IN THE

Supreme Court of the United States

October Term, 1955 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 the California Defendants to the Report and Recommendations of the Special Master With Respect to Their Motion to Join the States of Colorado, New Mexico, Utah and Wyoming

and

Brief in Support of Exceptions

(See List of Attorneys on Inside Cover)

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

For the State of California

EDMUND G. BROWN,
Attorney General of the
State of California,
600 State Building,
San Francisco, California,

NORTHCUTT ELY,
ROBERT L. McCARTY,
Assistant Attorneys General,
1200 Tower Building,
Washington 5, D. C.,

PRENTISS MOORE,
Assistant Attorney General,
417 South Hill Street,
Los Angeles 13, California,

GILBERT F. NELSON,
Assistant Attorney General,

CHARLES E. CORKER,
HOWARD I. FRIEDMAN,
BURTON J. GINDLER,
JAMES B. McKENNEY,
JOHN R. ALEXANDER,
GEORGE BRODY,
Deputy Attorneys General,
909 South Broadway,
Los Angeles 15, California,

ELY, McCARTY AND DUNCAN,
CHARLES F. WHEATLEY, JR.,
Of Counsel,
1200 Tower Building,
Washington 5, D. C.,

For Palo Verde Irrigation District

FRANCIS E. JENNEY,
458 South Spring Street,
Los Angeles 13, California,

For Imperial Irrigation District

HARRY W. HORTON,
Chief Counsel,

R. L. KNOX, JR.,
101 Law Building,
El Centro, California,

For Coachella Valley County Water District

EARL REDWINE,
3610 8th Street,
Riverside, California,

For the Metropolitan Water District of Southern California

JAMES H. HOWARD,
General Counsel,

CHARLES C. COOPER, JR.
Assistant General Counsel,

DONALD M. KEITH,
Deputy General Counsel,

ALAN PATTEN,
Deputy General Counsel,

FRANK P. DOHERTY,
306 West 3rd Street,
Los Angeles 13, California,

For the City of Los Angeles

ROGER ARNEBERGH,
City Attorney,

GILMORE TILLMAN,
Chief Assistant City Attorney
for Water and Power,

JOHN H. MATHEWS,
Deputy City Attorney,
207 South Broadway,
Los Angeles 12, California,

For the City of San Diego

J. F. Du PAUL,
City Attorney,

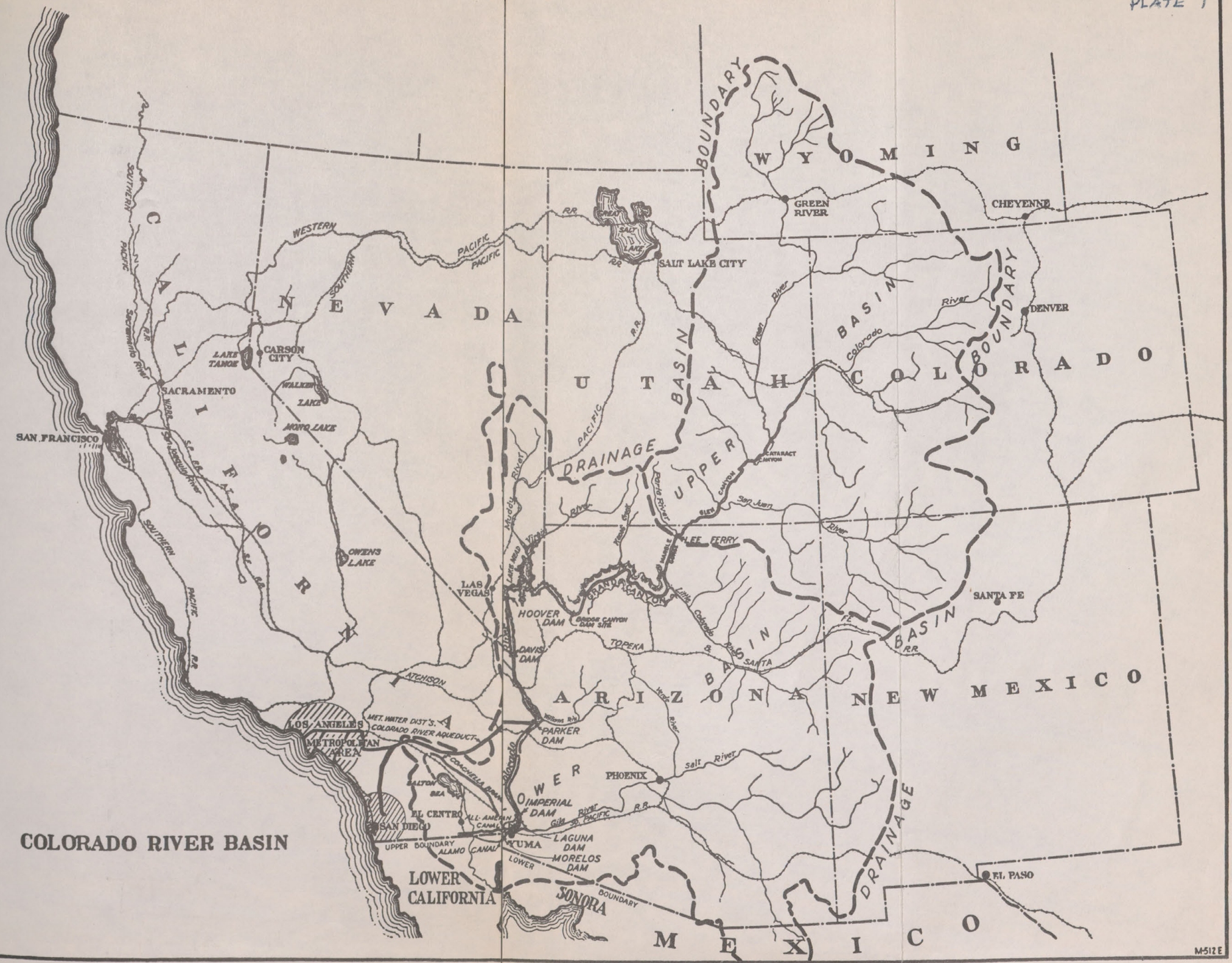
SHELLEY J. HIGGINS,
Assistant City Attorney,
Civic Center,
San Diego, California,

T. B. COSGROVE,
1031 Rowan Building,
Los Angeles 13, California,

For the County of San Diego

JAMES DON KELLER,
District Attorney,
Court House,
San Diego, California.

PLATE 1


COLORADO RIVER BASIN
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UPPER BASIN
LOWER BASIN
DRAINAGE
SALT LAKE CITY
GREEN RIVER
CHEYENNE
DENVER
SACRAMENTO
SAN FRANCISCO
CARSON CITY
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WALKER LAKE
MONO LAKE
OWENS LAKE
LAS VEGAS
HOOVER DAM
BOULDER CANYON DAM SITE
DAVIS DAM
PARKER DAM
IMPERIAL DAM
LAGUNA DAM
MORELOS DAM
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EL PASO
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CATARACT CANYON
LOS ANGELES METROPOLITAN AREA
MET. WATER DIST'S. COLORADO RIVER AQUEDUCT
SALTON SEA
EL CENTRO
ALL-AMERICAN CANAL
SAN DIEGO
UPPER BOUNDARY
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TREATISES, ARTICLES

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Exceptions of the California Defendants to the Report and Recommendations of the Special Master With Respect to Their Motion to Join the States of Colorado, New Mexico, Utah and Wyoming

and

Brief in Support of Exceptions

EXCEPTIONS TO THE REPORT AND RECOMMENDATION OF THE SPECIAL MASTER WITH RESPECT TO THE MOTION OF THE CALIFORNIA DEFENDANTS TO JOIN THE STATES OF COLORADO, NEW MEXICO, UTAH AND WYOMING

The recommendation of the Special Master is that the motion of the California defendants to join, as parties, the States of Colorado, New Mexico, Utah and Wyoming, be denied with respect to the four States in their "Upper Basin" capacities, but that it be granted as to Utah and New Mexico in their "Lower Basin" capacities and as to Lower Basin waters. The California defendants except to so much of the Special Master's Report as relates to denial of the motion, and respectfully request to be heard in oral argument.

Exceptions I through IV are based on grounds that the rights and obligations of the present parties, those whom the Special Master proposes to join, and those of the remaining States of the Colorado River Basin, are so interdependent that the absent States "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. . . ." *Shields* v. *Barrow,* 17 How. 130, 139 (U.S. 1855). Exception V is based on the ground that California, sued here as a sovereign, is entitled to invoke this rule as against her sister sovereigns in the circumstances of this case, because those States "not only have an inter-

est 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." (*Id.*, p. 139.)

If the absent States were without the Court's jurisdiction, the case should be dismissed because of the absence of indispensable parties. Since they are within the Court's jurisdiction, they should be joined as necessary parties, and the Special Master, in ruling otherwise, erred in the following particulars:

I.

General Exception

The Special Master erred in assuming how substantive issues will be decided after the trial, and in testing the necessity for joinder of the absent States by the effect upon them of a decree conforming to those assumptions. The proper test is whether any decree reasonably responsive to the pleadings will necessitate the presence of the absent parties in order to afford complete relief to those who are already parties.

II.

Exceptions Relating to the Claims of the United States

The Special Master erred in failing to find that the four States of Colorado, New Mexico, Utah and Wyoming are necessary parties to the adjudication of the claims of the United States to the waters of the Colorado River System.

III.

Exceptions Relating to the Issues of Whether Arizona Is a Party to the Colorado River Compact, Whether the Statutory Compact Created by the Boulder Canyon Project Act and the California Limitation Act Remains in Effect, and the Interpretation of That Statutory Compact

A. The Special Master erred in finding that Colorado, New Mexico, Utah and Wyoming are not necessary parties to a suit that will determine whether Arizona is a party to the Colorado River Compact.

B. He erred in finding that the four States are not necessary parties to a suit that may determine the continued existence and interpretation of California's obligations to all six of her sister Colorado River Basin States under the California Limitation Act.

IV.

Exceptions Relating to the Colorado River Compact

The four States of Colorado, New Mexico, Utah and Wyoming are necessary parties to this action because complete relief cannot be afforded among the present parties without a determination of (A) the rights of the absent States under the Colorado River Compact to the use of waters of the Colorado River System available to the "Upper Basin," (B) their obligations under that Compact as "States of the Upper Division" to deliver water to the Lower Basin, and (C) their interests in the waters of the Colorado River Sys-

tem which are not covered by the Colorado River Compact. The Special Master erred in ruling to the contrary.

The Special Master erred in finding that the Colorado River Compact, in terms, prohibits the joinder of the States of the Upper Division in this action.

V.

Exceptions Relating to Justiciability, the Sovereign Status of the Parties, and Rules of Joinder

A. The Special Master erred in determining that the absent Upper States, whose rights and obligations are vitally and inseparably affected by the present controversy to quiet title to certain waters of the Colorado River System, may not be joined for lack of a controversy independently justiciable as to them.

B. The Special Master erred in recommending that the motion be denied because a present breach of obligation against the absent States has not been alleged. Despite the absence of a present breach of obligation or a present physical invasion of a claimed right, a suit brought by Arizona or by the United States to quiet title against the absent States alleging the identical titles here asserted by them would state a justiciable controversy within the constitutional power of this Court to decide. *A fortiori,* such a breach of obligation or invasion of right is not necessary where the joinder of the absent States is required in order to accord com-

plete relief in the existing quiet title suits brought by Arizona and by the United States.

C. The Special Master's conclusion that no justiciable controversy is stated between the present parties and the absent States is based on assumed facts as to water supply and water use which have no foundation in the record, and which, since they are the subject of dispute among qualified engineers, are not proper subjects of judicial notice. Moreover, the assumptions are contrary to what evidence would establish as the actual facts.

D. The Special Master's recommendation that California, sued as a sovereign, be denied the right to join Colorado, New Mexico, Utah and Wyoming because they are also sovereigns is without support either in reason or in judicial precedent.

BRIEF OF THE CALIFORNIA DEFENDANTS IN SUPPORT OF THEIR EXCEPTIONS TO THE REPORT AND RECOMMENDATION OF THE SPECIAL MASTER UPON THEIR MOTION TO JOIN, AS PARTIES, THE STATES OF COLORADO, NEW MEXICO, UTAH AND WYOMING

RULES, TREATIES, INTERSTATE COMPACTS AND STATUTES INVOLVED

These are cited in our opening brief on this Motion, filed October 7, 1954, pp. 2-4. Their text appears in two volumes of Appendixes to our Answer to Arizona. The Statement of Jurisdiction appears at page 1 of our opening brief.

STATEMENT OF THE CASE

The facts are summarized in our opening brief, filed October 7, 1954, pages 4-25. A "Summary of the Controversy" is annexed to this Motion filed July 15, 1954, page 7.

QUESTION PRESENTED

The question presented upon these exceptions is:

Are the States of Colorado, New Mexico, Utah and Wyoming necessary parties to this action, in their "Upper Basin" capacities, and in their capacities as "States of the Upper Division," as those terms are defined in the Colorado River Compact?

SUMMARY OF THE ARGUMENT

I.

Whether additional parties are necessary to grant complete relief to the present parties requires a determination of whether issues in the controversy, however resolved, will affect the interests of those parties. No particular resolution of them can be assumed. The Special Master has departed from this rule, and has made substantive determinations without evidence on the merits of the issues determined.

II.

The four absent States are necessary parties to an adjudication of the claims asserted by the United States to the waters of the Colorado River System.

The United States' claims include: (1) water to supply the existing water delivery and electrical energy contracts of the United States in the Lower Basin; (2) water to satisfy the international obligations of the United States, including the Mexican Water Treaty; (3) water to fulfill obligations of the United States to Indians and Indian Tribes in Arizona and California; (4) water to supply the full capacity of the various structures owned by the United States in the Lower Basin; (5) water to supply the needs of the National Park Service, the Bureau of Land Management and the Forest Service in Arizona and California should these needs be jeopardized in this suit; and (6)

water to protect the interests of the United States in flood control and navigation. Specific claims in the first three categories aggregate 11,785,250 acre-feet per annum—far in excess of the 8,500,000 acre-foot aggregate of uses for the Lower Basin specified under Articles III(a) and III(b) of the Colorado River Compact.

The Special Master has erred in not recognizing the impact of these claims, if they are sustained, upon the interests of the absent States. He has confused the place where water is used, or delivered to Mexico (*i.e.*, the Lower Basin or the international boundary), with the place from which the water must be supplied.

The United States denies that all its rights are subjected by the Boulder Canyon Project Act to the Colorado River Compact. It expressly asserts that its claims on behalf of Indians are in no way subject to or affected by the Colorado River Compact and, contrary to the Special Master's determination, are not chargeable under the Compact to the Basin and State in which they are situated. The Mexican Water Treaty obligation, in terms, is to supply a guaranteed quantity from "any and all sources." Thus, the United States' claims are asserted to be independent of the Compact. It would be grossly inequitable either to saddle the Lower Basin with federal claims which are claims to the waters of the whole river system, or to leave in doubt the obligation of the absent States to contribute to the satisfaction of those claims.

Clearly, the magnitude of the Upper Division responsibility to deliver water is placed directly in issue by the prayer of the United States to quiet title to water to serve the Mexican treaty, and to quiet title to water for all purposes and from all sources in an aggregate amount greater than that which can be found in the Lower Basin.

The United States will be bound, throughout the entire Colorado River Basin, by the decree of this Court determining its rights under the Boulder Canyon Project Act and the Colorado River Compact. To subject the United States in the operation of federal works in the Upper Basin to one interpretation of the Compact, leaving the Upper Basin beneficiaries of those works free to assert a contrary interpretation, would produce hopeless chaos.

III.

Two of the issues in this litigation are (1) whether Arizona effectively ratified the Colorado River Compact in 1944, and (2) whether, if Arizona's purported ratification was effective, California's obligation to all her sister Colorado River Basin States under the California Limitation Act continues to be binding. California denies that Arizona effectively ratified the Colorado River Compact, and further asserts that a seven-State Colorado River Compact (*i.e.*, with Arizona a party) and the California Limitation Act are mutually exclusive.

The Special Master disposes of the first issue, as it affects the absent States, by determining that

the absent States are protected against Arizona appropriations by the Colorado River Compact regardless of whether Arizona is a party to that agreement. His conclusion is contrary to the decision in *Arizona* v. *California,* 283 U.S. 423 (1931), which held that Arizona, because not a party to the Compact, could appropriate all unappropriated water in the Colorado River System. That decision is *res judicata* in this litigation.

The Special Master disposes of the second issue, as it affects the absent States, by determining that those four States have no legal rights under and no interest in the California Limitation Act. This decision is contrary to the words of the Limitation Act and the Boulder Canyon Project Act, which prescribed the Limitation Act's terms expressly making the absent States beneficiaries, and is contrary to the legislative history of the Project Act. The Special Master's determination with respect to the Limitation Act has been neither urged nor acquiesced in by the absent States.

IV.

A fundamental misconception of the Special Master is that the Colorado River Compact divides the Colorado River System into two separate and independent parts, as geographical territory might be divided between two States. This misconception is the basis of his failure to understand the nature of the suit.

Arizona's suit merges three objectives, each involving the rights and obligations of all of the

other Colorado River Basin States under the Colorado River Compact:

1. *Relief essentially declaratory in character.*

Arizona asks:

(a) a declaration of the meaning of the term "beneficial consumptive use," appearing in Articles III(a) and III(b) of the Colorado River Compact. These Articles relate only to *inter*-basin rights. A declaration of their meaning affects both Basins. Arizona's allegation that "the use of water salvaged by man is not a beneficial consumptive use" would enable her to encroach, without charge, to the extent of more than 1,000,000 acre-feet upon the unapportioned surplus above the quantities specified in Articles III(a) and III(b) in which all seven States have undivided common interests.

(b) a declaration that the waters referred to in Article III(b) of the Compact are "apportioned," *i.e.,* apportioned not only to Arizona but to the Lower Basin against the Upper Basin.

(c) a declaration that reservoir losses shall be charged as beneficial consumptive uses against the apportionment made by Article III(a) to the Lower Basin. Nevada, intervening, insists that such losses be charged to the "surplus" in which the absent States have an undivided interest.

2. *A suit to quiet title.*

Arizona asks that her title be forever quieted to beneficial consumptive uses (measured in terms

of main stream depletion, with no charge for the use of "salvaged" water) as follows:

(a) 1,000,000 acre-feet per annum of the increase of use permitted to the Lower Basin by Article III(b), all to be taken from the Gila River System.

(b) 2,800,000 acre-feet per annum of the 7,500,000 acre-feet per annum of beneficial consumptive uses apportioned to the Lower Basin by Article III(a) of the Colorado River Compact, all from the main stream (except to the extent that uses on the Gila exceed 1,000,000 acre-feet per annum), subject to equitable shares for New Mexico and Utah. The 2,800,000 claimed by Arizona is the "residue" of the Lower Basin's Article III(a) apportionment after deducting the quantities of Article III(a) uses she concedes to California and Nevada from the main stream, *i.e.,* 4,400,000 acre-feet to California, and 300,000 to Nevada. Arizona identifies the apportionment made by Article III(a) to the Lower Basin with the obligation imposed by Article III(d) on the States of the Upper Division to deliver 75,000,000 acre-feet at Lee Ferry in each decade. Thus, to quiet title in Arizona to 2,800,000 acre-feet of Article III(a) uses from the main stream, Arizona must quiet title in the Lower Basin, as against the Upper Division to all of the 75,000,000 acre-feet of Article III(d) deliveries as water the use of which is "apportioned" by Article III(a). The Special Master apparently agrees with Arizona's contention.

This is a fundamental revision of the Compact, converting it from a system-wide Compact into what would be essentially a main stream agreement, and from an allocation of beneficial consumptive uses to an allocation of the flow of the main stream. Such a revision could not be effected without the concurrence of the four States of the Upper Division. Article III(a), as written, is an apportionment "from the Colorado River System," defined in Article II(a) as "the Colorado River and its tributaries." That apportionment includes "all water necessary for the supply of any rights which may now exist," *i.e.,* rights to uses on the tributaries as well as on the main stream. The Lower Basin thus cannot claim all of its Article III(a) apportionment from the main stream. Accordingly the obligation of the States of the Upper Division under Article III(d) to deliver 75,000,000 acre-feet in each decade to the Lower Basin is not identical with the Article III(a) apportionment to the Lower Basin, but contains water available for Mexico, to which the Lower Basin has no title. If the 75,000,000 acre-feet per decade were decreed to the Lower Basin as its Article III(a) apportionment, Article III(c) would require the States of the Upper Division to increase their deliveries to supply water to Mexico, since, upon Arizona's measurement of "consumptive use," there is no "surplus" in the 75,000,000 acre-feet out of which the Mexican burden can be met. Statistics published by the State of Colorado show that if a minimum of

75,000,000 acre-feet per decade were delivered by the States of the Upper Division during a period like that of 1930-52, the Upper Basin would have available no more than 6,200,000 acre-feet per year of its apportioned consumptive use of 7,500,000 acre-feet, and at that these statistics do not provide for the Mexican burden. The Special Master's contrary assumptions as to water supply are not supported by any record.

