IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 8 Original

STATE OF ARIZONA,
Complainant

v.

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

STATE OF NEW MEXICO,
Impleaded Defendant

STATE OF UTAH,
Impleaded Defendant

REPLY BRIEF FOR ARIZONA

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REPLY BRIEF FOR ARIZONA

This reply brief, like Arizona's Opening Brief, is divided into two parts. Part I considers matters pertaining to the controversy among Arizona, California and Nevada with respect to Colorado River water. Part II deals with the controversy between Arizona and the United States with respect to the rights of federal establishments to water in

the main stream of the Colorado River and water from the Gila River System for the Gila National Forest.

The basic questions involved in the controversy among the states are:

> First. Does the Project Act make a statutory allocation, or authorize the Secretary of the Interior to make a contractual allocation, of water among the three Lower Basin states?
>
> Second. If an interstate allocation is effectuated or authorized by the Project Act, is it an allocation of main stream water only?

The Special Master finds the evidence to be clear that Congress in enacting the Project Act intended to provide for an apportionment of main stream water exclusively and authorized the Secretary of the Interior to enter into water delivery contracts which, in the absence of an interstate compact, control the allocation of main stream water among Arizona, California and Nevada (Rep. 99-100, 152-54, 173-85, 201).

If the Master's conclusions are sound—and all the parties save California agree that they are—California's case necessarily collapses. A statutory allocation of main stream water, whether achieved directly by the statute itself or by secretarial contracts pursuant to the statute, renders untenable the fundamental positions upon which California's case is based, namely:

> First. That principles of equitable apportionment and prior appropriation are applicable to and decisive of the issues in this litigation.[1]

[1] Briefed by

Arizona	Ariz. Op. Br. 40-46; Ariz. Ans. Br. 4-57.
California	Cal. Op. Br. 25, 39, 46-47, 52, 68, 138-94; Cal. Ans. Br. 29-31, 36-75, 106-29, 136-40.
Nevada	Nev. Ans. Br. 29-43.
United States..	U. S. Ans. Br. 21, 24-25.

Second. That the water to the use of which California is limited by the Project and Limitation Acts consists of both main stream water and water of Lower Basin tributaries.[2]

Third. That the future water supply in the Lower Basin can and must be determined in order to sustain the Court's jurisdiction and to decide the legal issues involved.[3]

Arizona has exhaustively briefed her position in support of the Master's conclusion that the Project Act authorizes an allocation among Arizona, California and Nevada of water of the main stream of the Colorado River only (Ariz. Op. Br. 57-108; Ariz. Ans. Br. 4-97).

In Part I of this brief we shall continue to correct California's persistent misreading and miswriting of the legislative history. We shall not repeat arguments which we have previously made, except when necessary to meet variations contained in California's Answering Brief of contentions she has previously urged.

Since the Opening Brief of the United States did not deal with the claims for federal establishments, we deferred their further consideration until this reply brief. In Part II of this brief we respond to the contentions made in the Answering Brief of the United States with respect to these claims.

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[2] Briefed by

Arizona	Ariz. Op. Br. 57-82; Ariz. Ans. Br. 58-85.
California	Cal. Op. Br. 69-137; Cal. Ans. Br. 18-29, 33-36, 77-106.
Nevada	Nev. Op. Br. 35-49; Nev. Ans. Br. 16-18.
United States..	U. S. Ans. Br. 22-46.

[3] Briefed by

Arizona	Ariz. Ans. Br. 98-146.
California	Cal. Op. Br. 232-78; Cal. Ans. Br. 31-32.
Nevada	Nev. Ans. Br. 47-48.
United States..	U. S. Ans. Br. 53-54

PART I

The Controversy Among Arizona, California and Nevada with Respect to Main Stream Water

ARGUMENT

I

California continues to misread the legislative history of the Project Act.

The Special Master found that the pertinent legislative history was so clear and conclusive as to necessitate his fundamental findings and recommendations as to the meaning of the Project Act and the significance of the water delivery contracts (Rep. 154). However, California seems bent upon injecting ambiguity and confusion into the legislative history in the hope that the Court may find it of doubtful utility in the decision of the basic issues, the resolution of which rests in the last analysis upon the intent of Congress in enacting the Project Act. This strategy is pursued in California's Answering Brief with respect to the two basic issues: (1) the statutory allocation question and (2) the main stream versus system allocation question.

