the interests of Utah and Colorado. It is hoped, but not urged, that these continue, and if successful, during the time that final hearings are on they can be made a part of and effective in the decree to be recommended.

We also suggest that if this does not eventuate, the Master will set a special time during the hearing for proofs to be devoted entirely to considerations relating to the rights of New Mexico and Utah as Lower Basin States. If this is done, the representatives of such States may find it agreeable to attend only the hearings of direct interest to them, and of course, such others as they may wish. The details of such arrangements can be worked out at a pretrial conference which, in view of the many complexities involved, the Master proposes to hold sometime early this fall. It is thought that these two States as Lower Basin

States can adduce the relevant and material evidence necessary to protect their interests in a very short time. Since the present parties to this cause recognize that these two States have rights in the Lower Basin, it is thought that they may aid in carrying out one or the other of the foregoing suggestions.

VI. CONCLUSIONS.

I conclude as follows:

1. No original party to the cause and no intervener charges any wrongful acts of commission or omission against the Upper Basin States, or presents any prayer for relief against them.

2. The Colorado River Compact divided the Colorado River System into two separate and distinct Basins.

3. By the Colorado River Compact, each Basin was left to make its own intra-basin allocations of the use of its waters.

4. In 1949 the Upper Basin States entered into a Compact, the "Upper Colorado River Basin Compact", which was approved by the Congress of the United States.

5. The Upper Basin States have since been and now are operating under that Compact.

6. By that Compact, they settled among themselves the inter-basin rights to the use of its waters, and also settled among themselves several Upper Basin questions which in the Lower Basin and in respect to its waters are now in controversy in this cause.

7. There is presently no legal or equitable reason for this Court to disturb the operation of the Upper Colorado

River Basin Compact, which result might come by joining these Upper Basin States as parties to this cause.

8. The States of the Upper Basin do not wish to join as parties in the instant cause. They resist the Motion to join them.

9. To join them would be a backward and retarding step with respect to the solution of problems relating to the Colorado River System.

10. To now join the Upper Basin States in this cause with respect to Upper Basin Waters would not tend to avoid litigation but would presently promote it.

11. The Upper Basin States in their capacities as such presently have no legal or equitable interest in the instant cause.

12. As to the Upper Basin States as such, there is no existent justiciable controversy between them and the present parties to this cause.

13. The United States, as Intervener, has not enlarged the scope of the instant cause.

14. The interest of the United States in this proceeding is confined to its rights relating to waters of the Lower Basin.

15. Whatever the possibility of future controversy may be, there exists in such possibility no sound equitable reason for now joining the Upper Basin States as such in the instant litigation.

16. A decree can be soundly entered in this cause that will not affect the Upper Basin States with respect to rights to water or the use of waters in the Upper Basin.

17. The Motion filed herein on July 15, 1954 by the California defendants to join Upper Basin States as parties ought to be denied as to Colorado and Wyoming, and denied as to Utah and New Mexico in their capacities as Upper Basin States.

18. Utah and New Mexico each has interests in the Lower Basin. These interests are small in comparison to the interests in Lower Basin water of the Lower Basin States, particularly California and Arizona. However small, they are substantial and important to Utah and to New Mexico, and likely will be so considered by dwellers in the areas having use and need for Colorado River water.

19. In the equitable allocation of the waters of the Lower Basin, the decree should not overlook these relatively small, but nevertheless substantial, interests.

20. The respective interests of Utah and New Mexico in Lower Basin waters are adverse to the interests of California, Nevada, Arizona and the United States in Lower Basin waters. A justiciable controversy presently exists respecting these Lower Basin waters which involves substantial interests of Utah and New Mexico therein. In order to make equitable allocations of the use of Lower Basin waters in this case, New Mexico and Utah are necessary and indispensable parties.

21. With respect to Utah and New Mexico in their capacities as Lower Basin States, and only to the extent of their respective interests in Lower Basin waters, the Motion should be allowed, and allowed separately as to each of them.

VII. RECOMMENDATION.

Accordingly, it is recommended that the Motion of the California parties to join the States of Colorado, Wyoming, Utah and New Mexico as parties to this cause, in their capacities as Upper Basin States and in respect to Upper Basin waters be denied. It is a further recommendation that as to each of the States Utah and New Mexico in their capacities as Lower Basin States and in relation to their respective Lower Basin waters only that the said Motion be allowed.

Respectfully submitted,

GEORGE I. HAIGHT
Special Master

Chicago, Illinois

July 11, 1955.

APPENDIX A.

THE COLORADO RIVER COMPACT.

November 24, 1922

The States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, having resolved to enter into a compact under the Act of Congress of the United States of America approved August 19, 1921 (42 Statutes at Large, Page 171), and the Acts of the Legislatures of the said States, have through their Governors appointed as their Commissioners:

W. S. Norviel	for the State of Arizona
W. F. McClure	for the State of California
Delph E. Carpenter	for the State of Colorado
J. G. Scrugham	for the State of Nevada
Stephen B. Davis, Jr.	for the State of New Mexico
R. E. Caldwell	for the State of Utah
Frank C. Emerson	for the State of Wyoming

who, after negotiations participated in by Herbert Hoover appointed by The President as the representative of the United States of America, have agreed upon the following articles:

ARTICLE I.