If title cannot be quieted in the Lower Basin to 7,500,000 acre-feet per annum in the main stream as apportioned by Article III(a), title cannot be quieted in Arizona to 2,800,000 acre-feet of main stream Article III(a) uses, for she concedes 4,700,000 acre-feet to Nevada and California.

3. *A suit for injunctive relief.*

Arizona asks an injunction against the assertion by California of any right in the excess or surplus waters not covered by Articles III(a) and III(b) of the Compact, unless and until a new compact, made after 1963, apportions such waters to the Lower Basin. This presupposes that neither Basin can acquire appropriative rights in such waters except by a new compact, *i.e.,* with Arizona's concurrence. California asserts that either Basin may validly appropriate unapportioned waters, subject only to divestiture by a new compact or by the superior requirements of the Mexican Water Treaty. Inasmuch as the unapportioned surplus is a common fund of water in which the absent States have undivided and

undetermined interests in common with the present parties, the questions both of how rights in that common fund shall be established and what rights have been established cannot be determined in their absence. The magnitude of that common fund is affected by the question of whether Arizona may encroach upon it by avoiding any charge under Articles III(a) or III(b) for the use of "salvaged water."

V.

The Special Master expressly concedes that the resolution of some of the issues in the present litigation may ultimately affect the interests of the absent States. He nevertheless finds that their joinder is not appropriate at this time. The Special Master bases this conclusion on two legal premises that are in fundamental error. The first is that an independently justiciable controversy, which could provide the basis for a separate lawsuit by or against absent parties, must be stated before they can be joined. The second erroneous premise is that a present breach of obligation or a present physical invasion of a claimed right is required as an element of a justiciable controversy when suit is brought to quiet title. He combines with these legal premises an assumption, contrary to the pleadings and based neither on evidence nor on a proper exercise of judicial notice, that water supply exceeds all the claims against it, and that this condition will continue into the indefinite future. Thus, he concludes, requirements for a

justiciable controversy forbid joining the absent States, a conclusion he reinforces by an erroneous postulate that the sovereign status of the absent parties precludes the application of the usual rules of joinder.

The legal premises are in error. If a controversy is "justiciable" among present parties—and the Special Master expressly finds that it is—there is no further question of justiciability on the joinder motion. This Court has constitutional power to dispose fully and effectively of all disputes which are properly before it. The power to join as parties those who are necessary in order to accord complete relief to those already parties is a familiar application of this power. If a finding of justiciability is necessary with respect to the absent States sought to be joined, the joinder rules themselves satisfy the justiciability standards set by this Court in that the resolution of issues in the existing controversy vitally affects the rights and interests of the absent States, thereby constituting an immediate invasion of their present rights.

Even if this were not true, the Special Master's conception of a justiciable controversy as a dispute based on a present breach of obligation or present physical invasion of a claimed right is too restrictive. In the absence of such a breach of obligation or invasion of right, a suit to quiet title by Arizona or the United States against the absent States alleging the identical title here asserted

would clearly state a justiciable controversy within the constitutional power of this Court to decide. *A fortiori,* such a breach or invasion is not required in order to accord complete relief in the existing quiet title suits brought by Arizona and the United States.

Even if the Special Master's concept of justiciability were correct, both as related to joinder and as related to suits to quiet title, there is no basis to apply that concept in this case. There is no basis in the evidence (none having been taken) and there can be no basis in judicial notice (the facts being controversial) for the Special Master's assumptions as to water supply and water use. Evidence, if taken, would show the true facts to be contrary to those he has assumed.

Finally, the Special Master's recommendation that California, sued as a sovereign, be denied the right to join the absent States, is without support either in reason or in judicial precedent. This Court has been consistently careful to respect the quasi-sovereign status of states sued as defendants. A defendant state is entitled to at least as much consideration as a non-sovereign defendant. California, a sovereign defendant in this case, is sued on her obligation stated in the California Limitation Act. That obligation runs to six States named as beneficiaries. California is entitled to the same protection that would be accorded a non-sovereign obligor—namely, joinder of all joint obligees or dismissal of the suit. Sued for a declaration of rights and obligations under the

Colorado River Compact, California is entitled to the same protection that would be accorded a non-sovereign party similarly sued—namely, joinder of all the States among whom the rights and obligations of the Compact run. Sued by the United States, California is entitled to the joinder of her sister sovereigns, who by virtue of their common agreement and equal status, must share the burden of the Federal claims.

ARGUMENT

I.

GENERAL EXCEPTION

THE SPECIAL MASTER ERRED IN APPLYING AS A TEST FOR THE JOINDER OF NECESSARY PARTIES WHETHER A DECREE CAN BE SOUNDLY ENTERED IN THIS CAUSE WHICH WILL NOT AFFECT THE ABSENT STATES. THE PROPER TEST IS WHETHER ANY DECREE REASONABLY RESPONSIVE TO THE PLEADINGS WILL NECESSITATE THE PRESENCE OF THE ABSENT PARTIES IN ORDER TO GRANT COMPLETE RELIEF TO THOSE ALREADY PARTIES*

The Special Master's conclusions that the absent States "presently have no legal or equitable interest in the instant cause" and that "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 uses of waters in the Upper Basin" (Report, p. 67, conclusions 11, 16) depend upon a number of substantive determinations of both fact and law which he has made. Such substantive determinations are improper at this stage of the litigation because:

(a) They have been made without taking evidence, without information as to the legislative history of the laws he interprets, and without a full hearing on the issues decided.

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* Rule 19 of the Federal Rules of Civil Procedure and the case authority on joinder of parties are analyzed in the California Defendants' Initial Brief, pp. 26-31, and their Reply Brief, pp. 7-19. The applicability of this rule to interstate cases is discussed in Part V, Section D of this Brief.

(b) Most of the determinations adversely affect the absent States even as decided by the Special Master. Even where the Special Master's determination does not adversely affect the absent States, a different decision which can reasonably be reached under the pleadings would so affect them.

(c) The Special Master's substantive determinations can properly be made only in a judicial proceeding to which the absent States are parties, clearly bound by the decisions so made. If determinations different from those of the Special Master are reached on the merits, joinder of the absent States will be compelled later in the suit when their joinder will greatly prolong the litigation.

Whether the Special Master was right or wrong in his substantive determinations, we do not ask the Court at this time to decide. A number of the determinations in our view are erroneous, and will not be sustained on the merits. At least one determination (that Indian uses are to be charged to the State and Basin where they take place) we believe to be correct, and should be reflected in the Court's final decree. In this and in every other instance here discussed, however, the Special Master's determination is a matter which properly can be decided only after trial at which the facts have been developed. They relate to issues which cannot be decided now.

If this case presented the problem of indispensable parties, whose joinder would destroy the

Court's jurisdiction, it might be desirable to try certain issues to find whether a decree can be fashioned to permit retaining jurisdiction. That, however, would require a full hearing and trial on the matters decided.*

In this case, however, the issue of indispensability is not involved, and, on any view, one hearing on the merits is enough. In necessary party cases no particular decision of contested issues can be assumed but must await hearing on the merits. This standard has been applied even in indispensable party cases.**

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*"[N]o 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." (Report, p. 4.)

**"... The fact that their [indispensable parties'] interests may not have been prejudicially affected by the final judgment below, which was rendered after a trial on the merits, is not controlling, because the question of indispensable parties, and particularly of diversity jurisdiction, does not depend upon the result of the suit. The true test is the situation that existed before and not after entry of the final judgment." *Calcote* v. *Texas Pac. Coal & Oil Co.*, 157 F.2d 216, 218 (5th Cir.), *cert. denied,* 329 U.S. 782 (1946).

"The slightest consideration will show that if appellee were right in the view he takes, that the relief granted, rather than that asked, determines indispensability, the whole doctrine and the equitable basis on which it rests would be gone by the board." *Young* v. *Powell,* 179 F.2d 147, 152 (5th Cir.), *cert. denied,* 339 U.S. 948 (1950).

"The interest of absent parties must be determined by the issues presented by the pleadings and the evidence and not by the final decision in the case. The mere fact that the court decides the issues in such a way that the absent parties

Issues which are frivolous, immaterial, or otherwise lacking in substance can, of course, be disposed of summarily. *Cf. Bourdieu* v. *Pacific Western Oil Co.,* 299 U.S. 65 (1936) (indispensability of United States need not be decided where complaint fails to state cause of action against defendant). However, this is not true of the issues dealt with by the Special Master. Some of the issues which he has decided go to the very heart of the controversy. To decide them at this stage of the litigation is virtually to decide the case itself without trial.

To these issues we now turn.

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would have no interest in the subject matter of the suit does not control." *Oglesby* v. *Springfield Marine Bank,* 385 Ill. 414, 426, 52 N.E. 2d 1000, 1005 (1944).

"In determining who are necessary parties we cannot speculate as to how the case might be decided." *Lewis* v. *Hanson,* 124 Mont. 492, 499, 227 P.2d 70, 73 (1951).

II.

THE SPECIAL MASTER HAS ERRED IN FINDING THAT THE FOUR ABSENT STATES ARE NOT NECESSARY PARTIES TO AN EFFECTIVE ADJUDICATION OF THE CLAIMS ASSERTED BY THE UNITED STATES TO THE WATERS OF THE COLORADO RIVER SYSTEM

In its Petition of Intervention, the United States prays this Court "To quiet the title of the United States of America in and to each and every right to the use of water claimed and exercised by it, all as asserted in this Petition, ..." (Petition of Intervention, par. XXXIX, p. 42.) These claims include rights:

(1) To the use of Colorado River System water to fulfill its obligations arising from water delivery contracts aggregating 8,462,000 acre-feet of the water stored in Lake Mead behind Hoover Dam and from contracts to generate electrical energy in the Lower Basin.* (*Id.*, par. XX, p. 18.) The United States alleges "that each and every contract entered into by the United States of America involving the use and delivery of water or electric power . . . are valid, binding covenants constituting the measure of the rights of the parties

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* With the average head January through September, 1955, of 450 feet at Hoover Dam, 11,300,000 acre-feet of water per year must pass through the turbines to generate contract firm energy.

to the extent that they are reflected by those covenants." (*Id.*, par. XXXI, pp. 27-28.)*

(2) To the use of water in sufficient quantity to fulfill its obligations arising from international treaties and conventions. (*Id.*, par. XIII, pp. 12-13; par. XXVIII, p. 24.) This claim includes 1,500,000 acre-feet of water per annum, measured at the international boundary, required to satisfy the Mexican Water Treaty. Delivery at the international boundary requires much more water at Lee Ferry because of channel losses and evaporation in transit. In addition, this claim includes 76,000 acre-feet per annum for specified fish and wildlife projects stemming from international conventions with Great Britain and Mexico.

(3) To the use of water to satisfy its obligations to Indians and Indian tribes in California and Arizona. (*Id.*, pars. XXV-XXVII, pp. 22-23.) This claim totals 1,747,250 acre-feet of annual diversions (not beneficial consumptive use).

(4) To the use of water in sufficient quantities "to satisfy the maximum legal demands for . . . the various projects . . . to the full capacity of the diversion, carrying, and storage structures described in this Petition and its appendixes; . . . ." (*Id.*, par. XXX, p. 25.) The quantity of water included in this claim is unspecified, but presumably

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* In listing the allegations of the United States (Report, pp. 20, 21), the Special Master omits any reference to this claim, despite the fact that it is the largest single claim asserted by the United States.

includes the full capacity of all structures owned by the United States in the Lower Basin.*

(5) To the use of water in unspecified quantities for the satisfaction of the needs in Arizona and California of the National Park Service, the Bureau of Land Management and the Forest Service should these needs be jeopardized in this suit. (*Id.*, par. XXX, p. 26.)

(6) To the use of water in unspecified quantity to protect the interests of the United States in flood control and navigation. (*Id.*, par. XXIX, pp. 24-25.)

The United States' claims are urged to be independent of the Colorado River Compact. (Petition of Intervention, pars. XXXIV and XXXVII, pp. 34, 38.) If so held, they necessarily become claims and rights against the waters of the entire Colorado River System. The specified United States claims total 11,785,250 acre-feet of water per annum.** Manifestly, this amount

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* This claim is not mentioned by the Special Master in his listing of the United States' claims. (Report, pp. 20-21.)

Some of the major Lower Basin structures listed by the United States (Petition of Intervention, Appendixes I, II, pp. 43-58), with stated storage capacities, under this category are:

Hoover Dam (32,359,000 acre-feet)
Davis Dam (1,820,000 acre-feet)
Parker Dam (717,000 acre-feet)
Roosevelt Dam (1,398,430 acre-feet)
Other federal dams on Salt River and other tributaries in Arizona (631,135 acre-feet)
Coolidge Dam (1,285,000 acre-feet)

** Some of these claims are stated in terms of beneficial consumptive uses, and some in terms of diversions. Of course, 11,785,250 acre-feet of diversions will support a lesser total

cannot be decreed from the 8,500,000 acre-feet of beneficial consumptive uses per annum allocated to the Lower Basin by Articles III(a) and III(b) of the Colorado River Compact. Therefore, a minimum of over 3,000,000 acre-feet of water per annum could be decreed only from the waters of the entire System—either surplus or the water apportioned to the Upper Basin by Article III(a) of the Compact. The interest of the absent States in such a resolution of the United States' claims is obvious. Equally obvious is the interest of the defendants in having these claims adjudicated only in a suit to which all seven Colorado River Basin States are parties.

In finding that these United States claims do not materially affect the absent States, the Special Master:

(1) Determines that "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 satis-

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quantity of beneficial consumptive uses. And, conversely, to the extent that claims are for beneficial consumptive use, considerably more than 11,785,250 acre-feet of water would be required. The California and Arizona contracts, which are included in this figure, call for the delivery of water from storage in quantities to provide 8,162,000 acre-feet of beneficial consumptive uses. The remainder of the specified United States claims, including the water for the Nevada Water Delivery Contract, relate to "wet" water, *i.e.*, diversions or physical deliveries. In addition the United States claims water for certain large projects for which it gives acreages but not the requirements in acre-feet of water; *e.g.*, Salt River Project, 243,000 acres. (Petition of Intervention, p. 56.)

fied solely from water appropriated [*sic*] to that Basin." (Report, p. 54.)

(2) Finds that "the interest of the United States in this proceeding is confined to its rights relating to waters of the Lower Basin" (Report, p. 67, conclusion 14), and that the United States' claims do not "enlarge the scope of this cause." (Report, pp. 44, 59, 67.)

(3) Finds that the "United States here asserts no rights against the Upper Basin States as to Upper Basin waters." (Report, p. 44.)

(4) Determines that, since the United States' claims are asserted only "against parties to this cause," the absent States cannot be affected by the claims. (Report, p. 59.)

Each of these conclusions misconstrues the Government's pleading; each is premature in determining a substantial issue on the merits; each is wrong in its assumption that the issue does not affect the absent States.

The Special Master's determination that Indian rights are chargeable to the Basin in which they are situated flatly contradicts the position of the United States that "the rights to the use of water of the Indians and Indian Tribes *are in no way subject to or affected by the Colorado River Compact.*" (Emphasis supplied.) (Petition of Intervention, par. XXXVII, p. 38.) Moreover, the United States specifically denies that Indian rights are chargeable to the Basin and State in which they

are located.* On the merits, a conclusion contrary to that of the Special Master is entirely possible under the pleadings and would affect the absent States profoundly.

The United States relies on Article VII of the Colorado River Compact, which provides:

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* The United States "denies each and every allegation of the paragraphs of the pleadings of the parties to which reference has here been made" including expressly the "counter allegation of the defendants . . . declaring that all beneficial consumptive uses of water by Indian Tribes pursuant to obligations of the United States to such Tribes are chargeable to the beneficial consumptive uses available to the Basin under the Compact, and to the State in which such uses are situated, ..." (Petition of Intervention, par. XXXVII, pp. 37, 38.)

The United States has taken the same position in a meeting with the Special Master and other counsel. The following colloquy beween the Special Master and Assistant United States Attorney General J. Lee Rankin, which took place at the Special Master's first meeting with counsel in August 1954, is instructive:

> "THE MASTER: [referring to whether claims for Indians are to be embraced within whatever share Arizona is claiming or in addition to it] Do you think before the time we get to the actual hearing you can know what the specificities are in that regard?
>
> "MR. RANKIN: Yes, but in regard to the claims, you are going to have to determine before this case is over whether or not the Indian claims as will finally be determined are charges on the whole river or charges against each state in which they are or what the rights of the Indians are in that regard from a legal standpoint.
>
> "THE MASTER: I see.
>
> "Mr. RANKIN: And I don't think you will be able to decide that until you have seen the whole picture about the entire controversy." (Transcript of Organizational Meeting, August 5, 1954, pp. 96-97.)

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

Before the Colorado River Compact became effective the rights of the Indian tribes were clearly rights against the entire Colorado River System. Now, under the Special Master's view, they are rights only against the waters available to each Basin. Whatever the ultimate conclusion may be, it is clear that the problem is a substantial one and should not be decided in advance of trial.

The Special Master's second conclusion—that the United States' claims do not affect the absent States because the claims are limited to the use of water in the Lower Basin and therefore the United States has not attempted to "enlarge the scope of this cause"—is equally in error.* At

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* The Special Master twice raises a question, which he finds unnecessary to decide, whether an intervener can enlarge the scope of the controversy. (Report, pp. 44, 59.) This Court, in *Oklahoma* v. *Texas*, 258 U.S. 574, 581 (1922), held that the United States as an intervener in an original action can enlarge the scope of the suit:

> "Under the Constitution our original jurisdiction extends to suits by one state against another, and to suits by the United States against a state. [Citing cases.] In its first stage this was a suit by one state against another. When the United States intervened it became also a suit by the United States against those states. *In its enlarged phase,* it presents in appropriate form the conflicting claims of the two states and the United States to the river bed, and calls for their adjudication." (Emphasis added.)

See earlier opinion, *Oklahoma* v. *Texas,* 252 U.S. 372, 376 (1920).

See also 4 MOORE, FEDERAL PRACTICE ¶¶ 24.16, 24.17 (2d ed. 1950).

several points in his report, the Special Master characterizes "the subject matter of this suit" as the "water allocated to the Lower Basin States."* (*E.g.*, Report, p. 35.) It appears that the Special Master views this litigation as confined in scope to 8,500,000 acre-feet of beneficial consumptive use per annum.** The Special Master is obviously wrong because the specific claims of the United States total 11,785,250 acre-feet.

The Special Master, in his third conclusion with respect to the United States' claims (Report, p.

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* One ground for the Special Master's conclusion is that the Upper Colorado River Basin Compact in Articles VII and XIX specifically provides for use of waters in the Upper Basin by the United States, and the United States is a party to that Compact. (Report, p. 60.) Although the United States consented to the Upper Basin Compact, the Special Master is in error in stating that the United States thereby became a party. The legislative history makes this clear. The House Committee on Public Lands, in reporting legislation to give this consent, declared:

> ". . . It is recognized that the Upper Colorado River Basin Compact is binding only upon the States which are signatory thereto . . . . It is further recognized that Congress, by giving its consent to the Upper Colorado River Basin Compact, does not commit the United States to any interpretation of the Colorado River Compact expressed in, or implied from, the Upper Colorado River Basin Compact, and expresses neither agreement nor disagreement with any such interpretation." H.R. Rep. No. 270 on H. R. 2325, 81st Cong., 1st Sess. (1949).

** However, the Special Master recognizes the evidence must be received at the trial on the merits to determine the total quantity of water, including surplus, physically available to the Lower Basin. (Report, pp. 61-62.)

44) says that the "United States here asserts no rights against the Upper Basin States as to Upper Basin waters." (*Ibid.*) While the United States' claims relate to uses located in the Lower Basin, they constitute claims upon the unappropriated waters of the entire system, thus reaching to the unappropriated portion of the water apportioned to the Upper Basin by Article III(a) of the Compact. The Special Master confuses the site of use with the source of water to satisfy the use.

In his fourth conclusion, the Special Master attaches additional significance to the fact that the United States asserts its claims only "against the parties to this cause." (Report, pp. 44, 59.) He holds that since "the parties to this cause were and are Lower Basin States," the absent States cannot be affected by the United States' claims. (*Ibid.*) If this standard had been applied in *Texas* v. *New Mexico,* No. 9 Original, 1955, it would have been unnecessary to refer the question of indispensability of the United States to the Special Master (348 U.S. 805 (1954)), since Texas did not name the United States in her complaint. *Cf. Arizona* v. *California,* 298 U.S. 558 (1936), in which the United States was held indispensable although Arizona alleged no claims against the Government. Obviously, the Special Master's reasoning would simplify to the point of extinction all rules to determine necessary parties.

In each of his above four conclusions, the Special Master erred in finding that claims of the United States do not affect the absent States.