A. As to the Statutory Allocation Issue

California persists in asserting that the legislative history of the Project Act shows that Congress did not intend to delegate authority to the Secretary of the Interior to make an allocation of the water of the Colorado River (Cal. Ans. Br. 50-56). She criticizes the use by the United States, in support of its contention that Congress did so intend, of statements of opponents of the bill denouncing it as an unwarranted assertion of federal power, upon the ground that "views expressed by opponents of an act are not persuasive legislative history" (Cal. Ans. Br. 51).

However, California neglects to state that the authors of the Project Act—Senator Johnson and Congressman Swing—well understood that the statute did authorize

an allocation of water of the Colorado River and nevertheless supported the measure as a proper exercise of federal power. The majority of the Senate and House Committees which favorably reported the fourth Swing-Johnson bill (which became the Project Act) similarly appreciated the effect of the bill, as did witnesses who testified before those Committees in favor of the measure (Ariz. Ans. Br. 30-47).

California not only ignores these views of the authors and supporters of the Project Act, but she erroneously claims that the proponents of the statute "refuted" the charge of its opponents that §5 gave to the Secretary of the Interior authority to make an interstate allocation of water (Cal. Ans. Br. 51). For example, she says (Cal. Ans. Br. 53) that Mr. Swing "responded" to the charge of Mr. Douglas of Arizona that the Swing-Johnson bill "vests in the Secretary of the Interior complete and absolute control over the waters of the Colorado below Boulder Dam".[4] California comments: "It is unlikely that any member of the House took seriously Mr. Douglas' diatribe" (Cal. Ans. Br. 54). Yet, at the very outset of his response to Mr. Douglas, Mr. Swing stated:

> "Mr. Chairman and gentlemen of the House, I want to congratulate my colleague [Mr. Douglas of Arizona], who has just preceded me, on presenting as forcefully, as effectively as it is humanly possible to present it, the side of the case against the Boulder Dam project."[5]

Mr. Swing proceeded to discuss the Boulder Dam Project—its engineering feasibility, its necessity as a means of flood control and its economic soundness.[6] Not until the

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[4] 69 Cong. Rec. 9623 (1928).
[5] 69 Cong. Rec. 9635 (1928).
[6] 69 Cong. Rec. 9635-45 (1928).

very close of his argument did he discuss what he termed "the so-called question of constitutional rights".[7]

Mr. Swing then argued in favor of the bill's constitutionality and cited, among other legal authorities, what he characterized as a "very able brief" prepared by an Arizona law firm in which the conclusion was reached that

> ". . . the rights of the Federal Government to withdraw the river, for the purposes of development, from State sovereignty is undoubted."[8]

While thus arguing for his bill as a constitutional exercise of federal power, not once in the course of his protracted speech did Mr. Swing "respond" to the Douglas charge that the bill "vests in the Secretary of the Interior complete and absolute control over the waters of the Colorado below Boulder Dam".

Mr. Swing's statement that the contentions made by Mr. Douglas "have been answered in the investigations made of the project and in the hearings held on this bill"[9] did not and could not have referred to the question whether the bill was intended to make an interstate allocation of water. As the record of the congressional committee hearings establishes, there was a clear understanding that the Project Act made, or empowered the Secretary of the Interior to make, an allocation of water among the lower Basin states. The primary area of dispute between proponents and opponents of the bills was not over the effect of the proposed legislation but whether Congress had the constitutional power so to allocate water among the states (Ariz. Ans. Br. 30-44).

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[7] 69 Cong. Rec. 9645 (1928).

[8] 69 Cong. Rec. 9645 (1928).

[9] 69 Cong. Rec. 9635 (1928).

California also claims that proponents of the Project Act "refuted" the assertion of Congressman Colton of Utah that §5 gave the Secretary of the Interior "control of all the water stored in the reservoir and its delivery to any part of the river below". This so-called refutation is said to have been made by Congressmen Bankhead of Alabama and White of Colorado (Cal. Ans. Br. 51-53). The Colton-Bankhead exchange is quoted only in part by California (Cal. Ans. Br. 52-53 note 1). It is set forth in full in the margin.[10]

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[10] "Mr. Colton. . . . Our [Utah's] whole industrial life has been built up upon the theory that the State owns the waters, and a man in my State to-day can not acquire the ownership of any water for any purpose. He can acquire the right to use any water, and as long as he puts that water to a beneficial use he can assert control over it; but when he ceases to put it to beneficial use it reverts to the State and is again subject to appropriation by any other citizen within the State. So that when you say that the Government of the United States owns and controls waters within that State, cannot you see that you strike at the very basis of our industrial life? You are saying that you are going to take it away from the States and place it in the Federal Government, and section 5 of this bill asserts that very principle. It provides that the Secretary of the Interior shall have control of all of the water stored in the reservoir and its delivery to any part of the river below. We deny that in principle and say it is against the very contract that this country has entered into with our Western States and contrary to the decisions of the United States Supreme Court.

