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IN THE
Supreme Court of the United States

October Term, ~~1955~~ ⁶⁹ 1961

No. ~~10~~ ⁷⁸ 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*.

**Petition for Rehearing of Decision Denying Motion
to Join the States of Colorado, New Mexico, Utah
and Wyoming**

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**Petition for Rehearing of Decision Denying Motion
to Join the States of Colorado, New Mexico, Utah
and Wyoming**

PETITION FOR REHEARING

The per curiam decision of December 12, 1955, denies our motion to join Colorado and Wyoming, and grants the motion to join Utah and New Mexico as parties "only to the extent of their interest in Lower Basin waters."

The motion to join was decided in the absence of any brief or argument by the United States, which is by far the major claimant.

We respectfully petition for rehearing, and ask that the Court, under Rule 58 (3) of this Court, request the Solicitor General of the United States to reply to this petition, and, in so doing, to answer this question:

INQUIRY TO SOLICITOR GENERAL REQUESTED

Are the claims which the United States pleads for water for Indian use, satisfaction of contract obligations, treaty requirements, navigation, flood control, and other federal purposes, restricted to the waters available to the Lower Basin under the Colorado River Compact, or are they claims against the waters of the entire Colorado River System?

COURT'S PREVIOUS INQUIRY TO SOLICITOR GENERAL

The Clerk of the Court, on October 15, 1952, wrote the Solicitor General, saying, *inter alia*:

"I have been directed by the Court to request you to state your views as regards jurisdiction."

The Government's motion for leave to intervene (December 31, 1952) and Petition of Intervention (December 8, 1953), followed. To our eyes, the Petition is a plain claim of paramount federal powers "against the river", not merely "Lower Basin waters". Unfortunately, the Government's silence here and before the Special Master has created a situation which should be clarified before final disposition of the joinder motion.

If the Government, now or later, confirms that any of its claims are against the waters of the entire Colorado River System (there is no reason to believe that the Government will contend otherwise), then all seven States are necessary to their adjudication. It is better to know that now rather than later. "A decree could not be framed without the adjudication of the superior rights asserted by the United States." *Arizona v. California, et al.*, 298 U. S. 558, 572 (1936).

But if the Government's reply should be that the federal interests are limited to "Lower Basin waters", however defined,* that answer would be

* The expression "Lower Basin waters" used in the Court's per curiam decision of December 12, 1955, is not found in the Colorado River Compact or the Boulder Canyon Project Act. Does it mean the 7,500,000 acre-feet per annum, the use of which is apportioned to the Lower Basin by Article III (a) of the Compact? The added 1,000,000 acre-feet of consumptive use covered by Article III (b)? The 75,000,000 acre-feet per decade guaranteed by the States of the Upper Division in Article III (d)? The additional de-

inconsistent with the following claims made or necessarily implied in its Petition of Intervention:

**I. FEDERAL INDIAN CLAIMS ARE PLEADED
"AGAINST THE RIVER", NOT AGAINST
"LOWER BASIN WATERS"**

The Petition of Intervention claims 1,747,250 acre-feet per annum of diversion rights, of which 1,556,250 acre-feet are in Arizona (Petition, Par. XXVII, p. 23, Appendix II-A, pp. 56, 57), and *denies that these are subject to the Colorado River Compact* (Par. XXXIV, p. 34), *denies that Indian uses are chargeable to the Basin and State in which they are located* (Petition, Par. XXXVII, pp. 37, 38), and specifically alleges that Indian rights "*are in no way subject to or affected by the Colorado River Compact.*" (Petition, Par. XXXVII, p. 38.) (Emphasis supplied) If that is so, they are not subject to the Compact's division of the Colorado River System into Basins. In a motion "for determination of questions of law" filed here October 20, 1955, denied November 7, 1955, the Government said, "If the Indian claims are held to be 'against the river' as distinguished from the Lower Basin as defined by the Colorado River Compact, that conclusion would have far-reaching effect upon the interests of all the States

liveries required by Article III (c)? The "unapportioned excess or surplus" of which the Boulder Canyon Project Act permits California to use one-half? It seems clear that the federal claims are not restricted to waters fitting any of these descriptions.

in the Colorado River Stream System." Has it changed its view?