Some of the ways in which they are necessarily affected are:

(1) The United States "denies that Section 8 and Section 13(b), (c) and (d) of the Boulder Canyon Project Act subject all of its rights to the provisions of the Colorado River Compact . . . ." (Petition of Intervention, par. XXXIV, p. 34.)* These sections provide that the United States and those claiming under it shall be subject to and controlled by the Colorado River Compact, and also (Section 8(b)) by a compact authorized among Arizona, California, and Nevada, or any two of them, which was never in fact consummated.** The references in the Project Act to the Colorado River Compact must be read in the light of the fact that the Compact has escape clauses for navigation (Article IV(a)), Indian

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* This denial of the United States is a negative pregnant with the affirmative implication that some of the rights of the United States are subjected by the Project Act to the Colorado River Compact. Uncertainty over which rights are claimed by the United States to be governed by the Compact should have been resolved before deciding the joinder motion.

At the hearing on this motion before the Special Master, the California defendants sought such clarification. However, the Special Master refused to address the relevant inquiries to counsel for the United States. (Transcript, pp. 355-56, 419.)

** The Special Master says that "The Colorado River Compact, by reference, was made a part of the Boulder Canyon Project Act, by Section 8(b) . . . ." the text of which he then quotes. (Report, p. 15.) Section 8(b) does not refer to the Colorado River Compact but to the proposed tri-state compact. Sections 8(a) and 13(b),(c),(d) cover the relationship between the Colorado River Compact and the rights of the United States.

rights (Article VII), obligations to Mexico (Article III(c)), and "present perfected rights" (Article VIII). Moreover, the Compact, as Articles I and VI expressly recognize, covers only a part of the waters of the Colorado River System. If any of the claims of the United States are held to be independent of and unaffected by the Colorado River Compact, the apportionment to the absent States of 7,500,000 acre-feet of beneficial consumptive use per annum in perpetuity would provide no effective insulation against appropriations by the United States.

(2) To the extent that the United States' claims, other than those relating to the Mexican Water Treaty, are satisfied from surplus over the quantities specified in Articles III(a) and III(b) of the Compact, these claims reduce or eliminate the "buffer" of surplus which protects the Upper Division States from the obligation imposed by Article III(c) to deliver additional water in satisfaction of any Mexican Treaty deficiencies. The absent States must necessarily be affected by any determination that permits reduction in, if not complete exhaustion of, the amount of surplus available to satisfy the Mexican Treaty.

(3) To the extent that the United States' claims are satisfied from this surplus, they reduce the surplus water to which, in California's view, the absent States could otherwise secure rights by priority of appropriation and which would otherwise be subject to further apportionment after 1963 under Articles III(f) and III(g).

(4) Since the United States seeks to quiet title to 1,500,000 acre-feet of water at the international boundary for the Mexican Treaty, the absent States are affected by the type of decreed rights the United States may secure in this regard. The United States does not confine her claim under the Mexican Treaty to "surplus" water. The Treaty obligation, by Article 10, is a first call on all water "from any and all sources," not merely a claim against "surplus." Indeed, as Arizona alleges in her Complaint, "It is uncertain whether excess or surplus flows of the Colorado River unapportioned by the Compact will be adequate to satisfy the allotment of water to Mexico." (Complaint, par. XVI, p. 21.) Clear title in the United States requires a determination of the magnitude of the respective obligations of all of the Colorado River Basin States to satisfy Mexican Treaty deficiencies under Article III(c).

The Special Master obviously contemplates a decree in this case which will bind the United States with respect to its Lower Basin rights only. It is doubtful that the binding effect of the Court's decree can be so limited.* The United States will

* The United States would be bound, under the doctrine of collateral estoppel, in any future litigation involving exclusively Upper Basin States. Three Upper Basin States (Arizona, New Mexico and Utah) will be parties if the Special Master's recommendation is followed, and those three will also be bound.

A precise parallel is *Oklahoma* v. *Texas*, 256 U.S. 70 (1921). That case held that an earlier suit, *United States* v. *Texas*, 162 U.S. 1 (1896), conclusively determined that the Texas-

be bound by the decree in this case. It must operate its reservoirs and works in the Upper Basin, which control supply to both Upper and Lower Basins, in conformity with the decree. For example, if the contention of the United States that its rights are not subjected by Sections 13(b), (c) and (d) of the Boulder Canyon Project Act* to the Colorado River Compact is sustained by the decree in this case, the United States would be free of the Compact in its operations throughout the Colorado River Basin.** Similarly, should the decree determine that rights can and have been acquired in surplus water by present parties (as

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Oklahoma border, first delineated in a treaty with Spain in 1819, is the south bank of the Red River, and not the center of the channel. The earlier case was conclusive despite the fact that it had involved only a small segment of the boundary in dispute in the later suit. The Colorado River Compact, even more than the Spanish Treaty, is indivisible. It cannot mean one thing in California, Nevada, parts of Arizona, New Mexico, and Utah, and something else in Colorado, Wyoming, and other parts of Arizona, New Mexico and Utah.

* These sections of the Project Act, if effective at all, operate with respect to claims of the United States throughout both basins. Their operation is not limited to the Lower Basin.

** This is not an academic matter to the Upper Basin. In the pending case of *United States* v. *Northern Colorado Water Conservancy District,* Civil No. 2782 (D. Colo. 1955), the decree recently entered reserves for future judicial determination the issue of the extent to which the United States, by virtue of Section 13 of the Project Act, subjected its rights in the *Upper* Basin to Article IV of the Colorado River Compact. An expanded domestic water supply for the City and County of Denver and the City of Colorado Springs may turn on the ultimate resolution of this issue.

the California defendants contend), the United States cannot be permitted to impound and withhold surplus in Upper Basin reservoirs on the theory that no rights in surplus can be secured prior to a 1963 compact. To confine the binding effect of the decree upon the United States to its Lower Basin operations only would create a bifurcated sovereign whose Upper and Lower Basin responsibilities would be administered without reference to each other. Such a result would produce hopeless confusion.

Moreover, if the federal works in the Upper Basin are controlled by the Colorado River Compact as construed by a decree in this case, to which the United States is a party, but the beneficiaries of those works in the Upper Basin are free to assert contrary interpretations because they are not parties to the decree, confusion will be converted into chaos.

III.

THE SPECIAL MASTER ERRED IN NOT RECOMMENDING JOINDER OF THE ABSENT STATES BY VIRTUE OF THEIR INTEREST IN THE RESOLUTION OF THE ISSUES OF WHETHER ARIZONA IS A PARTY TO THE COLORADO RIVER COMPACT, WHETHER THE STATUTORY COMPACT CONTAINED IN THE BOULDER CANYON PROJECT ACT AND THE CALIFORNIA LIMITATION ACT REMAINS IN EFFECT, AND THE INTERPRETATION OF THAT STATUTORY COMPACT

The Boulder Canyon Project Act, by which Congress consented to the Colorado River Compact, was specified to become effective on one of two alternatives stated in the first paragraph of section 4(a):

(1) ratification by all seven signatory States within six months and proclamation by the President;

(2) in default of seven-State ratification within six months, ratification by six States including California (the six States waiving the Compact requirement for seven-State ratification) and the enactment by the California Legislature of a Limitation Act in terms prescribed by the Project Act, and proclamation by the President.

The Boulder Canyon Project Act and the Colorado River Compact became effective June 25, 1929, upon the President's Proclamation that the first alternative had failed and the second alterna-

tive had been accomplished. (46 STAT. 3000 (1929), Appendix 4 to California Answer.)

California contends that a seven-State Colorado River Compact and a six-State Colorado River Compact plus the California Limitation Act are mutually exclusive alternatives. Arizona sues here, however, relying both upon asserted rights as a party to the Colorado River Compact and as a beneficiary of the California Limitation Act. The Special Master finds that the absent States are not affected by this issue because (1) the protection afforded the Upper States by the Colorado River Compact is effective against Arizona even if Arizona is not a party, and (2) the absent States have no rights under and no interest in the California Limitation Act. (Report, pp. 45, 58.)

A. The Special Master's determination that the protection afforded the Upper Basin States by the Colorado River Compact is effective against Arizona even if Arizona is not a party to the Compact (Report, pp. 48, 50) is patently erroneous, and deeply affects the absent States

Arizona contends that in 1944 she effectively ratified the Colorado River Compact. California denies that Arizona's ratification was effective. In 1934, this Court determined that Arizona, because she was not a party to the Compact, lacked standing to litigate against the six other Colorado River Basin States interpretations of the Com-

pact which she again asserts in this suit.* The 1934 decision upon that point is *res judicata* in this suit. If the Court determines that Arizona is not a party to the Compact, Arizona still lacks standing to seek some and possibly all of the relief she asks.

On the merits of whether Arizona is now a party to the Compact, the Special Master makes no determination. Indeed, he could not, because many factual matters are involved, and no evidence has been taken. However, he finds that the issue "is a matter of concern to water users in the Lower Basin only." (Report, p. 48.) "The only part of the Colorado River System involved here in which it [Arizona] has an interest is the Lower Basin; . . . ." (*Ibid.*)

The effect of this determination on the absent States is clear from the decision of this Court in *Arizona* v. *California,* 283 U.S. 423 (1931). If not a party to the Compact, Arizona is entitled to appropriate all the unappropriated water in the Colorado River System, including any unappro-

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* *Arizona* v. *California,* 292 U.S. 341 (1934). Arizona's bill against the Secretary of Interior and the six other States sought to perpetuate testimony of the Compact negotiators that uses permitted the Lower Basin by Article III(b) are "for the sole and exclusive use and benefit of the State of Arizona." Arizona makes the same claim in this suit. The Court denied leave to file the bill in the earlier suit, on the ground, *inter alia,* that ". . . the meaning of the Compact, considered merely as a contract, can never be material in the contemplated litigation, since Arizona refused to ratify the Compact." 292 U.S. at 356-57.

priated part of the water necessary to satisfy beneficial consumptive uses apportioned to the Upper Basin by Article III(a).* If a party to the Colorado River Compact, she is obligated to respect the apportionment, insulated from the law of prior appropriation, which the Compact makes to the Upper Basin. The 1931 decision is *res judicata* as to that determination in this suit.**

Moreover, if Arizona's view that rights cannot be acquired in surplus should prevail, and if she is held to be a party to the Compact, she may not appropriate any surplus water which is subject, under Articles III(f) and III(g), to apportionment between the two Basins by a compact

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* 283 U.S. at 463, n.15: "It is also argued that of the 7,500,000 acre-feet allotted by the compact to the upper basin states, only 2,500,000 have already been appropriated, and that thus the presently unused surplus of 5,000,000 acre-feet cannot be appropriated in Arizona. But Arizona is not bound by the compact as it has withheld ratification. If and when withdrawals pursuant to the compact by the upper basin states diminish the amount of water actually available for use in Arizona, appropriate action may then be brought."

** In the 1931 suit, as in two later suits, Arizona joined all six States of the Colorado River System, *Arizona* v. *California,* 292 U.S. 341 (1934); *Arizona* v. *California,* 298 U.S. 558 (1936). The Special Master finds nothing in the nature of a "*quasi estoppel*" in this fact which would compel Arizona to join the absent States in this action. (Report, p. 42.) The proponents of the joinder motion have not urged estoppel as a basis for joinder, but have called attention to the parties in the prior cases to show the unquestioned recognition of the fact that issues in those cases, which are also issues in the present litigation, could not be decided without the presence of all the Colorado River Basin States.

negotiated sometime after October 1, 1963. But if Arizona is not a party to the Colorado River Compact, and her view as to surplus (also urged by Nevada) is followed by the Court, Arizona alone among the Colorado River Basin States is entitled to appropriate all of the unapportioned water otherwise subject to apportionment by a post-1963 compact. The other States in the Colorado River Basin, since they are bound by the Compact, could not even compete with Arizona in the appropriation of this surplus water.

The Special Master attributes to the absent States the position that the issue of Arizona's status under the Compact does not require joinder "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." (Report, p. 46.)

The fact is that neither in their briefs nor in their oral argument did the absent States take either of the two positions the Special Master ascribes to them. Arizona's status under the Compact has long been a matter of pressing concern to all four States. More than once their official representatives have opposed any development in Arizona which would enable her to use more water unless and until, either by supplementary compact among all seven States or by a

contractual limitation act, Arizona should accept the obligations of the Colorado River Compact.*

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* See "Protest Of The States of Colorado, New Mexico, Utah and Wyoming Against The Proposed Gila Valley Irrigation Project In Arizona And The Proposed Pilot Knob Power Plant In California, By the Representatives of the States in Interstate Conference at Denver, February 5th, 1936." This document was signed by the Attorneys General for Colorado, New Mexico, and Wyoming and by Special Counsel for Utah. This Protest stated:

"One of the principal purposes of the Compact is to protect the protesting States in respect to their present and future allocations against the acquisition of priorities that might be asserted against their basinal allocation by the States of the Lower Basin. It contemplates that Arizona, like California and Nevada, shall take her water, not out of the allocations made and to be made under the Compact to the Upper Basin, but out of those to the Lower Basin in which she belongs. Arizona, by not ratifying the Compact, denies and repudiates the inter-basinal division of the water made by the Compact and thereby questions the legal effect of water appropriations made and to be made in the protesting States of the Upper Basin, as against water appropriations made and to be made within her own limits. (p. 6.)

". . . .

". . . [T]hese protesting States would have no objection to Federal aid to water projects in Arizona if, as a condition precedent to the operative effect of such aid, that State, with the consent of the Congress which is now in session, would enter into an inter-state agreement with the other six States whereby she would become a signatory to the Compact, or, if, with the consent of the Congress, she were to enact a Self Limitation Act whereby she would contract with the United States for the benefit of the other Colorado River States, and each thereof, that her interests and rights in the Colorado River System should be bound by the Compact. . . ." (p. 10.)

For further protest by Upper Basin Representatives see 80 CONG. REC. 9388-89 (1936) and testimony of official representatives from Colorado, New Mexico, Utah, and Wyoming, before Subcommittee of House Committee on Appropriations, on Interior Department Appropriation Bill for 1938, Hearings, Part II, pp. 1807-43 (1937).

Even were it not for the 1931 decision, there could be no colorable argument for the proposition that the Compact's rights or obligations run to a non-signatory State. If the Compact protects the Upper Basin's apportionment against Arizona's appropriations, although Arizona is not a party, it could do so also against appropriations by California and Nevada if neither State had ratified the Compact. The Upper Basin could have negotiated an effective compact for the Colorado River Basin without the concurrence of any Lower Basin State.

Were the Colorado River Compact a contract between individuals, it is clear that all six original parties would be necessary to any decision as to whether a seventh had been added. (See California Defendants' Reply Brief, pp. 32-4.) If the curious anomaly of a six-state compact in the Lower Basin, a seven-state compact in the Upper Basin, and a six-and-one-half state compact for New Mexico and Utah is to be avoided, all the signatory States are necessary parties in a suit which must decide this issue.

B. The Special Master's determination that the "Upper Basin States could not sue as beneficiaries of the California Limitation Act," is patently erroneous and deeply affects the absent States as well as California (Report, p. 45)

The California Limitation Act, in conformity with the first paragraph of Section 4(a) of the Boulder Canyon Project Act, in express terms recites that the State of California "agrees irrevocably and unconditionally with the United States

and for the benefit of the States of Arizona, *Colorado,* Nevada, *New Mexico, Utah,* and *Wyoming* as an express covenant and in consideration of the passage of the said 'Boulder canyon project act' [emphasis supplied]" to limit her uses in California of Colorado River System water. The Limitation Act and the Boulder Canyon Project Act thus constitute a compact between California and the United States. Precedent for such a compact between a state and the United States, embodied in reciprocal legislation, is ample.* *Stearns* v. *Minnesota,* 179 U.S. 223, 248 (1900); *Neil, Moore & Co.* v. *Ohio,* 3 How. 720 (U.S. 1845); *Searight* v. *Stokes,* 3 How. 151 (U.S. 1845). See THURSBY, INTERSTATE COOPERATION 51 (1953). To distinguish this compact from the Colorado River Compact the California defendants have referred to it in their briefs and pleadings as the Statutory Compact.

Arizona sues California on an alleged breach of the Statutory Compact and to enforce her claimed rights thereunder. (Arizona Complaint, pars. XXVI, XXVII, pp. 28-29.) The California defendants deny any breach of that Compact, and further assert that if the Colorado River Compact has been effectively ratified by Arizona (as Arizona contends) all obligations to the six beneficiary States under the Statutory Compact are at an end. A seven-State Colorado River Compact, or a six-State Colorado River Compact plus the

* The Colorado River Compact also became effective through reciprocal legislation modifying Article XI which calls for seven-State ratification.

California Limitation Act, we contend, are mutually exclusive alternatives.

On every principle of necessary parties, this issue requires joinder of the absent States. If California's obligation under the Limitation Act is broken as to one State, it is broken as to all. If Arizona's ratification of the Colorado River Compact terminated California's obligation under the Limitation Act, that obligation is terminated as to every state in the Colorado River Basin. The reason for the rule which universally makes joint obligees necessary (and, where relevant, indispensable) parties is to protect obligors from the harassment of multiple suits and possible inconsistent decrees. The difficulties of interstate litigation provide even more reason for affording the protection of this rule to a state sued by one of several joint obligees than to a private party who might be similarly sued on such an obligation.

The Special Master denies neither the statement of the rule nor its application to states. Rather, he reads four of the six joint obligees out of the Statutory Compact by finding that they cannot sue on California's obligation. Never before, so far as we know—and certainly not in this litigation—has such a proposition been asserted.* The

* Even the Special Master wavers in adhering to his determination that the absent States *cannot* sue when he asserts, later in his Report, that "there is no reason to fear that they may institute an action based on the California Limitation Act." (Report, p. 58.) As we shall demonstrate later in this portion of the brief, this latter assertion is equally incorrect.

Special Master's determination of itself adversely and materially affects the absent States. Moreover, we believe it is patently erroneous.

Doubt that the Special Master's determination will be sustained, either in this suit or later litigation, is based on the following reasons:

(1) Considered as a contract, the Statutory Compact bears on its face the clear and unmistakable evidence of an intent to confer rights on the States as third-party beneficiaries.

(2) Considered as a federal and a state statute, the Statutory Compact should be construed, if possible, to give some meaning and operative effect to every term.* The conclusion that the absent States have no rights under the Statutory Compact renders meaningless terms in that Compact which name the "states of Arizona, *Colorado,* Nevada, *New Mexico, Utah,* and *Wyoming,*" as beneficiaries of its covenants [emphasis supplied].

(3) The provision of the Statutory Compact which limits California to the use of one-half the "excess or surplus" waters unapportioned by the Colorado River Compact concerns the absent

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*". . . No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, § 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." ' [citation.]" Ex parte *Public National Bank,* 278 U.S. 101, 104 (1928).

States. Such "excess or surplus" includes the surplus subject, under Articles III(f) and III(g), to apportionment by a post-1963 compact if all the present signatory states are able to agree.* This surplus is, in the words of Article VI of the Colorado River Compact, "waters of the Colorado River System not covered by the terms of this compact." Subject to a possible later compact, the Colorado River Compact, we contend, left these waters available to appropriation and use by any of the Colorado River Basin States. As to this surplus water, "separation of basins made by Article I of the Colorado River Compact," to which the Special Master refers (Report, p. 45), has never taken place.

Apparently the Special Master's conclusion that the absent States cannot sue on the Limitation Act is based on inadvertence in overlooking the provision of the Limitation Act which applies to "excess or surplus."

The probability that the Special Master overlooked this second part of the Limitation Act is

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* Article III(c) of the Colorado River Compact defines surplus which is available for Mexico as water "over and above the aggregate of the quantities specified in paragraphs (a) and (b)" of Article III. California contends that the "*excess or surplus* waters unapportioned by said [Colorado River] compact" to which California is entitled under the Statutory Compact includes but is not limited to Article III(c) "*surplus*," and that the balance of such "*excess* or surplus waters" is that referred to by Article III(b). California has a right to use, not one-half of each component, but one-half of the aggregate of both components of "excess or surplus."

strongly suggested by his misreading contentions of the California defendants:

> "It is argued, too [by the California defendants], 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." (Report, pp. 57-58.)

The California defendants have made no such argument. In affirmative defenses California has asserted rights to use not less than 5,362,000 acre-feet per annum, all within the Limitation Act.

(4) The legislative history of the Boulder Canyon Project Act makes abundantly clear that the California Limitation Act provision was inserted in the Project Act at the insistence of representatives of the absent States.* The express purpose

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* S. REP. No. 592, 70th Cong., 1st Sess. at p. 4 (1928), majority report to accompany S. 728 (Boulder Canyon Project Bill), contains this explanation of the first version of the provision which gave rise to the Statutory Compact:

> "The amendment on page 6, line 9, provides that the Secretary shall not make contracts for use in California for an aggregate amount of water exceeding 4,600,000 acre-feet per year, and one-half of the surplus or excess water. This amendment, like numerous other provisions of the bill, is designed to give further assurances to the various States, particularly those in the upper basin, against any undue advantages or rights to California."

