IN THE

Supreme Court of the United States

OCTOBER TERM, 1955 [illegible] 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.*

EXCEPTIONS OF INTERVENING STATE OF NEVADA TO THE REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTER CONCERNING CALIFORNIA'S MOTION TO JOIN COLORADO, NEW MEXICO, UTAH AND WYOMING

HARVEY DICKERSON
Attorney General
Carson City, Nevada

W. T. MATHEWS
Special Assistant Attorney General
P. O. Box 2463
Reno, Nevada

WM. J. KANE
Special Assistant Attorney General
43 N. Sierra Street
Reno, Nevada

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EXCEPTIONS TO THE REPORT:

Comes now the Intervening State of Nevada and herein excepts to the Report and Recommendations of the Special Master, wherein he recommended the denial of the motion to join as parties in the cause the States of Colorado and Wyoming, and granted the motion insofar as it related to the States of New Mexico and Utah in their capacities as Lower Basin States, and only to the extent of their respective interest in Lower Basin Waters.

I

Nevada excepts to the Conclusions of the Special Master as enumerated at Pages 66-68 of the report.

1. Nevada agrees that Conclusions Numbers 1 to 6, inclusive, would be correct if qualified by the Statement that the right to the beneficial consumptive use of the waters apportioned by the Colorado River Compact to the Upper and Lower Basins respectively, was and is a right to the said use of such waters that was and will continue to be interrelated and interdependent as between said basins and controlled in its entirety by the provisions of the Colorado River Compact of 1922, to which said Compact, the Upper Colorado River Basin Compact of 1948 is not tantamount but made subservient and subject thereto in the following language—

> "It is recognized that the Colorado River Compact is in full force and effect and all of the provisions hereof are subject thereto." Art. I(b) Upper Colorado River Basin Compact.

2. Nevada excepts to Conclusions Numbers 7 to 12, inclusive, and to Conclusions Numbers 15 and 16 upon the following grounds:

The Colorado River Compact of 1922 was approved and ratified by each of the signatory states thereto excepting Arizona, as a six state compact, and later in 1944 ratified by Arizona thus completing the full seven state ratification. By such ratification each signatory state became and is now, and was at the time of the institution of the instant case bound by the terms of the Compact.

Such Compact provides, inter alia, First, the apportionment to the Upper Basin and to the Lower Basin, respectively the beneficial consumptive use in perpetuity of 7,500,000 acre feet of water per annum from the Colorado river stream system. Art. III (a).

Second, In addition to said apportionment provided in Article III (a) the Lower Basin was and is given the right to increase its beneficial consumptive use of such waters by one million acre feet per annum. Art. III (b).

Third, Article III (d) of said Compact provides that the States of the Upper Division, i.e., Colorado, New Mexico, Utah and Wyoming, 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 the Compact.

Fourth, Arizona's claim of the right to beneficial consumptive use of the Colorado River water is 3,800,000 acre feet per annum, Prayer, Arizona Bill of Complaint, page 30. California's minimum claim of its right to the beneficial consumptive use of said water is alleged as 5,362,000 acre feet—California's answer to Bill of Complaint, page 1. Nevada's claim of the right to the beneficial consumptive use of said waters is 539,000 acre feet of Article III (a) water plus an equitable share of Article III (b) water, Prayer, Nevada petition of Intervention, page 25. Thus the total of the amount of water subject to the right of beneficial consumptive use in and by Arizona, California and Nevada and concerning which the issues are clearly pleaded is 9,701,000 acre feet.

Fifth, Article III (f) of the Compact provides for further equitable apportionment of the beneficial uses of the waters of the Colorado River System Unapportioned by paragraphs (a), (b) and (c) of said Article may be made at any time after October 1st, 1963, if and when either basin shall have reached its beneficial consumptive use as set forth in paragraphs (a) and (b).

Article III (b) of the Compact in clear and unambiguous language apportions to the Lower Basin one million acre feet of water for beneficial consumptive uses in addition

to the 7,500,000 acre feet apportioned by Article III (a), and this apportionment is due for such use in the Lower Basin immediately upon the showing of the consumptive uses of all of the III (a) water. The Compact does not intend nor require that the use of III (b) water must await the year 1963.

Nevada has heretofore in its Motion to Intervene and Petition of Intervention, which said Motion was granted June 1st, 1954, directed attention to this important phase of the case in paragraphs VIII, XIII, and XIV of its said petition. It is conceded by all the states signatory to the Colorado Compact that the law of appropriation of beneficial uses of water as applied in and sanctioned by the Western States governs with respect to apportionments under the Compact and that the rights to such use should be and of necessity must be determined in advance. The doctrine was well sanctioned by this Court in the case of *Pacific Livestock Company* vs. *Oregon Water Board,* 241 U.S. 440, which case was submitted to the Special Master by Nevada in oral argument at Phoenix, Arizona, during the submission of the Motion to join the Upper Division States. Pages 122 et seq., Vol. 1, Transcript of Oral Arguments, now of record in the Court.