In *Texas v. New Mexico*, No. 9 Original, this Court now has under review a report of a Special Master on the relation of the Indian claims on the Rio Grande to the claims of Texas and New Mexico. The Rio Grande Compact, there litigated, contains an exemption of Indian rights (Art. XVI) which is modeled on that in the Colorado River Compact (Art. VII). In an *amicus* brief filed April 16, 1952, in *Texas v. New Mexico*, the United States contended, "In the absence of authority from Congress, the Compact could not bind the United States or its wards, the Pueblo Indians. The consent of Congress to the states entering into the Compact was not a consent to be a party bound by the Compact. Cf. *Hinderlider v. LaPlata Co.*, 304 U. S. 92, 109." On October 17, 1955, the Court requested the Department of Justice to again state its position on the indispensability of the United States as a party to the Rio Grande controversy.

Indian claims now asserted by the Government on the Colorado are at least thirty times larger than on the Rio Grande.

In *Federal Power Commission v. Oregon*, 349 U. S. 435 (1955), the United States asserted and the Court recently sustained federal water rights, based on Indian ownership of riparian lands, in contravention of statutes of Oregon. See *Winters v. United States*, 207 U. S. 564 (1908); *United*

States v. Powers, 305 U. S. 527 (1939); *United States v. Winans*, 198 U. S. 371 (1905).

The States of the Colorado River Basin cannot safely assume, in the teeth of the Government's Petition of Intervention here, that federal Indian claims on the Colorado are softer and less extensive than those asserted on the Columbia, the Milk River and the Rio Grande.

Does the Government here claim 1,747,250 acre-feet of diversion rights *in addition* to the "Lower Basin" waters referred to by the Court? If so, where is this water to come from, except the waters of the entire System? Does it claim 1,556,250 acre-feet in Arizona as part of the 3,800,000 Arizona claims, or *in addition* thereto? If in addition, how can this quantity possibly be supplied out of "Lower Basin waters"?

II. HAS THE UNITED STATES, BY CONSTRUCTING HOOVER DAM, APPROPRIATED THE "SURPLUS" UNAPPORTIONED BY THE COLORADO RIVER COMPACT?

Section 5 of the Boulder Canyon Project Act directs that no person shall have the right to use water stored by Hoover Dam except by contract with the Secretary of the Interior.

The question here is whether the United States, by construction of Hoover Dam, has appropriated the surplus waters of the Colorado River System as against all seven States and may lawfully dispose of their use by contract. The United

States was held indispensable in *Arizona v. California*, 298 U. S. 558, 571-72 (1936), because “a decree could not be framed without the adjudication of the superior rights asserted by the United States.” One of the “superior rights” so asserted was thus described by this Court, after tabulating the California contracts: (p. 570.)

“Without more detailed statement of the facts disclosed, it is evident that the United States, by congressional legislation and by acts of its officers which that legislation authorizes, has undertaken, in the asserted exercise of its authority to control navigation, to impound, and control the disposition of, the surplus water in the river not already appropriated.”*

Cf. *Arizona v. California*, 283 U. S. 423, 456-58, (1931); *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 328-30 (1935); *United States v. Appalachian Power Co.*, 311 U. S. 377, 423-24, 426 (1940); *United States v. Chandler Dunbar Co.*, 229 U. S. 53, 72, 73 (1913); *United States v. San Francisco*, 310 U. S. 16, 29, 30 (1940); *Alabama v. Texas*, 347 U. S. 272, 273 (1954).

The Colorado River Compact does not allocate this “surplus”, leaving that to a later compact.

* In *Nebraska v. Wyoming*, 325 U. S. 589, 629-631, 639-640 (1945), Government contracts under the Warren Act (36 STAT. 925) for delivery of water stored by federal projects were recognized and excepted from the final apportionment of “natural flow” among the States.