For the full legislative history of Section 4(a), see H. Doc. No. 717, 80th Cong., 2d Sess., p. 55, n.14 (1948).

was to protect those States against the possibility that California would appropriate all the water permitted the Lower Basin under the Compact, and that Arizona, not a party to the Compact, would invade the Upper Basin's apportionment, as this Court held in *Arizona* v. *California,* 283 U.S. 423 (1931), she was free to do. If Arizona is held in this suit not to be a party to the Compact, the situation is no different in this respect today from that which was contemplated when the Boulder Canyon Project Act was passed. To hold that the absent States have no rights under the Statutory Compact would thwart the legislative purpose that brought it into existence.

In the light of the legislative history of the Statutory Compact, in the light of its purpose, and in the light of its unambiguous and unmistakable language, we feel that the Special Master's determination that it gives the absent States no rights is clearly wrong. That, however, is not the issue posed by these exceptions. Unless the Special Master is so clearly right in his determination that no other view merits a hearing, issues under the Statutory Compact clearly compel joinder of the absent States.

IV.

THE SPECIAL MASTER ERRED IN FAILING TO RECOMMEND JOINDER OF THE FOUR STATES OF COLORADO, NEW MEXICO, UTAH AND WYOMING AS NECESSARY PARTIES TO THIS SUIT BECAUSE COMPLETE RELIEF CANNOT BE AFFORDED AMONG THE PRESENT PARTIES WITHOUT A DETERMINATION OF

(A) THE RIGHTS OF THE ABSENT STATES UNDER THE COLORADO RIVER COMPACT TO THE USE OF WATERS OF THE COLORADO RIVER SYSTEM AVAILABLE TO THE "UPPER BASIN;"

(B) THEIR OBLIGATIONS UNDER THAT COMPACT AS "STATES OF THE UPPER DIVISION;" AND

(C) THEIR INTERESTS IN THE WATERS OF THE COLORADO RIVER SYSTEM WHICH ARE NOT COVERED BY THE COLORADO RIVER COMPACT

THE SPECIAL MASTER ERRED IN FINDING THAT THE COLORADO RIVER COMPACT, IN TERMS, PROHIBITS THE JOINDER OF THE STATES OF THE UPPER DIVISION IN THIS SUIT

The Special Master has erred in his fundamental conception that the Colorado River Compact divides the Colorado River System into two parts as a political boundary might be drawn between two states. This leads to the erroneous conclusion that the present controversy relates exclusively to "water allocated to the Lower Basin" (Report, p. 35), a phrase impossible even to define without resolving issues of construction of the Colorado River Compact.

The Special Master apparently believes that the Colorado River System can be, and, by the Colorado River Compact has been, divided into

two unrelated and "independent" parts, that is, an Upper Basin and a Lower Basin, so that the determination of rights and obligations of water users in one basin can be made without affecting the rights and obligations of the water users in the other. In fact, the Special Master compares the situation to that in which territories are divided between sovereigns. (Report, p. 35.) On this premise, he concludes that "The only part of the Colorado River System involved here . . . is the Lower Basin," for the Compact "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." (Report, pp. 48, 35.) This concept of a complete separation, as though these were separate river systems, is a fundamental error running through the entire report.*

Even were the Special Master correct in treating the Colorado River Compact like a division of territory, he is in error that this precludes joinder, since the controversy among present parties centers on the size or amount of "territory"

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* At page 9 of his Report the Special Master quotes a statement on the "division into two Basins" which he attributes to Hon. Carl Hayden, Representative from Arizona. It is in fact part of a reply by Hon. Herbert Hoover to a questionnaire submitted by Mr. Hayden. See 64 CONG. REC. 2710-13 (1923) reprinted in H. Doc. No. 717, 80th Cong., 2d Sess., pp. A31-A43 (1948). The paragraphs quoted by the Special Master should be read in relation to the other twenty-five questions which Mr. Hoover was answering.

allocated to present parties as against the Upper States. For example, in a suit over a boundary described as the "center of the river" it would be impossible to say that the meaning of "center of the river" is for the state on each side of the river to determine for itself, as the Special Master says of the issue over meaning of "beneficial consumptive use" in the Colorado River Compact. (Report, p. 52.) Territorial dispositions are the frequent subject of controversy, as the interstate boundary cases in this Court show. See cases collected, Annot., 74 L. Ed. 784, 786-87 (1930). The fact, however, is that the Special Master erred in treating the Colorado River Compact as an instrument which divides geographical territory.

A related error, which reappears through the report, is the confusion between *flow* and *consumptive use* of water; *e.g.,* between the obligations of the States of the Upper Division, stated in Article III(d), not to deplete the *flow* at Lee Ferry below 75,000,000 acre-feet in each decade, and the apportionment of the beneficial consumptive *use* made by Article III(a) to the Lower Basin from the Colorado River System, which includes, by definition, the tributaries. He treats flow and use as identical. (Report, pp. 55, 61.) This is a fundamental misinterpretation of the Compact, as demonstrated in Part IV, Section A, page 56.

The confusion between flow and use also involves confusing Basins and Divisions. States of the

Upper Division are Colorado, New Mexico, Utah and Wyoming (Article II(c)). States of the Lower Division are Arizona, California and Nevada (Article II(d)). Colorado and Wyoming have areas in the Upper Basin only (Article II(f)). California and Nevada have areas in the Lower Basin only (Article II(g)). Arizona, New Mexico and Utah have areas in both Upper and Lower Basins. (See map (Plate I) inside front cover.) Delivery obligations and obligations not to withhold water are imposed by the Compact exclusively on the States of the Upper Division (Articles III(c), III(d), and III(e)). Rights to beneficial consumptive use are conferred exclusively on Basins (Articles III(a) and III(b)). Flow and use of water cannot be treated as equivalent without ignoring this distinction between Basins and Divisions as the Special Master does in twelve different places at which he refers to Basins delivering or withholding water. (Report, pp. 12, 13 (two places), 41, 45, 49 (two places), 50, 55, 56, 58, 61.) We submit that this confusion reflects not inadvertent inaccuracy of expression, but a failure to grasp the fundamental nature of the Compact.

Rights to the use of water flowing in a stream system must be distinguished from rights to land which may be subject to a territorial division by agreement on a boundary line. Under the law of prior appropriation generally applicable among the Western States, a prior appropriation on the lower reaches of a stream constitutes a valid right

to the use of water from the stream as against junior appropriators upstream. *Wyoming* v. *Colorado,* 259 U.S. 419 (1922), which accentuated the demand of the States of the upper Colorado River for a compact because of expanding uses in California and Arizona on the lower river, applied this doctrine of "first in time, first in right" on an interstate stream regardless of state lines. This law of prior appropriation, except to the extent superseded by the Compact, still governs. Hence, with respect to waters not covered by the Compact, it is clear that there can be no "boundary line" territorial division of the river system, for the waters originating in the upper River are directly affected by rights established by Lower Basin uses.

The Special Master correctly perceived that the Colorado River Compact, to the extent of the use of the water covered thereby, cut across the principle of priority of appropriation and preserved to the Upper Basin and the Lower Basin respectively rights in perpetuity to make future appropriations and use of water valid as against appropriations and uses which otherwise would be prior in time, and hence prior in right, in the other Basin. The Special Master erred, however, in failing to see that the heart of the present controversy concerns (a) the extent and amount of rights the Lower Basin acquired against the Upper under the Compact; (b) the amount of water the Upper Division States are obligated to deliver to the Lower Basin at Lee Ferry; and (c) rights

to the use of water not covered by the Compact. An analysis of these issues in controversy demonstrates the impossibility of dividing the present River System under the Compact into two separate and unrelated parts.*

A. The relief, essentially declaratory in nature, which Arizona asks with respect to three interpretations of the Colorado River Compact, affects the rights of the absent States under the Colorado River Compact

Arizona's Complaint (Par. XXII, pp. 25-26) poses three questions of interpretation of the Compact upon which, in effect, she asks declaratory relief. They are:

> "How is beneficial consumptive use to be measured?"
>
> "Is the water referred to and affected by Article III (b) of the Colorado River Compact apportioned or unapportioned water?"
>
> "How are evaporation losses from Lower Basin main stream storage reservoirs to be charged?"

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* The physical facts alone indicate the interrelationship of the Basins. Water physically available to the Lower Basin and Mexico originates in large part (80%) in the Upper Basin. Most of the water passing the division point will ultimately be return flow of water which has been diverted and re-diverted at several thousand points of diversion on the main stream and tributaries in the Upper Basin. R. J. Tipton, Report on Water Supply of Colorado and Allied Matters to the Upper Colorado River Basin Committee 25 (1938), excerpt reprinted in *Hearings Before a Subcommittee on Irrigation and Reclamation of the House Committee on Public Lands on H.R. 934 and H.R. 935,* 81st Cong., 1st Sess. at 1175 (1949).

The Special Master ruled, in effect, that however these questions may be answered in the final decree, the answer will not affect the Upper States. We think he is in error, for the reasons stated below.

1. *The definition of "beneficial consumptive use" under the Compact vitally affects the absent Upper Basin States.*

The Colorado River Compact uses the phrase "beneficial consumptive use" in two places and only two: in Article III(a) to apportion in perpetuity the beneficial consumptive use of 7,500,000 acre-feet of water per annum respectively to the two Basins, and in Article III(b) to permit the Lower Basin to increase its beneficial consumptive use by 1,000,000 acre-feet of water per annum. Thus, under the Compact, the sole significance of the term "beneficial consumptive use" is to establish *inter*-basin rights of the two Basins with respect to each other.

Arizona in the fifth paragraph of her prayer for relief asks that

> "A decree be entered herein recognizing, confirming and establishing that the beneficial consumptive use of water apportioned by the Colorado River Compact be measured in terms of stream depletion." (Complaint, pp. 30-31.)

Arizona asserts (Complaint, par. XXII, p. 26) that under the Colorado River Compact, "bene-

ficial consumptive use is measured in terms of main stream depletion, that is, the quantity of water which constitutes the depletion of the stream by the activities of man. . . . Water salvaged by man is not chargeable as a beneficial consumptive use."

California alleges (Answer to Arizona's Complaint, par. 8, pp. 11-12) to the contrary that "beneficial consumptive use" means the quantity of water actually consumed, at place of use, as defined in Section 4(a) of the Boulder Canyon Project Act ("diversions less returns to the river"), and in Article 1(j) of the Mexican Water Treaty (" 'Consumptive use' means the use of water by evaporation, plant transpiration or other manner whereby the water is consumed and does not return to its source of supply. In general it is measured by the amount of water diverted less the part thereof which returns to the stream.").

This treaty definition has basin-wide application. Article 10 of the treaty authorizes reductions in the guaranteed delivery to Mexico, in the event of extraordinary drought or serious accident, "in the same proportion as consumptive uses in the United States are reduced."

Nevada says (Petition of Intervention, par. XVIII, p. 20) in substance, that the rule of "diversion less return flow" applies generally subject to an exception in favor of the "main stream depletion theory" on certain tributaries, and that no

debit should be made for the use of salvaged water on the main stream in the Lower Basin.*

The Special Master finds that this issue does not warrant joining the Upper Basin States 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; . . . ." (Report, p. 52.)

These findings by the Special Master show a fundamental misconception of the controversy before the Court.

A decree determining how beneficial consumptive use shall be measured, limited to the Lower Basin,

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* The four absent States, in the Upper Colorado River Basin Compact, have provisionally agreed upon a fourth method whereby "beneficial consumptive use" under Article III(a) of the Compact is measured by the "inflow-outflow method in terms of man-made depletions of the virgin flow at Lee Ferry." But they reserve the right to change this method by unanimous agreement of their Upper Basin Compact Commission (Article VI). Arizona is a party to that Compact but is not represented on that Commission (Article VIII). The decree here sought by Arizona would "freeze" the definition of consumptive use throughout the Colorado River Basin.

is not the relief Arizona asks, and is not the issue in this suit. Rather, Arizona asks for a determination of the method of measurement under the Colorado River Compact, and the Compact uses the term only in establishing rights *between* Basins.

The heart of the dispute is not how to divide up a "known" quantity of water available to the Lower Basin under the Compact, as the Special Master assumes, but the more basic question of how much water the Lower Basin is entitled to under Articles III(a) and III(b), against the Upper Basin. The Court must determine how much water is legally available to the Lower Basin before it can decide the rights of the individual States in that water.

The issue is somewhat as though a syndicate of buyers bought 7,500,000 tons of ore from a syndicate of sellers, to be delivered over a period of time, but without defining the word "ton." As the ore begins to arrive, one of the buyers demands his share from the other buyers in long tons of 2240 pounds; the other buyers object, saying the seller's obligation is in short tons of 2000 pounds, and that the buyers' shares are to be computed in short tons. The discontented buyer sues his partners, asking that the term "ton," in their contract of purchase from the sellers, be defined as a "long ton of 2240 pounds," but he fails to join the sellers in the suit. Of course, the weight of a long ton and of a short ton can be "interpolated," but that is not the question. The question is, what is the sellers' obligation to the buyers: 7,500,000 long tons or 7,500,000

short tons? And how can this be determined in a suit among the buyers alone? Moreover, suppose that without such a determination of the term between buyer and seller, the discontented buyer persuades the court that a decree can be entered quieting title in one of them to 2,800,000 *long* tons, but in a later suit, the sellers establish that their obligation is in short tons? Is this an equitable position in which to leave the buyers, as among themselves?

Even this analogy vastly oversimplifies the problem involved in this suit. Long tons and short tons can be "interpolated." Beneficial consumptive use under the various methods urged by the present parties, and the provisional method used by the Upper Basin, cannot be "interpolated." There is fundamental disagreement not merely over method of measurement, but over what is to be measured. By no conceivable mathematical formula can the various methods, or any two of them, be translated one to the other. California contends that beneficial consumptive use means consumption at the site of use, and is there measured. The other three formulas involve computing the depletion of the estimated "virgin flow" of the main stream caused by the use in question. But water uses from different tributaries deplete the main stream in different proportions, depending on the tributary, its flow, and the season at the time uses are made. Uses from a single tributary affect the main stream differently depending on whether they take place near the headwaters of the tributary or near the main stream.

Arizona prays that "Its title to the annual beneficial consumptive use of 3,800,000 acre-feet of the water apportioned to the Lower Basin by the Colorado River Compact* be forever confirmed and quieted . . . ." (Complaint, p. 30.) But these same uses by these same farms and cities, measured at the site of use, exceed 5,000,000 acre-feet. The measurement by "stream depletion" of the 8,500,000 acre-feet per annum allocated by the Compact to the Lower Basin by Articles III(a) and III(b) would enable the Lower Basin to balloon its right to over 10,500,000 acre-feet of true consumptive use, measured by actual consumption at the site of use. This is the result of Arizona's contention that no accounting need be made for the use of waters salvaged by the activities of man, if such waters would be lost in a state of nature.

To which of these quantities is the Lower Basin entitled, as against the Upper?

Irrespective of the inherent unworkability of the Special Master's ruling that allows each Basin to determine the amount of its rights against the other Basin under Article III(a) through its own method of measurement, the Upper States are directly affected by the resolution of the issue in

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* Alleged, in par. XVII, p. 21 of the Complaint, to consist of 2,800,000 acre-feet out of the 7,500,000 acre-feet apportioned by Article III(a) and 1,000,000 acre-feet "apportioned" by Article III(b), the former being identified with the main stream and the latter (Reply, par. 8, p. 17) being identified with the Gila River.

the Lower Basin alone. For if Arizona's method of measurement prevails, and the Court grants the fifth paragraph of her prayer (Complaint, pp. 30-31), approximately 1,000,000 acre-feet of the over 2,000,000 acre-feet of uses on the Gila, even though they may be "rights which may now exist" within the meaning of Article III(a), will not be chargeable under the Compact to the Lower Basin's allocations. This directly affects the Upper Basin States, for if the Lower Basin may use water without a corresponding charge against the Basin allocation, the total surplus waters of the River System, available in part for satisfaction of the Mexican obligation of both Basins under Article III(c), and the subject of a future apportionment by an interstate compact after 1963 among all the States under Articles III(f) and III(g), are thereby directly reduced in a corresponding amount.

The Upper States are sensitive to this effect upon the "surplus," and hence upon their obligations under Article III(c). The statement of W. J. Wehrli, then Special Counsel for Wyoming (2 Official Record, UPPER COLORADO RIVER BASIN COMPACT COMMISSION, Proceedings of July 8, 1948, pp. 58-60), is illustrative:

> ". . . I believe no one can assume that you can construe the term, 'beneficial consumptive use', in Article III(a) of this Compact as meaning depletion at Lee Ferry for the Upper Basin without at the same time construing it as meaning depletion at the International

Boundary for the Lower Basin. I don't believe that it will be possible to accept one construction for the Upper Basin and have a different one apply in the Lower Basin. Ultimately probably this question will reach the Supreme Court of the United States. And I am inclined to the view that whatever is determined by that court will be something that is determined for both the Upper and the Lower Basin.

"Coming then to the question of whether or not this may be an entirely unmixed blessing, the figure has been given that by construing the Colorado River Compact as depletion at Lee Ferry, the Upper Basin will enjoy an additional 400,000 acre-feet of water at the site of use. Our Engineering Committee has not worked out the relative figure for the Lower Basin, at least it has not inserted it in any report, but I understand the Committee has agreed that under such an interpretation the Lower Basin will acquire at the site of use an additional amount of water of 2,150,000 acre feet.

"So that while the construction of depletion at the lower end of the Basin will permit the Upper Basin to use an additional amount of 400,000 acre feet of water at the point of use, the same construction applied to the Lower Basin will permit in the Lower Basin the use of 2,150,000 acre feet, which of course is not an exact figure any more than the 400,000 at site of use in the Upper Basin."

". . . .

"In order to make Wyoming's position in this matter entirely clear we do not propose

> to have anything adopted or inserted in the compact that will adopt one theory to the exclusion of the other. We see no necessity for it. The Upper Basin States will get the amount of water to which they are entitled under the Colorado River Compact regardless of what we say about it in this compact or what may be said by anyone else in the negotiation for this compact. The Supreme Court of the United States at some time will probably say what the Colorado River Compact means, and when that has been said, then we will know which of these theories has been adopted."

The Special Master attributes to "the opponents of the Motion" the statement that "whatever decision is made of this problem [measurement of beneficial consumptive use] the Upper States will follow it." (Report, pp. 51-52.) Neither in briefs nor in oral argument did counsel for the absent States take such a position.

The meaning and method of measurement of beneficial consumptive use under the Colorado River Compact are at issue in this suit. The issue is unavoidably an issue between Basins since the Compact uses the term for establishing rights *in perpetuity* between Basins. Arizona is seeking a declaration of the meaning of that term. The question is not whether anyone, either in the Lower Basin or Upper, is "fully performing." The Special Master, in this instance, has in effect recommended dismissal of that portion of the

complaint and the other pleadings which call for a determination.

Such dismissal, at this stage of the proceedings is improper; dismissal of this issue would make impossible the judicial resolution of other issues in the controversy.

2. *The Upper Basin States are affected by the issue of whether Article III(b) constitutes an apportionment to the Lower Basin of an additional 1,000,000 acre-feet per annum or whether the Lower Basin's right thereto is dependent upon appropriation and use.*

Article III(b) of the Compact provides that:

> "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 [of the Colorado River System] by one million acre-feet per annum."

At issue in this case is the question of whether this paragraph constitutes an apportionment in perpetuity to the Lower Basin as against the Upper, as Arizona contends,* or whether the

* The real issue is not whether the Compact "apportioned" III(b) water to the Lower Basin, but whether Congress in enacting the Boulder Canyon Project Act, by failing to mention Article III(b) specifically in the proposed limitation, intended to exclude California from sharing in Article III(b) uses under its Limitation Act, whether "apportioned" by the Compact or not. The legislative history is clear that Congress did not so intend. (See H. Doc. No. 717, 80th Cong., 2d Sess., p. 55 n.14 (1948).)

Lower Basin's right thereto as against the Upper is dependent upon appropriation and use, as California contends,* the unused portion becoming available for possible future apportionment between the two Basins under Article III(f).

Arizona seeks to quiet title to the 1,000,000 acre-feet of Article III(b) uses in herself as "apportioned" by the Compact. (Complaint, par. XVII, p. 21.) California alleges that the language of Article III(b) does not constitute an apportionment to the Lower Basin, which remains good in perpetuity against the Upper Basin regardless of non-use, as does the apportionment made in Article III(a), but that the "right to increase its use" given the Lower Basin becomes effective only as rights are established to such increase of use in that Basin, by appropriation or contracts with the United States for the use of water stored by the United States in Lake Mead, that only upon the establishment of such rights by appropriation or otherwise and not until then, does the right become vested in the Lower Basin (Answer to Arizona's Complaint, par. 9, p. 13); and that the first million acre-feet so committed in excess of 7,500,000 in any year, throughout the

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* The Special Master twice misstates California's contention, saying (p. 55), "The California parties maintain that the use of this water is subject to *apportionment* and use" and (p. 56) "solely dependent upon *apportionment* and use, as is contended by the California defendants." (Emphasis supplied.) Our position is just the reverse. We think he meant to say "appropriation."