The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River System; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies; and to secure the expeditious agricultural and industrial development of the Colorado

River Basin, the storage of its waters and the protection of life and property from floods. To these ends the Colorado River Basin is divided into two Basins, and an apportionment of the use of part of the water of the Colorado River System is made to each of them with the provision that further equitable apportionments may be made.

ARTICLE II.

As used in this compact:—

(a) The term "Colorado River System" means that portion of the Colorado River and its tributaries within the United States of America.

(b) The term "Colorado River Basin" means all of the drainage area of the Colorado River System and all other territory within the United States of America to which the waters of the Colorado River System shall be beneficially applied.

(c) The term "States of the Upper Division" means the States of Colorado, New Mexico, Utah and Wyoming.

(d) The term "States of the Lower Division" means the States of Arizona, California and Nevada.

(e) The term "Lee Ferry" means a point in the main stream of the Colorado River one mile below the mouth of the Paria River.

(f) The term "Upper Basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry.

(g) The term "Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry.

(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.

(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.

(c) If, as a matter of international comity, the United States of America shall hereafter recognize 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 when-

ever 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.

(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.

(f) Further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b) and (c) may be made in the manner provided in paragraph (g) at any time after October first, 1963, if and when either Basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b).

(g) In the event of a desire for a further apportionment as provided in paragraph (f) any two signatory States, acting through their Governors, may give joint notice of such desire to the Governors of the other signatory States and to The President of the United States of America, and it shall be the duty of the Governors of the signatory States and of The President of the United States of America forthwith to appoint representatives, whose duty it shall be to divide and apportion equitably between the Upper Basin and Lower Basin the beneficial use of the unapportioned water of the Colorado River System as

mentioned in paragraph (f), subject to the legislative ratification of the signatory States and the Congress of the United States of America.

ARTICLE IV.

(a) Inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its Basin, the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural and power purposes. If the Congress shall not consent to this paragraph, the other provisions of this compact shall nevertheless remain binding.

(b) Subject to the provisions of this compact, water of the Colorado River System may be impounded and used for the generation of electrical power, but such impounding and use shall be 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.

(c) The provisions of this article shall not apply to or interfere with the regulation and control by any State within its boundaries of the appropriation, use and distribution of water.

ARTICLE V.

The chief official of each signatory State charged with the administration of water rights, together with the Director of the United States Reclamation Service and the Director of the United States Geological Survey shall cooperate ex-officio:

(a) To promote the systematic determination and coordination of the facts as to flow, appropriation, consump-

tion and use of water in the Colorado River Basin, and the interchange of available information in such matters.

(b) To secure the ascertainment and publication of the annual flow of the Colorado River at Lee Ferry.

(c) To perform such other duties as may be assigned by mutual consent of the signatories from time to time.

ARTICLE VI.

Should any claim or controversy arise between any two or more of the signatory States: (a) with respect to the waters of the Colorado River System not covered by the terms of this compact; (b) over the meaning or performance of any of the terms of this compact; (c) as to the allocation of the burdens incident to the performance of any article of this compact or the delivery of waters as herein provided; (d) as to the construction or operation of works within the Colorado River Basin to be situated in two or more States, or to be constructed in one State for the benefit of another State; or (e) as to the diversion of water in one State for the benefit of another State; the Governors of the States affected, upon the request of one of them, shall forthwith appoint Commissioners with power to consider and adjust such claim or controversy, subject to ratification by the Legislatures of the States so affected.

Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method or by direct future legislative action of the interested States.

ARTICLE VII.

Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.

ARTICLE VIII.

Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate.

ARTICLE IX.

Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of its provisions.

ARTICLE X.

This compact may be terminated at any time by the unanimous agreement of the signatory States. In the event of such termination all rights established under it shall continue unimpaired.

ARTICLE XI.

This compact shall become binding and obligatory when it shall have been approved by the Legislatures of each of the signatory States and by the Congress of the United States. Notice of approval by the Legislatures shall be given by the Governor of each signatory State to the Governors of the other signatory States and to the President

of the United States, and the President of the United States is requested to give notice to the Governors of the signatory States of approval by the Congress of the United States.

IN WITNESS WHEREOF, the Commissioners have signed this compact in a single original, which shall be deposited in the archives of the Department of State of the United States of America and of which a duly certified copy shall be forwarded to the Governor of each of the signatory States.

DONE at the City of Santa Fe, New Mexico, this twenty-fourth day of November, A. D. One Thousand Nine Hundred and Twenty-two.

(Signed) W. S. NORVIEL
(Signed) W. F. MCCLURE
(Signed) DELPH E. CARPENTER
(Signed) J. G. SCRUGHAM
(Signed) STEPHEN B. DAVIS, JR.
(Signed) R. E. CALDWELL
(Signed) FRANK C. EMERSON

APPROVED:
(Signed) HERBERT HOOVER.