(Art. III (f), (g).) But such a later compact would require anew the consent of Congress. (Constitution, Art. I, Sec. 10.) Thus such an appropriation by the United States of surplus which is explicitly excluded from the effect of the present compact, if valid now, cannot be divested without the consent of Congress to a suppositional new compact, and the Government's right is good until so divested. Cf. *United States v. River Rouge Improvement Co.*, 269 U. S. 411, 420 (1926). The United States denies that "all" its rights are subject to the present compact. (Petition, Par. XXXIV, p. 34.) Cf. *Hinderlider v. LaPlata River and Cherry Creek Ditch Co.*, 304 U. S. 92, 109 (1938). If not "all", then which ones?

III. FEDERAL TREATY CLAIMS ARE CLEARLY "AGAINST THE RIVER", NOT MERELY AGAINST "LOWER BASIN WATERS"

Article 10 of the Mexican Water Treaty (Treaty Series 994) guarantees Mexico 1,500,000 acre-feet per annum "of the waters of the Colorado River, from any and all sources". Senate Reservation "(c)" to that Treaty withholds power from the Secretary of State and the International Boundary and Water Commission "directly or indirectly to alter or control the distribution of water to users within the territorial limits of any of the individual States," but it omits the Secretary of the Interior from the Prohibition. This omission was deliberate, to enable the Secretary of the Interior to operate all federal dams *in all seven States* so as to perform

the guaranty to Mexico. An amendment to include that officer in the prohibition was rejected for that very reason. See Senate debate on consent to ratification: 91 CONG. REC. 3373-81, (April 16, 1945, 79th Cong., 1st Sess.). The protocol of November 14, 1944, to the Treaty is in accord. (Treaty Series 994.) Cf. *Missouri v. Holland*, 252 U. S. 416, 434 (1920).

The treaty burden, in terms, rests upon the whole system, not the Lower Basin. Article III(c) of the Compact, Article 10 of the Treaty, say so.

The Government's Petition of Intervention (Par. XIII, p. 12, Par. XXVIII, p. 24) does not limit its treaty claims to "Lower Basin waters"; it denies that these rights are subject to the Colorado River Compact. (Par. XXXIV, p. 34.) California's answer to that petition (Par. 44 (b) (2), p. 51) alleges that the federal treaty claims are against all seven States of the Colorado River Basin, not merely against the Lower Basin. Does the United States assert otherwise?

IV. THE FEDERAL REQUIREMENTS FOR FLOOD CONTROL AND NAVIGATION, LIKE THOSE FOR THE MEXICAN WATER TREATY, ARE "AGAINST THE RIVER", NOT MERELY AGAINST "LOWER BASIN WATERS"

The federal navigation and flood control servitudes, like that imposed by the Treaty, cut across the Compact, indifferent to its division of the System into Basins.

As to navigation and flood control, Congress, in the Boulder Canyon Project Act (Act of December 21, 1948, 45 Stat. 1057) directed that the reservoir created by Hoover Dam "shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River Compact; and third, for power." (Sec. 6) This Court has already held that this "*specific statement of primary purpose in the act governs the general references to the compact.*" *Arizona v. California*, 283 U. S. 423, 456 (1931). (Emphasis supplied)

There is thus no division into Upper Basin and "Lower Basin waters" so far as paramount federal powers are concerned. As between those powers and one State or seven, "This is not a controversy between equals." *Sanitary District of Chicago v. United States*, 266 U. S. 405, 425 (1925). See *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 512, 525-26 (1941); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 426-27 (1940).