Lower Basin, is covered by this permission.* It follows that if such rights have not been exercised by the time the Upper Basin becomes entitled under Articles III(f) and III(g) to seek a further apportionment, the uncommitted portion of this million acre-feet becomes available for further apportionment upon demand of the Upper

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* Nevada takes yet a third position and prays that "this . . . Court enter its judgment and decree, that the additional one million acre-feet of water set forth and provided in Article III(b) . . . is water apportioned to the Lower Basin, and be subject to use only when all the Lower Basin States shall have by authoritative Compact or Agreement increased the beneficial consumptive use in said Basin as provided in said Article III(b) . . . ." (Petition of Intervention, Prayer 3, p. 25.)

The Special Master twice misstates the Nevada contention:

(1) "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) [III(b)?] 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)." (Report, p. 22.)

(2) "The State of Nevada maintains that this water [specified in Article III(b) of the Compact] may not be used until 1963." (Report, p. 55.)

In fact the compact or agreement which Nevada says is necessary to bring Article III(b) into operation is a Lower Basin Compact which may be executed at any time. It is not the Compact on or after October 1, 1963, among all signatories to the Colorado River Compact, which Articles III(f) and III(g) contemplate may apportion surplus water between basins. See Transcript, Oral Argument on Joinder Motion, pp. 141, 361-3.

Basin, as a part of the waters unapportioned by the Colorado River Compact.*

The Special Master gives three grounds for concluding that the absent States have no interest in the resolution of this issue, all of which are insufficient to preclude joinder. He first concludes that the absent States should not be joined because "insofar as [this issue] 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." (Report, p. 56.) It is difficult to ascertain exactly what the Special Master means here. Perhaps he meant to say *Lower* Basin, but if so he missed our point. The question of whether 1,000,000 acre-feet of Article III(b) uses are considered "apportioned" to the Lower Basin as against the Upper under the Colorado River Compact, and thereby valid in perpetuity as

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* See Report of Delph E. Carpenter, Compact Commissioner for Colorado, to the Governor of Colorado, December 15, 1922; 70 CONG. REC. 577-586 reprinted in H. DOC. No. 717, 80th Cong., 2d Sess., p. A81 (1948):

> ". . . a permissible additional development in the lower basin to the extent of a beneficial consumptive use of one million acre-feet, was recognized in order that any further apportionment of surplus waters might be altogether avoided or at least delayed to a very remote period. *This right of additional development is not a final apportionment.* This clause does not interfere with the apportionment to the upper basin or with the right of the States of the upper basin to ask for further apportionment by a subsequent commission." (Emphasis supplied.)

against the Upper Basin, clearly strikes to the heart of *inter*-basin rights under the Compact.

Second, the Special Master finds no effect on the Upper States because: "inter-basin apportionment is to be considered in 1963, at the earliest; it is not feasible to decide questions before they arise." (Report, p. 56.) However, Arizona has called upon the Court to determine that under the Colorado River Compact, the 1,000,000 acre-feet of Article III(b) uses are "apportioned" to the Lower Basin, and seeks to forever quiet title to this water *now*. The Special Master admits that this is a question "raised by the pleadings on the merits of this cause" which must be "resolved on final hearing." (Report, p. 51.) If the determination sought by Arizona were made, the rights of the Upper Basin States would be immediately affected by the present removal of this 1,000,000 acre-feet from any possible future allocation. In view of this the Special Master's third conclusion that "regardless of whether or not this apportionment by Article III(b) is one in perpetuity or solely dependent upon apportionment [*sic*] and use, as is contended by the California defendants, the absent States have no present interest in it" (Report, p. 56), seems clearly erroneous. Under the Special Master's reasoning there would be no interest in or harm to an absent remainderman in a suit to declare a devise invalid, on the ground that until the death of the life tenant, the remainderman could have no interest in the litigation. The Upper States, like contingent

remaindermen, have an immediate interest in the present resolution of the issue, and should be joined as necessary parties. *Wilson* v. *White,* 109 N.Y. 59, 15 N.E. 749 (1888).

3. *The absent Upper States are affected by the issue whether reservoir evaporation losses in the Lower Basin are to be charged to "surplus" waters in excess of the quantities specified in Articles III(a) and III(b), or whether these losses are to be charged to the Lower Basin III(a) apportionment.*

Arizona contends that main stream reservoir losses in the Lower Basin are to be charged to uses apportioned by Article III(a) of the Compact, as between Arizona and California. (Reply to California's Answer, p. 50.)* Nevada, on the other hand, contends that:

> "evaporation losses of water from storage reservoirs on the main stream of the Colorado River in the Lower Basin are first chargeable out of excess or surplus water and that such evaporation losses are not chargeable against Article III(a) or III(b) waters unless and until all such available excess or surplus water is exhausted in any given year." (Petition of Intervention, par. XVIII, p. 21.)

The quantities of reservoir evaporation losses involved in the whole Lower Basin are of the

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* The Special Master paraphrases the prayer appearing at p. 31 of the Complaint. (Report, p. 19.) Actually Arizona amended her prayer in her reply to our answer.

order of 1,100,000 acre-feet per annum. The Upper States are affected by this issue, for if the reservoir losses in the Lower Basin are charged to surplus waters, it will automatically reduce (1) the quantity of such water available to satisfy the Mexican Treaty obligation before the States of the Upper Division are called on to make additional deliveries under Article III(c), as well as (2) the surplus available for future apportionment under Article III(f) and (g), in which all seven States of the Colorado River System have an undivided common fund interest.

The Special Master ruled that this issue does not affect the Upper States because:

> "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."* (Report, p. 52.)

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* The Special Master's determination that the Upper Basin cannot be charged with reservoir evaporation losses occurring in the Lower Basin seems especially unfair with respect to exclusively federal claims such as the Mexican Treaty. The Mexican Treaty of 1944 guarantees to Mexico "from any and all sources" an annual quantity of 1,500,000 acre-feet of water per year at the International Boundary. To meet

The Special Master begs the question when he states that the "water delivered at Lee Ferry to the Lower Basin has been *specified as to quantities*" part of which he identifies as including the quantity specified "to meet any possible deficiency in the supply to the Republic of Mexico." (Emphasis supplied.) Such "quantities" cannot be "specified" until there has been a resolution of issues, such as this issue over chargeability of reservoir losses in the Lower Basin. How reservoir losses are charged directly affects the "buffer" of surplus available for Mexico insulating the four absent States of the Upper Division against the liability for additional specified deliveries to satisfy the Mexican Treaty burden. The absent Upper States are therefore directly concerned with the resolution of this issue.

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this obligation, the Treaty provided for the construction of Davis storage dam and reservoir on the main stream. To charge the Lower Basin with all reservoir losses incidental to meeting this obligation of the entire River System is manifestly unwarranted. Also unwarranted is charging the Lower Basin with channel losses incidental to the flow of water which Article III(c) of the Compact requires the States of the Upper Division to deliver at Lee Ferry, which must flow to the international boundary. So also with reservoir losses properly allocable to other federal functions, *e.g.*, flood control, navigation and power operations, none of which is related to consumptive uses in any State as such.

B. Arizona's suit to quiet title to the beneficial consumptive use of 2,800,000 acre-feet per annum from the main stream, as waters apportioned by Article III(a), directly involves the obligations of the States of the Upper Division to deliver water under Articles III(c) and III(d) of the Colorado River Compact

1. *Arizona's claimed title to 2,800,000 acre-feet per annum under Article III(a) from the main stream is dependent upon quieting title in the Lower Basin to the 75,000,000 acre-feet per decade delivered by the States of the Upper Division under Article III(d) as apportioned to the Lower Basin by Article III(a).*

Arizona prays to have her title quieted to the annual beneficial consumptive use of 3,800,000 acre-feet per annum, subject to the rights of Utah and New Mexico and subject to availability under the Colorado River Compact. (Complaint, p. 30.) She alleges that "Such quantity is made up of 2,800,000 acre-feet out of the 7,500,000 acre-feet apportioned to the Lower Basin by Article III(a) of the Compact plus the 1,000,000 acre-feet apportioned by Article III(b) of the Compact." (Complaint, par. XVII, p. 21.)

As to the 2,800,000 acre-feet from the main stream Arizona alleges:

> "Arizona has the right to the beneficial consumptive use of 2,800,000 acre-feet of water diverted from the main stream of the Colorado River either above or below Hoover Dam subject only to the rights of Utah and New

> Mexico as Lower Basin States."* (Reply to California's Answer, par. 41(1), p. 33.)

Her claim of title to 2,800,000 acre-feet per annum under Article III(a) from the main stream is spelled out as follows:

> "The 7,500,000 acre-feet of water per year apportioned to the Lower Basin by Article III(a) was and is within the water present in the main stream and measured at Lee Ferry, a point approximately 675 miles northerly and upstream from the confluence of the Gila River and the Colorado River." (Reply to Defendants' Answer, par. 8, p. 16.)

This 7,500,000 acre-feet, Arizona says, bears a "direct quantitative relationship" to the 75,000,000 acre-feet which Article III(d) requires the States of the Upper Division to let pass Lee Ferry in each 10-year period. (Reply, par. 11, p. 18.)

Article III(d) provides:

> "The States of the Upper Division will not cause the flow of the river at Lee Ferry to be

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* This concession to Utah and New Mexico is meaningless. The main stream does not touch either State in the Lower Basin. Their Lower Basin interests are in tributaries, primarily the Virgin River in Utah, the Gila in New Mexico.

Arizona apparently assumes that Utah's uses on the Virgin River, and New Mexico's on the Gila, will not be protected by the apportionment made by Article III(a). The water of these streams is never present in the main stream at Lee Ferry. So also with uses on the Bill Williams, Little Colorado, Muddy, and other streams which enter below Lee Ferry, and, on Arizona's theory, are not covered by either Article III(a) or Article III(b).

> 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."

Arizona also alleges that

> "The apportionment made by Article III(a) of the Colorado River Compact does not include and was not intended to include, any of the waters of the Gila River or its tributaries." (Reply, par. 8, p. 16.)

Arizona further alleges that "uses of the waters of the Gila River and its tributaries are chargeable to the apportionment made by Article III(b) of the Compact and are only chargeable to the apportionment made by Article III(a) of the Compact to the extent that such uses exceed 1,000,000 acre-feet of water per annum," (Reply, par. 8, pp. 16-17), and "Article III(b) relates solely to the waters of the Gila River and its tributaries."* (Reply, par. 9, p. 17.)

Arizona's allegations, identifying Article III(a) uses with Article III(d) main stream deliveries, and Article III(b) uses with the Gila, both of which California denies, are central to Arizona's case. Since she admits that California is entitled to 4,400,000 acre-feet of Article III(a) uses from the main stream (Complaint, p. 30) and

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* This contention that Article III(b) relates solely to the Gila was rejected in *Arizona* v. *California,* 292 U. S. 341, 358 (1934).

Nevada 300,000* (Reply, par. 63, p. 46), her claim to a residue of 2,800,000 acre-feet depends on the contention that all 7,500,000 acre-feet of the water for III(a) uses is found in the main stream. Without such allegations, Arizona's complaint would fail to state a cause of action to quiet title to the use of 2,800,000 acre-feet per annum under Article III(a) from the main stream.

If the Lower Basin is entitled to less than 7,500,000 acre-feet from the main stream under Article III(a), Arizona, on her own pleadings, is entitled to less than 2,800,000.

2. *If the deliveries by the States of the Upper Division under Article III(d) are all apportioned to the Lower Basin by Article III(a), they contain no "surplus" available for delivery to Mexico, and the States of the Upper Division are accordingly required by Article III(c) to increase their deliveries to supply one half of the Mexican deficiency.*

Article III(c) provides:

> "If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any

* Nevada denies this and asserts "the right to the beneficial consumptive use of 900,000 acre-feet of water per annum. The State of Nevada alleges that said 900,000 acre-feet of water consists of 539,100 acre-feet of the water apportioned to the Lower Basin by Article III(a) of the Colorado River Compact plus an equitable share in the water to be apportioned under Article III(b) and III(f) of the said Compact. . . ." (Petition of Intervention, par. VII, p. 13.)

> right to the use of any waters of the Colorado River System, such waters shall be supplied first from the waters which are *surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b)*; and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary *the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).*" (Emphasis supplied.)

Arizona's case leaves no surplus water either in (1) the Upper Division III(d) deliveries, or (2) in the Gila River, or (3) elsewhere in the Lower Basin, for satisfaction of the Mexican burden:

(1) *There is no surplus in the Article III(d) deliveries.* Under Arizona's view, the Article III(d) deliveries of 75,000,000 acre-feet each ten years are fully accounted for as apportioned to the Lower Basin by Article III(a).

(2) *There is no surplus on the Gila.* Arizona not only identifies the Gila River with Article III(b) of the Compact, but alleges that "When and if any curtailment of Lower Basin use is required to satisfy the Mexican right, then such curtailment must be of the use apportioned by Article III(a)." She "denies that the Gila River and its tributaries are subject to any obligations imposed by the Mexican Water Treaty." (Reply, par. 10, p. 18; compare par. 62, p. 45.)

(3) *There is no surplus anywhere else in the Lower Basin.* The inflow to the main stream from Lower Basin tributaries other than the Gila System is substantially offset by natural stream losses.* On Arizona's interpretation of "beneficial consumptive use," if these natural losses were salvaged, the consumptive use of the salvaged tributary inflow would not be chargeable, but would be used (like the more than 1,000,000 acre-feet salvaged on the Gila) in the States where salvaged, without accounting for that use at all.

Arizona concedes that

> "It is uncertain whether excess or surplus flows of the Colorado River unapportioned by the Compact will be adequate to satisfy the allotment of water to Mexico." (Complaint, par. XVI, p. 21.)**

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* See A. P. Davis, then Commissioner of Reclamation, "Answer No. 5" to Congressman Hayden's questionnaire, 64 CONG. REC. 2713-2717 (1923) reprinted in H. Doc. No. 717, 80th Cong., 2d Sess., p. A48 (1948). He states that mean flows during 1903-1920 at Lee Ferry and at Laguna Dam just above the mouth of the Gila are assumed to be substantially equal. More recent figures have been published by the United States Bureau of Reclamation, in H. Doc. No. 419, 80th Cong., 1st Sess., pp. 282-83 (1947). Based on data for the period 1897 to 1943, the report shows an average net inflow between Lee Ferry and a point above the mouth of the Gila of 180,000 acre-feet per annum.

** There is no uncertainty about it; on her theory in a quarter century of precipitation like 1930-54, there would be a deficit of one to two million acre-feet per year. See Plate II in Part V, Section C of this Brief, p. 119.

The States of the Upper Division, under Arizona's theory, would be obligated to increase their deliveries under Article III(c) in consequence of the fact that the 75,000,000 acre-feet delivered under Article III(d) contains no surplus for delivery to Mexico.

3. *California asserts that the Article III(a) apportionment to the Lower Basin includes uses under "rights which may now exist" on the tributaries, and that there is no identity between that apportionment and the Article III(d) obligation of the States of the Upper Division.*

Under California's interpretation of the Compact there is no identity between Articles III(a) and III(d). The deliveries under the latter include surplus available for delivery to Mexico. The Lower Basin cannot quiet title thereto as water the use of which is apportioned to that Basin.

California alleges (Answer to Arizona's Complaint, par. 11, p. 15) that "the quantity of 75,000,000 acre-feet specified in Article III(d) bears no quantitative relationship to the beneficial consumptive use of 7,500,000 acre-feet per annum apportioned to either the Upper Basin or Lower Basin by Article III(a);" that "Said apportionment [by Article III(a)] is from the waters of the entire Colorado River System, including the Gila

River and its tributaries,* and not merely from the virgin flow of the main stream" (*id.*, par. 8, p. 11); and that "Uses of the waters of the Gila River and its tributaries under rights which existed as of June 25, 1929, are chargeable first against the apportionment made to the Lower Basin by Article III(a) of the Compact. Such uses in Arizona as of that date aggregated not less than 2,000,000 acre-feet per annum." (*Id.*, par. 8, p. 12.)

As to Article III(b), California alleges (Answer to Arizona's Complaint, par. 9, p. 13): "The first million acre-feet of beneficial consumptive uses above 7,500,000 acre-feet per annum, wherever

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* See the Colorado River Compact: Analysis by Hon. Herbert Hoover, Chairman of the Colorado River Commission (Answer, Dated January 27, 1923, to Questionnaire submitted by Hon Carl Hayden, Representative from Arizona); 64 CONG. REC. 2710-13 (1923), reprinted in H. Doc. No. 717, 80th Cong., 2d Sess., p. A33 (1948):

> "*Question 4. Why was the term 'Colorado River system' used in paragraph (a) of Article III, wherein 7,500,000 acre-feet of water is apportioned to the upper and lower basins respectively?*
>
> "This term is defined in Article II as covering the entire river and its tributaries in the United States. No other term could be used, as the duty of the commission was to divide all the water of the river. It serves to make it clear that this was what the commission intended to do and prevents any State from contending that, since a certain tributary rises and empties within its boundaries and is therefore not an interstate stream, it may use its waters without reference to the terms of the compact. The plan covers all the waters of the river and all its tributaries, and the term referred to leaves that situation beyond doubt."

such uses in the Lower Basin may occur, are encompassed by Article III(b), and said Article III(b) does not relate solely to waters found flowing in the Gila River or any other specific portion of the Lower Basin.''*

Thus, upon California's interpretation, the 75,000,000 acre-feet delivered each decade by the States of the Upper Division under Article III(d) is not water apportioned to the Lower Basin by Article III(a), but contains, in addition to water available for the ''increase of use'' permitted the Lower Basin by Article III(b), substantial quantities of water which are surplus to the quantities specified under Articles III(a) and III(b) and hence available for delivery to Mexico before either Basin is required by Article III(c) to contribute to the deficiency in the Mexican supply. It may amount to several million acre-feet in each decade.

4. *The Special Master's assumption that the obligation of the States of the Upper Division under Article III(d) is identical with the apportionment under Article III(a) to the*

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* See Hoover Analysis in response to Hayden Questionnaire cited in footnote at p. 81, *supra:*

> ''*Question 6. Are the 1,000,000 additional acre-feet of water apportioned to the lower basin in paragraph (b) of Article III supposed to be obtained from the Colorado River or solely from the tributaries of that stream within the State of Arizona?*
>
> ''The use of the word 'such waters' in this paragraph clearly refers to waters from the Colorado River system, and the extra 1,000,000 acre-feet provided for can therefore be taken from the main river or from any of its tributaries.''

Lower Basin is erroneous, and predetermines an issue which requires the presence of the States of the Upper Division.

The Special Master in his Report apparently decides this issue in favor of Arizona and against California. At page 55 he says:

> "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."

Again, at page 61, he writes:

> "[The Upper] 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."

We think the Special Master in this determination is wrong. He confuses beneficial consumptive use, apportioned by Article III(a), with water supply, *i.e.*, the flow of the stream, dealt with by Article III(d). He reads Article III(a)

as a "delivery" obligation, which clearly it is not. If 75,000,000 acre-feet were diverted each decade, the consumptive use would be less, because on any theory the Lower Basin is entitled to credit for return flow at the Mexican border. He ignores the clear language of Article III(a) which apportions uses from the "Colorado River System," not the main stream alone. The Special Master's interpretation leaves the uses by Nevada and Utah on the Virgin River, New Mexico's uses on the Gila, and uses on all other Lower Basin tributaries, outside the scope of Article III(a). The identification of Articles III(a) and III(d) is a mathematical impossibility, in view of Arizona's admission that the uses on the Gila, to the extent that they exceed 1,000,000 acre-feet, are chargeable to Article III(a) and her further admission that they exceed that quantity by 170,000 acre-feet per annum. (Reply, par. 8, p. 17.) He ignores the deliberate distinction which the Compact makes between an apportionment "per annum" (Article III(a)), which can only refer to calendar years, and the ten year periods beginning October 1 of each year (Article III(d)). He assumes, as a fact, that there is water enough to satisfy both the Upper Basin's Article III(a) apportionment and the Upper Division's Article III(d) obligation.*

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* See "Report on Depletion of Surface Water Supplies of Colorado West of Continental Divide," Bulletin No. 1, Surface Water Series, Colorado Water Conservation Board, State of Colorado; reprinted as S. Doc. No. 23, 84th Cong., 1st Sess. (1955) (known as the Hill Report). This report is discussed in detail in Part V, Section C, *infra*.

California has pleaded that Arizona is estopped and precluded from now asserting the interpretations which the Special Master adopts. (Answer, Second Affirmative Defense, pp. 39-45.)

It is perfectly clear, from Arizona's own record, that the 7,500,000 acre-feet which was apportioned to the Lower Basin by Article III(a) was arrived at as a summation of the anticipated uses on the main stream plus those on the tributaries, and that the 75,000,000 acre-feet stated in Article III(d) was arrived at as a summation of the anticipated uses on the main stream plus the water for Mexico. As the Special Master's substantive interpretation in advance of trial amounts to rewriting the key feature of the Compact, upon which Arizona's whole quiet title action is hinged, the Court's attention is called to the following:

1. Excerpt from statement of Richard E. Sloan, Legal Adviser to the Arizona Colorado River Commissioner, (and Chairman of the Legal Committee in the Negotiation of the Compact) January 15, 1923, (Reprinted in H. Doc. No. 717, 80th Cong., 2d Sess., p. A69 (1948)).