"Mr. Bankhead. As I understand, the whole theory of this bill is predicated on the recognition of the right that the gentleman is now asserting, for the reason that nothing can be done by Congress under this bill until the States acting through this compact shall determine what their respective rights are in reference to this matter.

"Mr. Colton. I will answer in this way: *If the gentleman from Alabama were stating the proposition correctly, there would not be the slightest objection to this bill other than from the engineering and economic standpoint. I feel sure that it is not fully understood. We do not get full protection under this bill, for there is no seven-State compact. Arizona is not a party at all to this compact.*

"She and her citizens may appropriate water at any time.

"Mr. Douglas of Arizona. Arizona is a party to it, but Arizona has not ratified it.

"Mr. Colton. Yes. The gentleman's statement is more accurate. *Arizona can grant applications for water if my theory is*

The Colton-Bankhead colloquy was not concerned with the effect of the provisions of §5 of the Project Act but rather with the question whether, in the absence of seven-state ratification of the Colorado River Compact, the State of Utah would be protected against claims of right to the use of Colorado River water by appropriations in or by Arizona. Mr. Bankhead had erroneously assumed that the bill provided for seven-state ratification of the Compact. When Mr. Colton pointed out that six-state ratification was required, Mr. Bankhead had nothing further to say.

Shortly after this there occurred the Colton-White discussion, which is quoted only in part by California to support her claim that "Mr. Colton's charges . . . [that §5 gave the Secretary of the Interior authority to make an interstate allocation of water] were refuted by Mr. White . . . (and, in effect, by Mr. Colton himself)" (Cal. Ans. Br. 51-52). California misreads the record. Actually Mr. Colton, in quoting §5, refuted the assertion of Mr. White that the pending legislation made no attempt "to nullify, abrogate, or change the doctrine of priority in the use of water". When Mr. Colton cited the provisions of §5, Mr. White made no further comment. Indeed, no one arose to dispute Mr. Colton's construction of the meaning and effect of §5 of the Project Act or to deny his assertion that it gave the Secretary of the Interior control of the water to be impounded by the dam and stored in the reservoir

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correct, and her citizens can acquire rights by prior usage to every bit of water belonging to the upper States. There is absolutely no protection against her and her citizens. The gentleman from Alabama [Mr. Bankhead] has stated the principle for which Utah is contending. We have been pioneers in the development of the Colorado River. We are anxious to see California prosper. This development, however, must not be made at the injury and expense of other States." 69 Cong. Rec. 9648 (1928). (Unless otherwise indicated, italics appearing in quotations in this brief have been added for emphasis).

authorized by the Act. The complete text of the Colton-White colloquy is set forth in the margin.[11]

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[11] "Mr. Colton. Congress can not allocate water. I want to say to the gentleman that I have here figures showing that in two counties of my State they have now 277,839 acres under cultivation, and there is enough land susceptible of practical irrigation and reclamation to make a total of 689,762 acres in those two counties, so that there are 300,000 acres in two counties alone of my State that are now susceptible of reclamation and irrigation, and the projects for reclamation are perfectly feasible. We say we are not opposing this dam, provided it will not be under terms that are injurious to Utah. But we must have future development protected. There are seven or eight other counties in my State which have lands capable of reclamation.

"Mr. Leatherwood. Will the gentleman yield?

"Mr. Colton. Yes.

"Mr. Leatherwood. I just want to call the gentleman's attention to the fact that the gentlemen who are raising the question about our refusal to go ahead without a full seven-State compact in every case have insisted that in their State they be absolutely protected without any question.

"Mr. Colton. I think the gentleman is right in that.

"Mr. White of Colorado. Will the gentleman yield?

"Mr. Colton. Yes.

"Mr. White of Colorado. A while ago the gentleman stated that he doubted whether or not Congress had the power at this late date to nullify, abrogate, or change the doctrine of priority in the use of the water.

"Mr. Colton. I think they have not that power.