The issue then and now in this respect has not changed. The beneficial consumptive use of the waters has been apportioned to the Upper and Lower Basins in definitely stated amounts. In addition thereto the Lower Basin was apportioned and now is entitled to an increased beneficial consumptive use of one million acre feet of water per annum. It is not denominated in the Compact or elsewhere as surplus water. Its source is the Colorado River System as defined in Article II and Article III of the Compact, and it is submitted so recognized in the case of *Arizona* vs. *California et al.,* 292 U.S. 341.

Most certainly the Lower Basin, a basin composed of states of extreme aridity, once establishing its right to the

beneficial consumptive use of 8,500,000 acre feet of water per annum as apportioned by Article III (a) and (b) of the Compact will then and there have drawn in question an issue at once involving the right of the states of the Upper Basin to withhold water and deplete the flow of the river to the aforesaid aggregate of 75,000,000 acre feet. In brief a determination must be made of the paramount force and effect of Article III (b) and III (d) as to which provision shall govern. It is submitted that this issue alone warrants the joinder of all the States of the Upper Division, in order to fix and determine long prior to 1963 the right to the beneficial consumptive use of Article III (b) water. To enter a decree so determining this right without the States of the Upper Basin being parties thereto would not be consistent with equity and good conscience, for the reason that the waters of the Colorado River stream system constitute the common fund in which the Upper and Lower Basins are apportioned by mutual consent certain designated rights therein. Rights that are so interrelated and interdependent that any adjudication and determination of any one right is bound to seriously affect every other right and interest therein of either the Upper or Lower Basin.

It is therefore Nevada's contention that the Special Master's Conclusions Numbers 7 to 12, inclusive, and Conclusions Numbers 15 and 16 are in error.

II

The Interest of the United States, Special Master's Conclusions Numbers 13 and 14.

The Special Master concluded that the United States, as Intervener has not enlarged the scope of the case, and further, that its interest is confined to its rights relating to waters of the Lower Basin.

Nevada is not in agreement therewith and respectfully submits such conclusions are in error for the following reasons:

1. The Colorado River Compact of 1922, with respect to the rights of the United States provided in Article VII that "Nothing in this Compact shall be construed as affecting the obligations of the United States to Indian tribes," and in Article IV provided that if Congress did not consent to the use of waters for navigation being made subservient to domestic, agricultural and power purposes, nevertheless the other provisions of the compact shall remain binding.

2. It is also clear that Congress in the enactment of the Boulder Canyon Project Adjustment Act, approved December 21, 1928, 45 Stat. 1057, did not enlarge the powers of the United States or any department thereof to depart from nor encroach upon the binding effect of the Compact, but to the contrary expressly provided that the United States, its permittees, licensees, contractees, users and appropriators of water and the rights thereof, however claimed or acquired "shall be subject to and controlled by said Colorado River Compact". Sections 8 and 13, Project Act.

3. The Petition in Intervention of the United States alleges claims for the use of waters of the Colorado River in the Lower Basin totalling not less than 1,823,250 acre feet per annum exclusive of flood control and navigation, as follows:

Indian Claims—1,747,250 acre feet,
Ultimate use—Paragraph XXVII, and
Appendix II A. Petition of United States.
Fish and Wild Life—76,000 acre feet—
Paragraph XXVIII—Appendix III, Petition of United States.

4. Further, it is alleged in Paragraph XXX, pages 25-27 of the Petition of the United States that the foregoing claims of the United States are jeopardized because the present claims of the parties to the cause far exceed the quantity of water apportioned to the Lower Basin by the Colorado River Compact, and that—

"The United States of America also has claims throughout the States of Arizona and California in connection with the Colorado River and its tributaries for the use of the National Park Services and the Bureau of Land Management of the Department of the Interior, and the Forest Service of the Department of the Interior, and the Forest Service of the Department of Agriculture. In the event these claims are in any way put in issue or jeopardized in this litigation, the United States reserves the right to assert them."

"Due to the insufficient supply of water to the Lower Basin by the Colorado River Compact to meet the aggregate of the adverse claims of all the parties to this cause, this is a pressing need for a decree by this Court declaring, confirming and quieting the title of all parties to their respective rights and interest in and to the waters of the Colorado River, absent such a decree by this Court, the protracted conflict giving rise to this cause will continue to the detriment of all parties."

5. The United States alleges in Paragraph XIII, page 12 of its Petition that it has an international obligation arising from its Treaty with the United Mexican States of 1944, ratified by Congress and approved by the President in 1945, 59 Stats. 1219, whereby the United States guaranteed to furnish Mexico with an annual quantity of 1,500,000 acre feet of the waters of the Colorado River from any and all sources thereof. Section 10 (a) Treaty. Paragraph 6, Page 17, Master's Report.