> "It may be of interest to know why the figures of 7,500,000 acre-feet for the upper basin and 8,500,000 acre-feet for the lower basin were reached. It grew out of the proposition made by the upper basin that there should be a fifty-fifty division of rights to the use of the water of the river between the upper and lower basins which should include the flow of the Gila, and the insistence of Mr. Norviel, commissioner from Arizona, that no

fifty-fifty basis of division would be equitable unless the measurement should be at Lee's Ferry. As a compromise the known requirements of the two basins were to be taken as the basis of allotment with a definite quantity added as a margin of safety. The known requirements of the upper basin being placed at 6,500,000 acre-feet, a million acre-feet of margin gave the upper basin an allotment of 7,500,000 acre-feet. The known future requirements of the lower basin from the Colorado river proper were estimated at 5,100,000 acre-feet. To this, when the total possible consumptive use of 2,350,000 acre-feet from the Gila and its tributaries are added, gives a total of 7,450,000 acre-feet. In addition to this, upon the insistence of Mr. Norviel, 1,000,000 acre-feet was added as a margin of safety, bringing the total allotment for the lower basin up to 8,500,000 acre-feet."

2. Statements made in the Arizona brief (p. 32) submitted in *Arizona* v. *California,* 283 U. S. 423 (1931), (extracts from which are printed in the present case in Appendix 28 to California's Answer, pp. 397-399).

Surely any determination that will make the difference between whether States of the Upper Division are required to supply 75,000,000 acre-feet every ten years, *including* water for Mexico, or 75,000,000 acre-feet every ten years, *plus* water for Mexico, involves a direct and important determination of their obligation. Arizona, in seeking to quiet title to 7,500,000 acre-feet of Article III(a) uses each year from the main stream has,

in effect, brought an action to quiet title *pro tanto* against States of the Upper Division, the suppliers of that water. California's motion is designed to add four States which Arizona should have named as defendants in her complaint.

C. The absent States, as States of the Colorado River System, are vitally affected by the present controversy over the establishment of present rights to waters of the Colorado River System not covered by the Colorado River Compact

1. *The absent States are affected by whether the claimed rights to water for Indians in the Lower Basin are chargeable against the apportionments made by the Colorado River Compact or are excluded therefrom by Article VII.*

This question is discussed in Part II of this Brief, which relates to claims of the United States.

2. *The Upper States are affected by whether valid appropriative rights may be initiated in waters not covered by the Compact.*

We have heretofore pointed out the numerous respects in which the issues in this case bear upon the magnitude of the "surplus" in which the seven States have undivided common interests. But also at issue in this case is the question of whether surplus waters of the Colorado River System, unapportioned by Articles III(a), (b) and (c), and described by Article VI as "waters . . . not covered by the terms of this compact," may be validly appropriated prior to a possible interstate com-

pact apportionment after 1963. With respect to these waters, Article III(f) of the Compact provides that:

> "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)."

Under California's view, rights to this unallocated surplus water beyond that needed to supply consumptive uses under Articles III(a) and III(b) could be acquired by appropriation* just as rights could be acquired in all of the water of the Colorado River System prior to the six-State Compact in 1929. (Answer to Arizona's Complaint, par. 27, p. 28; par. 13, p. 16.) Those rights are subject to divestment by interstate compact, just as rights acquired before 1929 in the rest of the waters of the System might have been divested by compact.** *Hinderlider* v. *La Plata*

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* The word "appropriation" as used in this brief with reference to rights to the use of water in California, includes rights arising out of contracts with the United States executed under the Boulder Canyon Project Act.

** "There is an essential difference between a substantial property right which may be enjoyed until taken away in the appropriate exercise of a paramount authority, and an uncertain and contingent privilege which may not be allowed at all." *United States* v. *River Rouge Improvement Co.*, 269 U. S. 411, 420-21 (1926).

River & Cherry Creek Ditch Co., 304 U.S. 92 (1938). They are valid until so divested. See comments of Herbert Hoover, United States representative in the Compact negotiations: H. Doc. No. 717, 80th Cong., 2d Sess., p. A34 (1948).

The United States apparently supports this view for it alleges that its contracts aggregating 8,462,000 acre-feet of deliveries of water stored in Lake Mead "are valid, binding covenants constituting the measure of the rights of the parties." (Petition of Intervention, par. XXXI, pp. 27-28.)

Arizona, however, takes a contrary position, and maintains that no "firm rights" may be acquired to the use of surplus water prior to a post-1963 compact, to which all States must agree. (Reply to Defendants' Answer, par. 13, pp. 18-19.)

Since under the Compact the surplus waters of the river system constitute an undivided common fund of water in which the seven States of the Colorado River Basin have undetermined interests, the four absent States of Colorado, New Mexico, Utah and Wyoming are directly affected by the resolution of this issue.

Just as the Special Master finds that Utah and New Mexico must be joined because of their unascertained rights to the common fund of water allocated to the Lower Basin under the Compact, so also should the absent Upper States be joined in this suit to determine rights in the undivided common fund of water not covered by the Compact. See *Williams* v. *Bankhead,* 19 Wall. 563

(U.S. 1874); *United States* v. *Bank of New York & Trust Company,* 296 U.S. 463 (1936); *Barney* v. *Baltimore,* 6 Wall. 280 (U.S. 1868).

If Arizona may enjoin California's assertion of rights in excess or surplus waters unapportioned by the Colorado River Compact (notwithstanding the specific language of the Project Act recognizing California's right to contract with the Secretary of the Interior for the storage and delivery of one-half of that excess or surplus), no other State than Arizona may acquire appropriative rights in "surplus" without a new compact, *i.e.,* without Arizona's consent. Arizona may acquire such rights, however, regardless of the post-1963 compact, if she is held not to have effectively ratified the Colorado River Compact in 1944.

While the Special Master gave no specific consideration to this issue, as presented by the Defendants in this Motion to Join, he did make two substantive determinations which bear on the question. In discussing the relationship between Articles III(a) and III(d) (Report, p. 50), the Special Master concludes that "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)." Hence under this determination all of the System's surplus water must go to the Lower Basin. If the Special Master means that the Upper States can never acquire rights in surplus waters, it is clear that the determination

deeply affects their rights. Second, the Special Master in discussing the California Limitation Act has made the substantive determination on the merits, without hearing or briefs thereon, that the "excess or surplus" referred to relates to "waters of the Lower Basin."* (Report, pp. 45, 58.) This is another instance of premature determination of an issue between Arizona and California as a technique for testing the necessity of joinder of the absent States.

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* What the Special Master means by "waters of the Lower Basin" is left in some doubt. The Special Master says (Report, p. 50), "Article III(c) of the Compact makes it apparent that the Mexican supply shall come from surplus waters of the Lower Basin . . . ."

Of course, at the instant that any waters flow into Mexico, they are flowing from the Lower Basin, but that does not mean that they are surplus waters of the Lower Basin. If they are "surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b)" of Article III, they are surplus of the entire Colorado River System, in which all seven States have an undivided interest. We suggest that here, as elsewhere in the Report, there is confusion between the place of use, and classification of the waters used.

D. The Special Master is in error in assuming that the Colorado River Compact, in terms, prohibits the joinder of the States of the Upper Division in this action

The Special Master declares:

> "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. . . . 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." (Report, p. 34.)

This conclusion is contrary to express terms in Article I itself:

> ". . . 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 . . . ." (Emphasis supplied.)

This conclusion is also contrary to two other provisions of the Colorado River Compact.

1. *Article VI* provides for two alternative methods of solution for five classes of disputes among the parties to the Compact:

> "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." (Emphasis supplied.)

It is clear that this suit involves controversies in the first three categories mentioned in Article VI:

"(a) *with respect to the waters of the Colorado River System not covered by the terms of this compact.*" See, for example, paragraph 27 of California's Answer to Arizona's Complaint, p. 28, alleging a present right to one-half of the excess or surplus waters of the Colorado River System not apportioned by Article III(a) of the Colorado River Compact.

"(b) *over the meaning or performance of any of the terms of this compact.*" See, for ex-

ample, paragraph 5 of the prayer of Arizona's Complaint, pp. 30, 31, which asks a decree "establishing that the beneficial consumptive use of water apportioned by the Colorado River Compact be measured in terms of stream depletion."

"(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.*" See, for example, Arizona's allegations that the waters to supply uses apportioned to the Lower Basin by Article III(a) are to be found flowing in the river and measured at Lee Ferry, and bear a quantitative relationship to the guarantee of the States of the Upper Division in Article III(d). (Reply, par. 8, p. 16; par. 11, p. 18.) Arizona's claims directly affect and increase the burdens imposed upon the absent States of the Upper Division under Articles III(c) and III(d) with respect to their "delivery of waters." (See discussion at pp. 74-87, *supra.*)

Negotiations extending over a period of more than thirty years, participated in by all seven States, have failed to resolve these controversies. We are here concerned with the second method for their resolution contemplated and preserved by Article VI.*

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*"[T]he adjustment of any such claim or controversy by any present method" by Article VI clearly envisages litigation. Jurisdiction of this Court to determine interstate controversies over the waters of interstate streams had been decided in *Kansas* v. *Colorado,* 185 U.S. 125 (1902). *Wyoming* v. *Colorado,* 259 U.S. 419 (1922), had been decided while

2. *Article IX* provides:

> *"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."*

The purpose of Article IX becomes clear when read in connection with Article VI.

Certainly it may not be held, as the Special Master does, that the Compact forbids by implication what express language of the Compact is so careful to preserve.

Colorado River Compact negotiations were in progress, and the negotiators had that case very much in mind. See statement by Richard E. Sloan, Legal Adviser to Colorado River Commissioner for Arizona (1923), reprinted in H. Doc. No. 717, 80th Cong., 2d Sess., pp. A63, A65 (1948).

V.

THE SPECIAL MASTER HAS ERRONEOUSLY CONCLUDED THAT THE ABSENT STATES SHOULD NOT BE JOINED EVEN THOUGH THEY MAY BE AFFECTED BY THE RESOLUTION OF ISSUES AMONG THE PRESENT PARTIES

A. The Special Master erred in determining that the absent Upper States, whose rights and obligations are vitally and inseparably affected by the present controversy to quiet title to certain waters of the Colorado River System, may not be joined for lack of a controversy independently justiciable as to them

The Special Master expressly finds that a justiciable controversy respecting "Lower Basin waters" exists. (Report, p. 68, conclusion 20.) The Special Master also expressly concedes that certain of the issues may ultimately affect the absent States,* but nevertheless has concluded that "As to the Upper Basin States as such, there is no existent justiciable controversy between them and the present parties to this cause." (Report, p. 67, conclusion 12.) If we understand the position taken by the Special Master—a position never previously suggested by this or any other court—it is that something like a separate cause of action, based upon a present breach of obligation or physical invasion of a claimed right, must exist

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* *E.g.*, whether there is a quantitative relationship between uses apportioned under Article III(a) of the Colorado River Compact and the delivery obligation imposed by Article III(d) (Report, pp. 49-50); whether the protection extended by Article VIII to "present perfected rights" extends to water quality as well as quantity (Report, p. 51); whether "salvaged water" is chargeable under the Compact as a beneficial consumptive use. (Report, p. 57.)

and must be pleaded between present parties and absent parties before joinder is appropriate.

The Special Master's error in this respect is two-fold.

First, the Special Master considers the question of justiciability with respect to the absent Upper Basin States as though there were no present justiciable controversy before the Court. He treats the issue of justiciability as if it required a separate bill of complaint against the Upper States, stating a de novo justiciable cause of action.* The error here, however, is that while an original bill of complaint may be dismissed, the justiciable controversy in the suit already before the Court requires judicial action regardless of the disposition of the joinder motion.**

Second, the Special Master's concept of justiciability is based upon his assumption that there can be no present effect upon the absent Upper States due to an abundance of water in the Colorado River System. Even assuming this assumption of fact to be presently true (and it is

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* In Part V, Section B of this Brief, p. 103, we demonstrate that the Special Master has applied an erroneous concept of justiciability, even considering the question on his own grounds as one of a de novo finding of justiciability.

** Only if the absent States were beyond the Supreme Court's jurisdiction so that the Court would have no power to join them, would the question be one of "indispensability" requiring dismissal of the suit. See California Defendants' Initial Brief in Support of Motion to Join, p. 30.

gravely mistaken, as is shown in Part V, Section C, pp. 112-121), this concept overlooks the fact that if the Upper States' permanent rights and obligations relating to the use of water are presently altered or affected by the resolution of issues in an existing controversy, then it is justiciable as to them, and whether they are presently using their rights is immaterial.

The requirement of "justiciability" to sustain the jurisdiction of this Court stems from the constitutional confinement of the judicial power to the resolution of matured and real disputes. Here these purposes are fully served by the justiciable character of the controversy already before the Court. The issues affecting the absent States are issues which must be decided in this suit whether the absent States are joined or not. If the dispute among present parties is "justiciable"—and the Special Master agrees with the present parties that it is*—there is no further justiciability problem to consider on the joinder motion.**

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* Report, p. 68, conclusion 20; Statement in Support of Motion, Arizona Complaint, p. 5; Return of Defendants to Rule to Show Cause and Brief in Support of Return, pp. 5-6; Motion by United States for Leave to Intervene, par. VIII, pp. 8-9; Nevada Petition of Intervention, par. I, pp. 7-8; Nevada Answer to United States, par. XVIII, p. 8.

** The well-established principles of ancillary jurisdiction support such a conclusion in that they give the Court power to hear questions even though there is no independent jurisdictional basis for a determination of the rights involved. See California Defendants' Reply Brief in Support of Motion to Join, pp. 19-27.

If, however, a separate element of justiciability as to the absent parties is required for joinder, this requirement is satisfied in the present case because the existing controversy immediately and vitally affects the present legal interests of the absent States.

In *Arizona* v. *California,* 298 U.S. 558, 567 (1936), Justice Stone announced the following standard for determining the existence of a justiciable controversy:

> ". . . A justiciable controversy is presented only if Arizona, as a sovereign state, or her citizens, whom she represents, *have present rights in the unappropriated* water of the river, or if the privilege to appropriate the water is capable of division and when partitioned may be judicially protected from appropriations by others pending its exercise." (Emphasis supplied.)*

By this standard, there can be no doubt of the existence of a justiciable controversy as to the

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* The suit, in which Arizona sought to have her rights in the River System decreed against the other six Colorado River Basin States, preceded Arizona's purported ratification of the Colorado River Compact in 1944. The Special Master errs in stating that one of the reasons for the Court's denial of leave to file the bill of complaint was the absence of a justiciable controversy. (Report, p. 32.) The Court found it unnecessary to decide the question of justiciability because of the absence of the United States, which was held to be an indispensable party and could not be sued without its consent. 298 U.S. at 568.

absent States if their "present rights in the unappropriated water of the river" are affected by the existing controversy before the Court. The Colorado River Compact apportions in perpetuity the right to use water which has not yet been appropriated. Article III(a) of the Compact confers on the Upper Basin, in Justice Stone's terms, "present rights in the unappropriated water of the river." The dispute among present parties involves the extent of the insulation afforded by Article III(a) to the Upper Basin and its effectiveness against both Arizona and the United States. Similarly the obligations of the absent States, as "States of the Upper Division," under Articles III(c) and III(d) of the Compact constitute present duties with respect to delivery of water at Lee Ferry. In settling the controversy among the present parties, this Court must determine the extent of the present duties of the Upper Division States to deliver water under these Articles of the Compact. The absent Upper States also share with all seven States of the River Basin a present undivided interest under Article III(f) in a common fund of surplus water, just as Arizona, California, Nevada, New Mexico and Utah share an interest in the undivided common fund of water allocated to the Lower Basin by Articles III(a) and III(b).

In Part II, we showed that the claims of the United States are asserted in such magnitude that they cannot be satisfied out of the 8,500,000 acre-

feet of beneficial consumptive use allocated to the Lower Basin by Articles III(a) and III(b) of the Compact. Those claims are urged as being outside of and unaffected by the Colorado River Compact. If this contention of the United States is sustained, and its claims are determined in the magnitude asserted, the United States will have acquired rights in the unused Upper Basin apportionment. Similarly, as we demonstrated in Part III, Section A, if the Court finds that Arizona has not effectively ratified the Colorado River Compact, she too is free to acquire rights in the unused Upper Basin apportionment to which her title may be quieted in the pending case. Even if it is determined that Arizona is a party to and bound by the Colorado River Compact, her claim to quiet title to 2,800,000 acre-feet of main stream uses can only be accomplished by identifying the Lower Basin's Article III(a) apportionment with the Upper Division States' Article III(d) delivery, thereby increasing their present obligation to deliver water under Article III(c) of the Compact. (See Part IV, Section B, pp. 74-87.) Further, the claim of California that her rights be decreed, and the claim of the United States that its title be quieted, to surplus waters of the Colorado River System, not covered by the Compact, immediately affect the present rights of the absent States in this undivided common fund of waters. (See Part IV, Section C, pp. 87-91.) If this Court, in its exercise of jurisdiction over the controversy before it, quiets title or determines rights

in any one of the instances enumerated above, the decreed rights would constitute an immediate invasion of the present rights of the absent States, whether or not those rights are being presently used to their full extent. A justiciable controversy as to the absent States is thus necessarily present.

In *United States* v. *Louisiana,* 339 U.S. 699, 702 (1950), Justice Douglas noted that Louisiana asserted:

> "... [T]hat there are no conflicting claims of governmental powers to authorize the use of the bed of the Gulf of Mexico for the purpose of searching for and producing oil and other natural resources, on which the relief sought by the United States depends, since the Congress has not adopted any law which asserts such federal authority over the bed of the Gulf of Mexico. Louisiana therefore contends that there is no actual justiciable controversy between the parties." 339 U.S. at p. 702.

This Court took jurisdiction, noting that its ruling in *United States* v. *California,* 332 U.S. 19 (1947) controlled. The absent Upper States argue in the present case, as did Louisiana in the tidelands case, that no justiciable controversy exists because they are not presently using their rightful share of water (as the United States was not using its rights in the tidelands), even though their rights to use the water may be presently invaded by resolution of the existing controversy. The Special Master adopted this

view. This position, rejected in *United States* v. *Louisiana,* must be similarly rejected here, as immaterial to the primary consideration of whether there is an invasion of existing rights.

B. Despite the absence of a present breach of obligation or a present physical invasion of a claimed right, a quiet title suit by Arizona against the absent States alleging the identical title here asserted would state a justiciable controversy within the constitutional power of this Court to decide. A fortiori, such a breach of obligation or invasion of right is not required where the joinder of the absent States is required to accord complete relief in the suits to quiet title brought by Arizona against California and by the United States against Arizona and California

A suit to quiet title by either the United States or Arizona against all of the Colorado River Basin States as defendants, claiming the same rights each alleges in the present suit, would state a justiciable controversy with respect to them. Since this is true, there can be no lack of justiciability to prevent joinder of the Upper States as parties to the present suit.

The specified claims of the United States to Colorado River System water amount to 11,785,250 acre-feet of water per year, of which about 11,000,000 acre-feet are asserted against the main stream water of the Colorado River.* Under

* These claims are for both diversions and beneficial consumptive use. All of the United States' claims which are included in the total of 11,785,250 acre-feet relate to the main stream except 822,800 acre-feet of Indian claims upon the tributaries.

Article III(a) of the Colorado River Compact, the Upper Basin States claim a right to the beneficial consumptive use of 7,500,000 acre-feet per annum. These combined claims total about 18,500,000 acre-feet per year. Yet, an engineering report recently published by the State of Colorado* indicates that the average annual dependable water supply of the Colorado River at Lee Ferry is approximately 13,700,000 acre-feet (virgin flow). (See Part V, Section C, p. 112.) On this basis, the claims exceed the supply by over 4,500,000 acre-feet per year.

Similarly, Arizona's claim that the Lower Basin is entitled to the ten-year 75,000,000 acre-feet Article III(d) delivery at Lee Ferry as water to supply Article III(a) uses, conflicts with the Upper States' claim to 7,500,000 acre-feet per annum under Article III(a) of the Compact. This is because 15,000,000 acre-feet of claims under Article III(a) cannot be satisfied if there is only 13,700,000 acre-feet flowing at Lee Ferry.** The Special Master would conclude that the Court has no power to hear these cases as long as the Upper

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* "Report on Depletion of Surface Water Supplies of Coloradio West of Continental Divide," Bulletin No. 1, Surface Water Series, Colorado Water Conservation Board, State of Colorado (1953). Reprinted as S. Doc. No. 23, 84th Cong., 1st Sess. (1955).

** The quantity of water flowing at Lee Ferry, of course, is not a reliable index of water available for use at the site of use in the Upper Basin, which would be somewhat larger. Even so, there would not be sufficient water to supply 15,000,000 acre-feet of beneficial consumptive uses in both Basins.

Basin is not using its entire apportionment. (Report, p. 52.) However, where there is not enough water in the river to satisfy the claims asserted against it, the clash of interests is of that character and dignity which makes the controversy justiciable. *Nebraska* v. *Wyoming,* 325 U.S. 589, 610 (1945). Compare *Texas* v. *Florida,* 306 U.S. 398 (1939), with *Massachusetts* v. *Missouri,* 308 U.S. 1 (1939).