The Government claims the right to utilize the full capacity (38,000,000 acre-feet) of all its reservoirs for *all* federal purposes. (Petition, Par. XXX, p. 25; Appendix I, p. 43.) The power claimed and exercised (millions of acre-feet may be released from Hoover Dam to the Gulf under the flood control mandate: see 33 C.F.R. § 208.80

requiring 5,350,000 acre-feet of vacant capacity in Lake Mead to be available by January 1 of each year) is the power to withhold from use, or release to the ocean and destroy, the *corpus* of the water. It has nothing to do with the *consumptive use* of water, as apportioned by the Compact. Compare *Sanitary District of Chicago v. United States*, 266 U. S. 405, 425, 426 (1925), and *Wisconsin v. Illinois*, 278 U. S. 367, 415 (1929), with *United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 737 (1950). It is more like the guaranty of the corpus of 1,500,000 acre-feet per year made to Mexico by Article 10 of the Treaty. (Treaty Series 994.)

California's answer to the Government's Petition of Intervention (Par. 44 (b) (4) p. 52) alleges that the Government's claims in the interests of flood control and navigation are against all seven States. The seven are on an equal footing with respect to paramount federal powers. *United States v. Texas*, 339 U. S. 707, 715-17, 719, 720 (1950); *United States v. Louisiana*, 339 U. S. 699 (1950); *United States v. California*, 332 U. S. 19, 31 (1947). Does the United States here contend otherwise?

Is the Colorado, alone of all the river systems of the country, one in which the adjudication of the rights of the United States for treaty, navigation and flood control functions can be restricted to the River's "Lower Basin waters," in consequence of the consent of Congress to an interstate compact?

Does the United States now so limit the plenary powers in aid of navigation and flood control which it asserted, and sustained, "without conforming to the police regulations of a state," in *Arizona v. California*, 283 U. S. 423, 451 (1931)? Nothing in its pleadings here so suggests. The Government, it can be predicted, will contend here, as it has done successfully before, that its constitutional functions cannot be limited by the legislation of any State, e.g. *Federal Power Commission v. Oregon*, 349 U. S. 435, 445 (1955); *First Iowa Hydro-Electric Coop. v. Federal Power Commission*, 328 U. S. 152, 181, 182 (1946); *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 404, 405, 426, 427 (1940); *Washington Dept. of Game and Fish v. Federal Power Commission* 207 F. 2d 391, 395, 396 (9th Cir. 1953), *cert. denied* 347 U.S. 936 (1954), nor by any concert of States by Compact, *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How. 421, 433 (U.S. 1856); *South Carolina v. Georgia*, 93 U. S. 4, 8, 9 (1876), and that by consenting to the Compact the Congress has not enthroned it as a federal statute, *Arizona v. California*, 283 U. S. 423, 456 (1931). Cf. *Hinderlider v. LaPlata River and Cherry Creek Ditch Co.*, 304 U. S. 92, 109 (1938).

Piecemeal litigation involving great water systems and many states, with delayed fuses on federal issues, is not in the interest of anyone.

CONCLUSION

The Court properly denied the Government's motion of October 20, 1955, "For determination of questions of law," including some of those above stated. But this does not solve the problem. When the United States intervened, this became, as to the federal claims, a suit by the United States against the States. *Oklahoma v. Texas*, 258 U. S. 574, 581 (1922). The Government, in fairness to the States it has sued, ought to tell the Court, instead of asking to be told, whether its own claims are "against the river" (a possibility which it suggests), or against only "Lower Basin waters" (the Court's expression in the decision of December 12, 1955). The question of whether seven States or five are necessary parties turns on the answer. The lack of that answer is "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 (1855). The provisions of Supreme Court Rule 58 (3), providing for a reply to a petition for rehearing if directed by the Court, afford an appropriate channel for obtaining it. The question of the source and extent of the Government's water rights on the Colorado is one of the gravest questions in the case. All seven States are necessary parties to the decree which decides what Federal rights exist, determines their magnitude and whether they are subject to the Compact, and distributes the burden which they impose.

The Government's silence, although doubtless based upon a desire to remain neutral as between the contending States, places the Court, the Special Master, and these defendants in an intolerable position, because the Government is an affirmative claimant, asserting rights adverse to those of the States, and far exceeding theirs. As to its own claims, it cannot be neutral. Are the federal claims "against the river" or against only "Lower Basin waters"?

CERTIFICATE REQUIRED BY RULE 58

This petition is presented in good faith, and not for delay.

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