Article III (c) of the Compact provides, in effect that if the United States shall recognize the right of Mexico to any of the waters of the Colorado River, that such waters shall be supplied first from waters that are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b), and if such surplus is insufficient then the burden of the deficiency shall be equally borne by the Upper Basin and Lower Basin. Such is the effect of Section 4 of the Boulder Canyon Project Act.

In view of this allocation of the waters in question the issue at once arises, it is submitted, that now requires the determination construing and reconciling the effect of Articles III (b), (c) and (d) of the Compact and Section 4 of the Project Act.

It is clearly apparent that if the rights of the United States are granted even in part that the scope of the case is so broadened that in order to satisfy such rights that even the increased beneficial consumptive use of the additional one million acre feet of water apportioned the Lower Basin by Article III (b) of the Compact will not be sufficient to even satisfy said rights and obligations of the United States in the Lower Basin. It cannot well be doubted but that the Upper Basin's rights will be materially affected by the demands of the United States.

III

Special Master's Report Re Article III(b) of Compact:

Nevada regretfully excepts to the statements of the Special Master interpreting Nevada's contention concerning the waters referred to in Articles III (b) and III (f) of the Colorado River Compact. Such statements appear in the report as follows:

> At page 22, lines 3-8, "(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)"
>
> At page 55, lines 26-28, the statement, "The State of Nevada maintains that this water may not be used until 1963." Referring to Article III (b) water.
>
> And the further statement contained in lines 7-18, inclusive, page 56, to the effect that the Upper Basin States should not be joined "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".

Nevada respectfully submits, as heretofore shown in Subdivision II of these exceptions to the report that with all due respect to the Special Master's Report and the Conclusions therein found, such conclusions with respect to Nevada's contentions as to the timely apportionment to the Lower Basin of Article III (b) water beyond question now presents a justiciable issue wherein the Upper Basin States, including Colorado and Wyoming are directly interested, and by reason thereof the Special Master's Report is in error thereon.

Conclusion:

Nevada respectfully represents to the Court that heretofore it submitted to the Special Master and in addition thereto lodged in the Court the BRIEF OF THE STATE OF NEVADA, INTERVENER, IN RE MOTION OF CALIFORNIA TO JOIN AS PARTIES THE STATES OF COLORADO, NEW MEXICO, UTAH AND WYOMING, and therein stated its position with respect to such joinder based upon the same premise as herein set forth to the end that New Mexico and Utah are indispensable parties and that Colorado and Wyoming at the very least are necessary parties. Nevada in such brief relied upon the rule as to the joinder of necessary parties as held in the case of *Washington* vs. *United States,* C.A.A. 9, 87 F. (2d) 421, followed with approval in *Pioche Mines Consolidated Inc.,* vs. *Fidelity-Philadelphia Trust Co.* C.A.A. 9, 202 F. (2d) 944, which said cases were and are based upon the case of *Shields* vs. *Barrow,* 17 How. 130, 15

L. Ed. 158 and *Mallow* vs. *Hinde,* 12 Wheat 193, 6 L. Ed. 599. The *State of Washington* vs. *United States* dealt with the right of the States of Washington and Oregon to intervene in a suit by the *United States* vs. *Columbia Packers Association.* The States were granted the right.

Nevada here refers to its said brief and adopts the same as its brief in support of its foregoing exceptions.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

W. T. MATHEWS
WM. J. KANE
Special Assistant Attorneys General
Counsel for State of Nevada

Certificate of Service:

I, W. T. Mathews, one of the attorneys of record for the State of Nevada, an Intervener in the above entitled cause, and a member of the Bar of the Supreme Court of the United States, do hereby certify that, on the 12th day of October, 1955, I served copies of the foregoing exceptions to the Report of the Special Master on the several parties thereto, as follows:

1. On the Solicitor General of the United States, Department of Justice, Washington 25, D. C., by mailing a copy in a duly addressed envelope with airmail postage prepaid.
2. On J. H. Moeur, Chief Counsel for the Complainant State of Arizona, Heard Building, Phoenix, Arizona, by mailing a copy in a duly addressed envelope with airmail postage prepaid.
3. On Gilbert F. Nelson, Assistant Attorney General of California, and one of Counsel for defendants, 909 South Broadway, Los Angeles 15, California.
4. On Duke W. Dunbar, Attorney General of and Counsel for the State of Colorado, State Capitol Bldg., Denver, Colorado, by mailing a copy in a duly addressed envelope with air mail postage prepaid.
5. On Richard Robinson, Attorney General of and Counsel for New Mexico, State Capitol Building, Santa Fe, New Mexico, by mailing a copy in a duly addressed envelope with airmail postage prepaid.
6. On E. R. Callister, Attorney General of and Counsel for the State of Utah, State Capitol Building, Salt Lake City, Utah, by mailing a copy in a duly addressed envelope with airmail postage prepaid.
7. On George F. Guy, Attorney General of and Counsel for the State of Wyoming, State Capitol Building, Cheyenne, Wyoming, by mailing a copy in a duly addressed envelope with airmail postage prepaid.

W. T. Mathews
Special Assistant Attorney General Nevada