The Special Master's criterion of justiciability is internally inconsistent. He has found that New Mexico and Utah are necessary (the Special Master says indispensable) parties to this controversy, although no allegation of any present injury or threat of injury by or against them has been made. They are necessary simply because they have an interest in the subject matter of the dispute that will be affected.

At the same time, the Special Master says that justiciability requirements prevent making the absent States parties in their Upper Division and Upper Basin capacities, that because no one has alleged a breach of obligation by them, the Court cannot make them parties.

If the Special Master had applied his Utah and New Mexico standard to all of the absent Upper States, there could be no question of the propriety of joining all of them. If applied to interstate controversies over interstate streams generally, the standard of justiciability which the Special Master has applied to the absent Upper Basin

States would mean that no method exists for those who wish to build projects to put at rest their uncertain water rights short of risking their treasure and the welfare of the people who will come to depend on those projects.

Nothing could be clearer than the equity court's traditional willingness to quiet title although no trespass or other wrong by the defendant has occurred. In most jurisdictions today, claims of ownership to property are asserted in a statutory suit to quiet title. These statutory suits embrace three traditional remedies: (1) bill of peace, (2) bill *quia timet,* and (3) bill to remove cloud on title. Of these remedies only the bill of peace required existing conflict in the claims of the parties. Chafee, *Bills of Peace with Multiple Parties,* 45 HARV. L. REV. 1297 (1932). The others required neither a present adverse claim nor a breach of obligation or duty on the part of the defendant.* Their purpose was to protect the

* The bill *quia timet,* in contrast to the bill of peace, did not seek to put an end to existing vexatious litigation concerning claims to property. Rather it sought to prevent future litigation. The plaintiff sought "the aid of a Court of Equity because he fears (quia timet) some future probable injury to his rights or interests, and not because an injury has already occurred which requires any compensation or other relief." 2 STORY, EQUITY JURISPRUDENCE § 1142 (14th ed. 1918). The bill was ordinarily applied "to prevent wrongs or anticipated mischiefs, and not merely to redress them when done." *Ibid.*

The bill to remove a cloud on title did not depend on the conduct of the defendant. It was designed to protect the marketability of the plaintiff's title against existing clouds whether actually asserted by the defendant or not. Howard, *Bills to Remove Clouds from Title,* 25 W. VA. L.Q. 4 (1917).

marketability and hence the usefulness of real property, and not to restrain unlawful conduct by the defendant.

The principle is illustrated by *Sharon* v. *Tucker,* 144 U.S. 533 (1892). Efforts of the complainants to dispose of the property had been frustrated, not by adverse claims by the defendants, but by the difficulty of securing an abstract of title which potential purchasers would accept. In ordering a decree quieting title in the plaintiffs, the Court found that

> "up to the commencement of these suits . . . [none] of the defendants therein or their predecessors in interest [have] asserted any claim to the property or interest in it, or attempted in any way to interfere with its possession or control. . . . The title of the complainants is not controverted by the defendants, nor is it assailed by any actions for the possession of the property, and this is not a suit to put an end to any litigation of the kind. It is a suit to establish the title of the complainants as a matter of record, that is, by a judicial determination of its validity. . . ." 144 U.S. at 535-36, 543.

See also, *e.g., Simmons Creek Coal Co.* v. *Doran,* 142 U.S. 417 (1892); *Peirsoll* v. *Elliott,* 6 Pet. 95 (U.S. 1832); *Allen* v. *Hanks,* 136 U.S. 300 (1890).

Equity courts, of course, exercise discretion in determining whether relief is appropriate in a particular case. This does not, however, go to jurisdiction, but to the propriety of its exercise, after the case has been heard.

The usual reason given for the jurisdiction to quiet title is expressed in terms of "marketability." Here, the ability to utilize the property is at stake. No problem of justiciability would be presented if Arizona had brought suit against California to quiet title to 50,000 acres of barren desert land. Present injury or threatened injury stemming from the defendant's conduct would not be necessary to such a suit. Surely it would be a tragic anomaly if the judicial power of the United States were held to be incapable of determining the rights to the water which alone could give those 50,000 acres any utility.

This Court has jurisdiction to determine, in a quiet title suit, rights to the stream bed underlying the Colorado River System. *United States* v. *Utah*, 283 U.S. 64 (1931). Surely it has power to determine the incomparably more important issues over the rights to the use of water which flows in that stream bed.

Suits to quiet title have long been commonplace in dealing with western water rights.* *E.g.*, *Stone* v. *Imperial Water Co. No. 1,* 173 Cal. 39, 159 Pac. 164 (1916); *Yuba River Power Co.* v.

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* In fact, an essential feature of the doctrine of appropriation, developed to meet the needs of the western states, is the mechanism by which water users can establish their rights in advance of spending time and money in building works to put water to use. Chandler, *The Appropriation of Water in California,* 4 CAL. L. REV. 206, 212 (1916). Recognition of these policy considerations may be found in *Pacific Live Stock Co.* v. *Lewis,* 241 U. S. 440, 448 (1916).

Nevada Irrigation Dist., 207 Cal. 521, 279 Pac. 128 (1929); *New Brantner Extension Ditch Co.* v. *Kramer,* 57 Colo. 218, 141 Pac. 498 (1914); *Conant* v. *Deep Creek & Curlew Valley Irrigation Co.,* 23 Utah 627, 66 Pac. 188 (1901). In such suits it is clear that "Actual present damage is not necessary in actions to quiet title, settle rights, or bills *quia timet* generally." WIEL, WATER RIGHTS IN THE WESTERN STATES 729 (3d ed. 1911). *Cf. Washington State Sugar Co.* v. *Sheppard,* 186 Fed. 233, 237 (C.C. Idaho 1911).

This Court has repeatedly recognized that the justiciability of an original suit to quiet title does not depend upon the same showing of injury that attends a suit for injunctive relief against a State, as in *Connecticut* v. *Massachusetts,* 282 U.S. 660 (1931), and *New York* v. *New Jersey,* 256 U.S. 296 (1921) (both of which are cited by the Special Master in his Report at pp. 35-38). Indeed, the Special Master's fundamental error lies in his application of an injunction standard to a quiet title suit.*

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* Analytically, the quiet title suit is a species of declaratory relief, long antedating modern statutory actions for declaratory judgment. The Special Master quotes (Report, p. 36) from *Alabama* v. *Arizona,* 291 U.S. 286, 291 (1934), the declaration:

> "This court may not be called on to give advisory opinions or to pronounce declaratory judgments."

Cited in the Court's opinion for this proposition are three prior Supreme Court decisions, all in the appellate jurisdiction. The statement with reference to declaratory judgments has been inaccurate since this Court in *Aetna Life*

In *United States* v. *West Virginia,* 295 U.S. 463 (1935), this Court dismissed, for want of a justiciable controversy, an original bill brought by the United States to enjoin West Virginia and certain corporate defendants from constructing and asserting any interest in a dam on the New River. The Court indicated that, had the United States asserted a property right to which title could be quieted, a justiciable controversy would have been presented. Mr. Justice Stone said (295 U.S. at 474-75):

> "The government places its chief reliance upon the decision in *United States* v. *Utah* . . . in which this Court took original jurisdiction of a suit, brought by the United States against the State, to quiet title to the bed of the Colorado River. But *the issue presented by adverse claims of title to identified land is a case or controversy traditionally within the jurisdiction of courts of equity. Such an issue does not want in definition. The public assertion of the adverse claim by a defendant out of possession is itself an invasion of the property interest asserted by the plaintiff, against*

Insurance Co. v. *Haworth,* 300 U.S. 227 (1937), upheld the constitutionality of the federal Declaratory Judgments Act. A suit for a declaratory judgment, other than a suit to quiet title, today may clearly present a case or controversy within the judicial power of the United States, and no distinction as to the existence of the power can be found between suits in the original jurisdiction of the Supreme Court and suits in the inferior federal courts. The judicial power of the United States is defined only once in Article III, Section 2, of the Constitution and the definition applies with equal force in all courts of the United States.

> *which equity alone can afford protection.*" (Emphasis supplied.)

The Court contrasted the position of the United States with that of a property owner "who because of the adverse claims to ownership can neither sell his property nor be assured of continued possession." 295 U.S. at 475. See also *United States* v. *Utah,* 283 U.S. 64 (1931); *United States* v. *Oregon,* 295 U.S. 1 (1935); *United States* v. *California,* 332 U.S. 19 (1947).

In *Nebraska* v. *Wyoming,* 325 U.S. 589 (1945), this distinction was invoked to support jurisdiction despite the absence of present interference with existing uses of the plaintiff as follows (325 U.S. at 610):

> "... If this were an equity suit to enjoin threatened injury, the showing made by Nebraska might possibly be insufficient ... 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."

Colorado moved to dismiss on the ground that her uses were not conflicting with the present uses of either Wyoming or Nebraska and therefore there was no controversy with respect to them. The Court denied the motion, despite the fact that

Colorado's actual uses did not exceed those to which she was held to be entitled. Since the dependable natural flow of the North Platte River was overappropriated, as is the natural flow of the Colorado River, the Court found that a "controversy exists appropriate for judicial determination," in that the "claims" exceeded the supply. (*Ibid.*)

From the above, it is apparent that a quiet title suit by Arizona or the United States naming the absent States as parties defendant would be within the constitutional power of this Court to determine. There would be no lack of a justiciable controversy despite the existence of unused Upper Basin apportioned water. On what principle can it then be argued that this Court does not have the constitutional power to order the joinder of these same States in a quiet title suit which requires their presence in order to accord complete relief to those already parties?

C. Even if the Special Master's concept of justiciability is accepted, it cannot be the basis at this stage of the litigation for denial of the motion to join the absent States. His recommendation that joinder be denied is based on assumed facts as to water supply and water use which have no foundation in the record and are not the subject of judicial notice. Moreover, the assumed facts are contrary to what evidence would show to be the actual facts

The Special Master's conclusion that at present there is nothing for this Court to decide affecting the rights and obligations of the absent States is based on the assumption that the Upper Basin is

presently using only a small part of its 7,500,000 acre-foot apportionment, and that the unused remainder is physically available and flows to the Lower Basin* (*e.g.*, Report, pp. 52, 61); and on the further assumption that there is 3,500,000 to 5,000,000 acre-feet per annum of uncommitted surplus in the Colorado River System. (Report, p. 62.) He also assumes that this situation will persist into the distant future. (Report, p. 50.)

The Special Master's assumptions are obviously not based on evidence submitted to him, since none has been taken. Nor, from what appears in the Report, do the assumptions rest on data judicially noticed. The only factual data relating to the subject found in the Special Master's Report (p. 62) is the Report of Herbert Hoover, chairman of the Colorado River Commission which negotiated the compact (H. Doc. No. 605, 67th Cong., 4th Sess. (1923)), stating that the Compact commissioners assumed that there would be approximately 5,000,000 acre-feet of water per annum in the Colorado River System in excess of the quantities specified in Articles III(a) and III(b) of the

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*This assumption, constituting a major determination of fact, is made by the Special Master in apparent contradiction of his disclaimer that "The Special Master . . . makes no determination of facts. Such determinations are unnecessary on this joinder Motion." (Report, p. 22.) He also refers to the necessity of taking evidence upon the water supply in the Lower Basin. (Report, p. 62.)

Compact. (Report, p. 62.) The Special Master states that this figure has been reduced by virtue of the Mexican Treaty to 3,500,000 acre-feet per annum.* (*Ibid.*) On the basis of the information now known, it is clear that the assumptions of water supply made by the Colorado River Commission thirty years ago were optimistic.

With the exception of Herbert Hoover's 1923 figures, the Special Master's conclusion rests on unspecified information of which judicial notice has presumably been taken without notice to the parties.** These assumptions do not relate to facts

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*The accuracy of these figures was specifically challenged at the oral hearing on this motion by Mr. Hatfield Chilson, counsel for Colorado. Mr. Chilson said:

". . . [A]s Your Honor knows, the negotiators started out with a history of a water supply of the river system of some, oh, eighteen to twenty million acre-feet per year. The historical flow since that time has shown that the negotiators were optimistic and that the average annual supply since that time has been considerably less to the point that at the present time there is very serious doubt that there is any surplus waters in the Colorado River." (Transcript, p. 271.)

In 1945, Herbert Hoover, in a formal letter to Senator Albert W. Hawkes of New Jersey on the Mexican Treaty, advised that the Compact was negotiated on the basis of overestimated supply and underestimated demand. SEN. Doc. No. 32, 79th Cong. 1st Sess. (1945), reprinted in H. Doc. No. 717, 80th Cong. 2nd Sess., at 159 (1948).

** Fairness will ordinarily require that the court before making a final ruling that judicial notice will be taken of a given fact should notify the parties of his intention to do so and afford them an opportunity to present information which might bear upon the propriety of noticing the fact, or upon

which "can be immediately and accurately demonstrated to be true by resort to easily accessible sources of indisputable accuracy." Morgan, *Judicial Notice,* 57 HARV. L. REV. 269, 292 (1944). See also, 9 WIGMORE, EVIDENCE § 2571 (3d ed. 1940).

It is manifest that facts which are the subject of disagreement among qualified experts are not properly subject to judicial notice.

In 1953, the engineering firm of Leeds, Hill and Jewett, under contract with the State of Colorado, reported after extensive study on the availability of water to the State of Colorado and to the other Upper Basin States. Two conclusions from that report (known as the Hill Report)* are:

> "1. All of the 7,500,000 acre-feet of water per annum apportioned to the Upper Basin by the Colorado River Compact may not actually be available for use because of the requirement that 75 million acre-feet be delivered at Lee Ferry during each consecutive 10-year period.
>
> "2. Compliance with this provision and limiting the carryover in cyclic storage to the

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the truth of the matter to be noticed." McCormick, *Judicial Notice,* 5 VAND. L. REV. 296, 319 (1952). Such notice is required by the MODEL CODE OF EVIDENCE, Rule 804(1) (1942). See also, *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n,* 301 U. S. 292, 300-303 (1937).

* Originally published as "Report on Depletion of Surface Water Supplies of Colorado West of Continental Divide," Bulletin No. 1, Surface Water Series, Colorado Water Conservation Board, State of Colorado. Reprinted as S. Doc. No. 23, 84th Cong., 1st Sess. (1955).

> 22 years from 1930 to 1952 would have required that reservoirs of 21 million acre-feet capacity had been available in 1927 for cyclic regulation and that the aggregate depletion in the upper basin be no more than 6,200,000 acre-feet per year." S. Doc. No. 23, 84th Cong., 1st Sess., p. vii (1955).

The Hill Report has been criticized by Governor Edwin C. Johnson of Colorado and others because, among other things, it does not take into account water that must be supplied for the Mexican Treaty and water for certain reservoir evaporation losses.*

As to water available to the Upper Basin as a whole, Governor Johnson has said:

> "Under the Seven State Compact the Upper States must deliver at Lee Ferry in each ten year period 75 million acre-feet to the Lower States and 7½ million acre-feet to Mexico before they can use one drop of water themselves beyond what they used before the Seven State Compact was ratified. In the current ten year period that will leave only 3,250,000 acre-feet per year for their total use. In the previous

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* ". . . Had Mr. Hill recognized these binding and irrevocable priorities and the evaporation of the down-river storage plans, which is to be charged to Colorado as 'consumptive use' of 400,000 acre-feet, he could not have shown any unappropriated water whatsoever in Colorado for Colorado." Statement by Governor Johnson of December 20, 1954, quoted in California Reply Brief, p. 54, at p. 72; see also, *Hearings Before the Senate Committee on Interior and Insular Affairs on S. 500,* 84th Cong., 1st Sess., pp. 251, 257, 717-718 (1955).

ten year period they would have had 4,150,000 acre-feet a year. In 1902 the Upper Basin States under this formula would have had no water at all." California Reply Brief, at page 70; *Hearings before the Senate Committee on Interior and Insular Affairs on S. 500,* 84th Cong., 1st Sess., pp. 251, 256 (1955).

The Special Master's statements that there is no foundation for deciding issues concerning the Mexican Treaty, and that there is no allegation that surplus for Mexico does not exist (Report, p. 50), require special attention. No party has alleged that such surplus does exist in quantities adequate to supply Mexico. To the contrary, Arizona alleges: "It is uncertain whether excess or surplus flows of the Colorado River unapportioned by the Compact will be adequate to satisfy the allotment of water to Mexico." (Complaint, par. XVI, p. 21.) Similarly, counsel for Colorado, in his argument on this Motion, said that "at the present time there is very serious doubt that there is any surplus waters in the Colorado River." (Transcript of Oral Argument, p. 271.) The Special Master ignores the pleadings and the argument and, in effect, creates a conclusive presumption that surplus exists. The presumption is unwarranted.

Evidence would show that in some years, on any theory, surplus water (over and above the aggregate of the quantities specified in Articles III(a) and III(b)) clearly is available. In other years surplus, on any theory, clearly is not available. During the period 1930-1954, the average yearly water supply of the Colorado River System was

not sufficient to service the Mexican Treaty out of surplus waters. In fact, during this period, on the average, there was no surplus at all, if Arizona's theory of measurement of consumptive uses is followed. This is demonstrated by the computation on Plate II formally submitted on behalf of Arizona by Sidney P. Osborn, then Governor of Arizona, to the Department of the Interior on April 24, 1948, in connection with the Central Arizona Project. (Reprinted in Letter from the Secretary of the Interior transmitting a Report and Findings on the Central Arizona Project, H. Doc. No. 136, 81st Cong., 1st Sess., p. 11 (1948).) The first column represents the figures submitted by Governor Osborn, contained in H. Doc. No. 136. The second column represents the same computation, with one change made by us—an adjusted average Lee Ferry flow to conform with the period 1930-1954.* The second column, however, shows

*The adjusted Lee Ferry flow is based on two factors: (1) the average historical flow of 11,480,000 for the period as measured by the United States Geological Survey (USGS, Water Supply Paper No. 1313 (1954) and provisional records) and (2) the addition of 2,170,000 acre-feet representing average Upper Basin depletions estimated at Lee Ferry during the period in accordance with the technique adopted by the U. S. Bureau of Reclamation in THE COLORADO RIVER, H. Doc. No. 419, 80th Cong., 1st Sess. (1947).

The 1930-1954 period is used because it more nearly represents the dependable flow. As this Court recognized in *Nebraska* v. *Wyoming*, 325 U. S. 589, 620 (1945), "the decree which is fashioned must be based . . . on the dependable flow." As said in *Wyoming* v. *Colorado*, 259 U. S. 419, 476 (1922), "Crops cannot be grown on expectations of average flows . . . which have passed down the stream in prior years."

Plate II

Item	Acre-Feet (Osborn)	Acre-Feet (1930-54 Average Showing Breach of III(d) Obligation)	Acre-Feet (1930-54 Average Showing III(d) Obligation Performed)
[Average] Virgin flow at Lee Ferry	16,270,000	13,650,000	13,650,000
Less apportionment [available] to Upper Basin by Article III(a) of Colorado River Compact	7,500,000	7,500,000	6,150,000*
Total	8,770,000	6,150,000*	7,500,000
Natural gain from tributaries, Lee Ferry to Boulder [Hoover] Dam	1,060,000	1,060,000	1,060,000
Total	9,830,000	7,210,000	8,560,000
Natural gain from tributaries, Boulder [Hoover] Dam to Mexican Border	1,420,000	1,420,000	1,420,000
Total	11,250,000	8,630,000	9,980,000
Less natural losses, estimated	1,030,000	1,030,000	1,030,000
Total	10,220,000	7,600,000	8,950,000
Allocated to Mexico by treaty	1,500,000	1,500,000	1,500,000
Total	8,720,000	6,100,000	7,450,000
Apportionment to Lower Basin by Article III(a) and (b)	8,500,000	8,500,000	8,500,000
Not apportioned to Lower Basin but present in Lower Basin	220,000	2,400,000 (deficit)	1,050,000 (deficit)

* The figure of 6,150,000 in the second column indicates that if the Upper Basin used 7,500,000 acre-feet per year, in a period like 1930-54, the States of the Upper Division could supply only 61,500,000 acre-feet at Lee Ferry in any ten-year period, breaching the obligation under Article III(d) not to deplete the flow to less than 75,000,000 acre-feet in any period of ten successive years. Conversely, the figure of 6,150,000 in the third column illustrates that if the States of the Upper Division performed their obligation to supply 75,000,000 acre-feet under Article III(d) during each decade of such a historical period of water flow, they would not be entitled to consume more than 6,150,000 acre-feet per annum. Arizona's interpretations of the Compact are used throughout.

the States of the Upper Division in breach of their Article III(d) obligation to deliver 75,000,000 acre-feet every ten years. Hence, we show a third column reflecting a second necessary adjustment to show the absent States honoring their Article III(d) delivery obligation.

Although we challenge several of the assumptions made in Governor Osborn's computation, including his exclusion of the actual supply of water on tributaries available at the site of use, it is clear from his figures that, on the basis of the calculated average virgin flow at Lee Ferry during the period 1930-1954, the Arizona theory would leave no surplus in the Colorado River System to service the Mexican Treaty. How the burden of the deficits would be borne, Governor Osborn's calculations do not, of course, show. It is apparent, however, that under his theory, which follows Arizona's contentions in this suit, there is a substantial deficit in the system which, to serve Mexico, would require the Upper Basin to disgorge its uses to the extent of over a million acre-feet. Under the California theory that the available supply is determined by what is available for consumptive use at the site of use, the over-all deficit shown by Governor Osborn would be considerably reduced.*

*The quantity of the waters of the Colorado River System classifiable in the language of Article III(c) as "surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b)" of Article III, depends in large part upon how beneficial consumptive use is charged under those articles, particularly the accounting for use of salvaged

A further symptom of the shortage conditions which prevail throughout the System is reflected by the United States Bureau of Reclamation notification of July 20, 1955, to all agencies making water orders from Lake Mead for delivery at Imperial Dam that at its maximum level in 1955, Lake Mead held only enough water to supply downstream uses for about a year and one half. Letter from J. P. Jones, Regional Director, Region III, USBR (July 20, 1955).

It is clear that the motion may not be disposed of on the basis of the Special Master's unsubstantiated assumption as to the water supply and hence as to the remoteness of the issues between the two Basins.

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waters. If the depletion theory were applied throughout the Colorado River Basin, about 18,000,000 acre-feet could be consumed, measured at the site of use, to deplete the main stream by 16,000,000 acre-feet, the "aggregate of the quantities specified in paragraphs (a) and (b)." For example, the use of about 400,000 acre-feet per annum in the Palo Verde Valley of California would not deplete the stream at all. Natural losses on swampy land, now reclaimed, exceeded present uses. But if the standard set by Section 4(a) of the Project Act and by Article 1(j) of the Mexican Water Treaty were applied, *i.e.*, measurement of consumptive use at the site of use, the consumption of this same 18,000,000 acre-feet would invade the surplus above the "aggregate of the quantities specified in paragraphs (a) and (b)" by 2,000,000 acre-feet. See the discussion of the "beneficial consumptive use" issue at pp. 57-66 of this brief.

D. The Special Master's recommendation that California, sued as a sovereign, be denied the right to join Colorado, New Mexico, Utah and Wyoming because they are also sovereigns, is without support either in reason or in judicial precedent

The classic test for determining necessary parties, set forth in *Shields* v. *Barrow,* 17 How. 130, 139 (U.S. 1855), is that the Court should join all persons subject to its jurisdiction

> ". . . 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."

In accordance with the reference of the new Revised Rules of this Court, prescribing that the Federal Rules of Civil Procedure "where their application is appropriate, may be taken as a guide to procedure in original actions . . . ."* the California defendants framed this motion under Rule 19(b) of the Federal Rules of Civil Procedure on the ground that the absent States are subject to the jurisdiction of this Court and "ought to be parties if complete relief is to be accorded between those already parties."**

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* Rule 9(2), Revised Rules of United States Supreme Court, 1954.

** Rule 19 of the Federal Rules of Civil Procedure and the case authority on joinder of parties is analyzed in the California Defendants' Initial Brief, pp. 26-31, and their Reply Brief, pp. 7-19.

The Special Master finds that Rule 19 of the Rules of Civil Procedure "is not made applicable by Rule 9(2) [of the new Supreme Court Rules] if it conflicts with the principles governing controversies between States." (Report, p. 25.) He distinguishes *Shields* v. *Barrow,* 17 How. 130 (U.S. 1855), and other cases cited in support of the joinder motion on the ground that they involved private parties and not States. (Report, pp. 31, 33, 34.)

We submit that there is no basis for such a distinction. This Court has applied the tests emanating from *Shields* to determine joinder questions in previous original suits and has more specifically applied them in a previous original suit brought by Arizona over the waters of the Colorado River System, now in litigation. *Arizona* v. *California,* 298 U.S. 558 (1936). Whether Rule 9(2) makes Rule 19 of the Federal Rules applicable to this motion does not, we believe, have any important bearing on disposition of the motion. If the purpose of the new Supreme Court rules is to unify procedure in the federal district courts and in the Supreme Court, and to provide definite guides for original suits in the Supreme Court, it would be preferable to follow Federal Rule 19, but the result should not be different whether Rule 19 is followed or not. This is because Rule 19 embodies the long-established joinder principles which this Court has con-

sistently applied in the exercise both of its appellate and original jurisdictions.*

In *Arizona* v. *California,* 298 U.S. 558, 572 (1936), this Court applied the established rules of joinder to determine that the interests of the United States in the waters of the Colorado River System were such as to make it an indispensable party to a suit by Arizona against all seven States of the Colorado River Basin for an equitable apportionment of the rights to the use of waters of the Colorado River System:

> "Every right which Arizona asserts is so subordinate to and dependent upon the rights and the exercise of an authority asserted by the United States that no final determination of the one can be made without a determination of the extent of the other. Although no decree rendered in its absence can bind or affect the United States, that fact is not an inducement for this Court to decide the rights of the states which are before it by a decree which, because of the absence of the United States, could have no finality. *California* v. *Southern Pacific Co.,* 157 U.S. 229, 251, 257; *Minnesota* v. *Northern Securities Co.,* 184 U.S. 199, 235, 245-247; *International Postal Supply Co.* v. *Bruce,* 194 U.S. 601, 606; *Texas* v. *Interstate Commerce Commission,* 258 U.S. 158, 163."

An analysis of the above cases cited by Mr. Justice Stone indicates the interchangeability of

* Rule 19 "is substantially a restatement of the practice prevailing before its promulgation." 3 MOORE, FEDERAL PRACTICE ¶¶ 19.02, 19.05(1) (2d ed. 1948).

authority on joinder in original and appellate cases, as well as the applicability of the rules to interstate cases like this litigation over rights to use waters of the Colorado River System:

California v. *Southern Pacific Co.,* 157 U.S. 229, 251, 257 (1895), an original action, relying on the classic statement of the rules in *Shields* v. *Barrow,* 17 How. 130 (U.S. 1855), a case in the Court's appellate jurisdiction.

Minnesota v. *Northern Securities Co.,* 184 U.S. 199, 235, 245-47 (1902), also an original action, and also relying on *Shields* v. *Barrow, supra.*

International Postal Supply Co. v. *Bruce,* 194 U.S. 601, 606 (1904), a case in the Court's appellate jurisdiction.

Texas v. *Interstate Commerce Commission,* 258 U.S. 158, 163 (1922), an original action, in which the Court relied on *California* v. *Southern Pacific Co.,* and *Minnesota* v. *Northern Securities Co., supra.*

No case and no treatise writer cited either by the Special Master or by the opponents of the motion has suggested that different principles of joinder apply among states and among other parties. Indeed, the contrary view seems universally to be assumed.* Not to apply the joinder principles,

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* In *Texas* v. *New Mexico,* No. 9 Original, 1953 Term, the Special Master first recommended that the suit be dismissed because the United States was an indispensable party and had not consented to be sued. Cases cited by him are very largely cases involving non-sovereign parties. (See Special Master's

where their requirements are fulfilled,* to original actions between States would depart from the consistent practice of this Court over the years.

The only direct authority on joinder in litigation between States, we believe, favors the motion, despite the Special Master's contrary conclusion. (Report, pp. 38-41.) We refer to two decisions in the preliminary stages of litigation over the waters of the North Platte River to which the parties were Nebraska, Wyoming and Colorado. *Nebraska* v. *Wyoming,* 325 U.S. 589 (1945).

Report filed March 15, 1954, pp. 7-8, 12, 47. This Court followed the Special Master's suggestion that Texas be given the opportunity to amend her complaint, and referred the question of the indispensability of the United States under a proposed amendment to the Complaint to the Special Master. *Texas* v. *New Mexico,* 348 U.S. 805 (1954). The Special Master reported on February 28, 1955, again applying the classic test of joinder announced in *Shields* v. *Barrow,* 17 How. 130 (U.S. 1855). (Report, p. 8.) New Mexico filed exceptions to the recommendation that the United States is not, under the amended complaint, indispensable. In her exceptions, filed April 23, 1955, New Mexico's discussion hinges on the rules applied among private parties, and expressly assumes the applicability of Rule 19(b) of the Federal Rules of Civil Procedure. (New Mexico Exceptions and Brief, pp. 18, 20.)

A leading case on necessary and indispensable parties is *State of Washington* v. *United States,* 87 F.2d 421 (9th Cir. 1936). Nowhere in its exhaustive opinion does the Court suggest that the sovereign character of the parties is a factor to be considered.

* Parts II, III, and IV of this Brief, *supra,* demonstrate that the absent States are vitally affected by the resolution of issues in the present controversy.

The first decision in that litigation was *Nebraska* v. *Wyoming,* 295 U.S. 40 (1935). The Court there decided that Colorado's joinder was not required because the only allegations in the pleadings were that the North Platte rises in Colorado and drains a considerable area of that State. With that decision we have no quarrel. No problem of justiciability was raised or discussed. The decision followed application of the normal rules of joinder.

The second decision followed an Amended and Supplemental Answer by Wyoming. Without opinion, this Court ordered that Colorado be made a party. *Nebraska* v. *Wyoming,* 296 U.S. 553 (1935). In substance, the amended answer alleged that Colorado and its citizens "now contemplate and for a long time have contemplated and now threaten" the diversion of waters from the North Platte which would, of necessity, be the subject matter *pro tanto* of the controversy between Nebraska and Wyoming.* The new allegations, says the Special Master (Report, p. 40), "disclosed a present justiciable controversy existing between the State of Wyoming and Nebraska and the State of Colorado."

The Special Master distinguishes *Nebraska* v. *Wyoming* from the present case on three grounds, each of which is unsound:

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* The amended Wyoming pleadings on the basis of which Colorado was joined are quoted and analyzed in our Reply Brief on this Motion, pp. 12-17.

(1) *That the Upper Basin States are foreclosed from asserting claims to water available to the Lower Basin States.* (Report, p. 41.)

This conclusion, of itself, deeply and materially affects the absent States and affords a conclusive reason for their joinder. Moreover, it errs in two major respects:

> (a) Unless the absent States are foreclosed from litigating claims involving the construction of the Colorado River Compact, contrary to the express provision of Articles VI and IX, they cannot be foreclosed from asserting claims to water covered by Article III of the Compact.
>
> (b) The Compact does not purport to deal with "surplus" water, as defined in Article III(c), and the controversy involves such surplus. As to such water "not covered by the terms of this compact," the Compact in Article VI provides that "Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method . . . . " This is said with respect to "any claim or controversy . . . between any two or more of the signatory States."

(2) *That there is no allegation that the absent States are threatening to infringe rights of the present parties.* (Report, p. 41.)

This ground for distinction is based on an erroneous assumption that a complaint must be stated against absent parties before their joinder is required. That there is no such requirement is

recognized by the Special Master in his recommendation to join New Mexico and Utah in their Lower Basin capacities, although no threat by either of them is alleged. See *Minnesota* v. *Northern Securities Co.*, 184 U.S. 199 (1902); *Northern Indiana R.R.* v. *Michigan Central R.R.*, 15 How. 233 (U.S. 1854).

The pleadings of Wyoming, on the basis of which Colorado was joined, fail to indicate whether the threatened and contemplated diversions were in the next several years or in the next several decades. However, the decision on the merits (which also rejected a Colorado motion to be dismissed from the suit) makes clear that the threat was long range. Colorado's uses at the time of the decree, ten years after the pleading alleging the threat, were for 131,800 irrigated acres, and 6,000 acre-feet a year of exportations from the basin. 325 U.S. at 600. None of these uses, including out-of-priority diversions by Colorado, was wrongful in the light of the decree which limited Colorado uses to the irrigation of 135,000 acres and export of 60,000 acre-feet of water in any period of ten consecutive years. 325 U.S. at 665. The nature of the "threat," however, which justified judicial intervention, arose from 34,000 acres of additional land that could be irrigated. Concerning projects to irrigate those acres the Court said (325 U.S. at 600):

> "... Those projects, however, are not completed; they are indeed projects for the indefinite future."

(3) *That there is no allegation that the Upper Basin States are failing to meet, or threatening not to meet, delivery obligations to the Lower Basin States.* (Report, p. 41.)

A present breach of obligation is not a requisite to justiciability in a suit to quiet title, as authorities cited in Part V, Section B, p. 103, clearly show. The Special Master recognizes this in recommending the qualified joinder of New Mexico and Utah. The reasons for joining those States are compelling, even though no allegation of threatened or actual breach of obligation by either of them has thus far been made.

In interstate suits justiciability is based not on rigidly prescribed doctrines but on the necessity, in a federal system, of some effective means of resolving important controversies.* As Charles Warren concluded, "the Supreme Court has *power* . . . to settle, as between the States, questions which, between foreign nations, would be known as 'non-justiciable,' and for the Supreme Court, a 'justiciable question' means simply a question which the Court decides it will settle in any particular

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* "Some things, undoubtedly, were made justiciable [by the Constitution] which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution." Bradley, J., in *Hans* v. *Louisiana,* 134 U.S. 1, 15 (1890), quoted with approval in *Louisiana* v. *Texas,* 176 U.S. 1, 15 (1900).

case."* WARREN, THE SUPREME COURT AND SOVEREIGN STATES 55 (1924).

The ultimate question as to justiciability among sovereign states is whether the Court should decide the controversy presented. A subsidiary problem is at what stage should the decision to decide or not decide be made? On the pleadings or on the basis of evidence?

Here, the answers seem clear. The subject matter of this dispute—rights of states in an interstate stream—has been cognizable by the Court since the first decision in *Kansas* v. *Colorado,* 185 U.S. 125 (1902). Moreover, after States have settled their differences by a compact, and a dispute arises over the meaning of the compact, there is no occasion for reluctance to decide an interstate case as there sometimes is before a compact has been executed. See *Washington* v. *Oregon,* 214 U.S. 205, 218 (1909). The usefulness of interstate compacts, and hence the willingness of states to enter into compacts, depends on their enforceability in this Court.**

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* Compare Frankfurter, J., in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 156 (1951):

> "Whether 'justiciability' exists . . . has most often turned on evaluating both the appropriateness of the issues for decision by courts and the hardship of denying judicial relief."

** The Special Master quotes a dictum from *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.,* 304 U.S. 92, 110-11 (1938), to the effect that the Court has jurisdiction to determine the validity and effect of a Compact between Colorado and New Mexico in a suit to which neither State is a

The Special Master quotes (Report, p. 26) from the opinion in *Colorado* v. *Kansas,* 320 U.S. 383, 393-94 (1943), the statement of a proposition well recognized:

> "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

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party. (Report, pp. 43-4.) The case is not a departure from principles that would be followed in a suit similarly involving a private contract. Since neither State was a party to the suit, neither State was affected except through the operation of *stare decisis.* Insofar as affected by *stare decisis,* both States were affected equally.

Moreover, a different result would have meant that no court in the United States would have had jurisdiction of the suit initiated by the Ditch Company against Hinderlider in the state courts of Colorado. Neither the state nor federal courts of Colorado or New Mexico could have exercised jurisdiction over the other State. The Supreme Court of the United States obviously would have lacked jurisdiction of the suit initiated by the Ditch Company against an individual officer and resident of the State of Colorado. The question in the *Hinderlider* case was whether Colorado and New Mexico were indispensable parties, not whether they were necessary parties.

> factors which create equities in favor of one state or the other must be weighed as of the date when the controversy is mooted."

The Special Master says that this quotation shows that this Court "long has been circumspect in taking cases in which sovereign states are the parties." (Report, p. 38.) The quotation, however, is clearly directed to the problem then before the Court. That problem was not whether to take the case, but whether the case in which jurisdiction had first been taken many years earlier had been proved and whether relief should be granted. The question of whether a case has been "fully and clearly proved" can only arise after jurisdiction has been assumed and the evidence heard. Compare earlier phases of the same dispute: *Kansas* v. *Colorado,* 185 U.S. 125 (1902) (overruling demurrer to complaint) and 206 U.S. 46 (1907) (opinion denying Kansas relief on the merits).

The 1943 opinion does not question justiciability, and it does not go to joinder of parties (although the Special Master attributes to the opponents of the motion the statement that it provides "the test with respect to joinder of parties in interstate litigation"). (Report, p. 28.) In fact, the case supports the view that, at this stage of the present litigation, any doubt about whether the absent States may be affected by the litigation should be resolved by taking jurisdiction over them. The fact that this Court in neither of two suits between Colorado and Kansas saw fit to enjoin Colorado's uses of water has never before, we believe, been cited to show that jurisdic-

tion to determine the merits was improperly assumed.

The first *Kansas* v. *Colorado* opinion, overruling Colorado's demurrer to Kansas' complaint, has recently been cited, in *United States* v. *Texas,* 339 U.S. 707, 715 (1950), for a necessary corollary of the doctrine that requires an interstate case to be fully proved:

> "The Court in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts." (Citing, *inter alia, Kansas* v. *Colorado,* 185 U.S. 125 (1902).)

California expects to prove all affirmative elements of her case, fully and clearly, according to the interstate standard. The fact that she has a burden of proving her case not imposed on a private litigant requires that she be given at least as full an opportunity to prove her case as would be accorded a private litigant.

Moreover, one consideration which differentiates the judicial treatment accorded States has been overlooked by the Special Master. A State suing a private citizen clearly has only the normal burdens of any other plaintiff. A State suing another State, however, must establish a case of serious magnitude, fully and clearly proved, before it is entitled to relief. Special consideration is accorded not to States as plaintiffs, but to States as defendants.

In this suit, California is a defendant. She is sued by one of six joint obligees of her obligation

under the Statutory Compact. She is sued for a declaration of rights under the Colorado River Compact whose rights and obligations run between the two Basins and the two Divisions which that Compact establishes. She is sued by the United States asserting claims independent of the Colorado River Compact which must be satisfied, if at all, from waters of the entire Colorado River System, most of which originate outside of Arizona, California and Nevada. The absent States have an interest in the controversy and "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." The absent States "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." *Shields* v. *Barrow,* 17 How. 130, 139 (U.S. 1855). If neither California nor the absent States were sovereigns, joinder under these rules would clearly be required. The States whom we seek to join under these rules have no higher sovereign status than does California, and all have equal status in this Court.

Certainly California as a sovereign defendant is entitled to at least the protection that would be accorded a private defendant. If joinder is denied, we believe it will be the first instance of treating a defendant State by a more severe rule of law than would be applied to a private party.

CONCLUSION

For the reasons stated in the exceptions and in this brief, we respectfully ask the Court to grant the motion to join the four absent States in their capacities as States of the Upper Division and States of the Upper Basin, notwithstanding the adverse report of the Special Master.

We also ask the Court's permission to be heard in oral argument on the motion and the exceptions to the Report of the Special Master.

Respectfully submitted,

For the State of California

EDMUND G. BROWN,
Attorney General of the State of California,
600 State Building,
San Francisco, California,

NORTHCUTT ELY,
ROBERT L. McCARTY,
Assistant Attorneys General,
1200 Tower Building,
Washington 5, D. C.,

PRENTISS MOORE,
Assistant Attorney General,
417 South Hill Street,
Los Angeles 13, California,

GILBERT F. NELSON,
Assistant Attorney General,

CHARLES E. CORKER,
HOWARD I. FRIEDMAN,
BURTON J. GINDLER,
JAMES B. McKENNEY,
JOHN R. ALEXANDER,
GEORGE BRODY,
Deputy Attorneys General,
909 South Broadway,
Los Angeles 15, California,

ELY, McCARTY AND DUNCAN,
CHARLES F. WHEATLEY, JR.,
Of Counsel,
1200 Tower Building,
Washington 5, D. C.,

For the Metropolitan Water District of Southern California

JAMES H. HOWARD,
General Counsel,

CHARLES C. COOPER, JR.
Assistant General Counsel,

DONALD M. KEITH,
Deputy General Counsel,

ALAN PATTEN,
Deputy General Counsel,

FRANK P. DOHERTY,
306 West 3rd Street,
Los Angeles 13, California,

For the City of Los Angeles

ROGER ARNEBERGH,
City Attorney,

GILMORE TILLMAN,
Chief Assistant City Attorney for Water and Power,

JOHN H. MATHEWS,
Deputy City Attorney,
207 South Broadway,
Los Angeles 12, California,

For Palo Verde Irrigation District

FRANCIS E. JENNEY,
458 South Spring Street,
Los Angeles 13, California,

For Imperial Irrigation District

HARRY W. HORTON,
Chief Counsel,

R. L. KNOX, JR.,
101 Law Building,
El Centro, California,

For Coachella Valley County Water District

EARL REDWINE,
3610 8th Street,
Riverside, California,

For the City of San Diego

J. F. Du PAUL,
City Attorney,

SHELLEY J. HIGGINS,
Assistant City Attorney,
Civic Center,
San Diego, California,

T. B. COSGROVE,
1031 Rowan Building,
Los Angeles 13, California,

For the County of San Diego

JAMES DON KELLER,
District Attorney,
Court House,
San Diego, California.