"Mr. White of Colorado. There is no attempt to do anything of that kind by this bill. On the contrary, the bill expressly provides for a compact among six States, and the only State that has shown the slightest tendency to stay out of the compact is Arizona. Now, how can that affect a State that is not a member of the compact?

"Mr. Colton. It can not. Moreover, I admit we are somewhat protected so far as California is concerned, although even that is a question in my mind. As the gentleman from Arizona has stated, you have an interstate compact made by seven States, and I do not believe six States may make it binding on the other. I would like to hear the opinion of the gentleman from Virginia [Mr. Montague] on that. He is a good lawyer. That raises a serious question at least. Let me point out to the gentleman just what this bill provides. In section 5 it is provided:

> That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe—

"To do what?

> to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on

California next refers to a colloquy between Senators Hayden and King and to what she describes as a discussion between Senators Hayden and Borah. These are cited to support California's assertion that the "charge that the bill gave control of water rights to the Secretary of the Interior was repeatedly answered by proponents of the measure" (Cal. Ans. Br. 55). California classifies Senator King and Senator Borah as "proponents" of the measure solely because they ultimately voted for its enactment.[12]

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said canal as may be agreed upon, for irrigation and domestic uses.

"The Chairman. The gentleman has used 30 minutes.

"Mr. Colton. I thank the Chair. If that does not give him absolute control of this water, or if it does not seek to give the Secretary of the Interior absolute control of this water, I can not understand the English language; and, gentlemen, that is exactly what we are objecting to. We are saying the Federal Government is trespassing upon territory that does not belong to it whenever it attempts to regulate or control the waters of a river when it is not for the express purpose of navigation and commerce. That is the only power the Congress of the United States has over the water in the streams of this country, and the basic principle upon which Utah has rested its opposition to this bill is that the States control the water for all other purposes." 69 Cong. Rec. 9648-49 (1928).

[12] 70 Cong. Rec. 603 (1928). Although Senator King ultimately voted for the Project Act, he can hardly be classified as a "sponsor" or "proponent" of the measure. The Project Act evolved from the fourth Swing-Johnson bill as altered through a series of amendments. In voting upon these amendments Senator King is to be found in most instances aligned with Senators Ashurst and Hayden of Arizona and opposed to Senators Johnson and Shortridge of California.

Early in the debate he stated frankly that his sympathies were with Arizona regarding the division of water between Arizona and California. 70 Cong. Rec. 164 (1928).

On the Hayden amendment to the Phipps amendment, which would have reduced the California limitation from 4,600,000 to 4,200,000 acre-feet per annum, Senator King voted for the amendment (with Senators Ashurst and Hayden and against Senators Johnson and Shortridge). 70 Cong. Rec. 382-84 (1928).

On the Bratton amendment to the Phipps amendment, which reduced the California limitation from 4,600,000 to 4,400,000 acre-feet per annum, Senator King voted for the amendment, with

The King-Hayden colloquy was unrelated to the powers conferred on the Secretary by the Act. It concerned Senator King's contention that there ought to be a judicial determination of water rights before any money was appropriated for the Boulder Canyon project (Ariz. Ans. Br. 46).[13]

The Hayden-Borah colloquy was really a Hayden-Borah-King discussion. California makes no reference whatever to Senator King's participation in it. Perhaps this conspicuous omission may be explained by the fact that Senator King pointed out to Senator Borah that the pending legislation *did* clothe the Secretary of the Interior with authority to allocate water and to generate and allocate power pursuant to contracts which the bill authorized him to make, and that these provisions jeopardized what Senator King described as Arizona's "future consumptive use of her just share of the waters of the Colorado River".

Senators Ashurst and Hayden and against Senators Johnson and Shortridge, who voted against it. 70 Cong. Rec. 384-87 (1928).

On the Hayden amendment to the Phipps amendment, which would have stricken from §4(a) the provision for six-state rather than seven-state ratification of the Colorado River Compact, Senator King did not vote, but was paired with Senator Shipstead of Minnesota, who was absent. However, Senator King stated that, if present, Senator Shipstead would have voted "Nay" and, therefore, if permitted to vote, Senator King would have voted "Yea". Senators Ashurst and Hayden voted for the amendment, while Senators Johnson and Shortridge voted against it. 70 Cong. Rec. 394 (1928).

On the Hayden amendment to authorize the Secretary of the Interior to investigate the feasibility of the Parker Project and to appropriate $250,000 therefor from the Colorado River Dam fund, Senator King did not vote. Senators Ashurst and Hayden voted for the amendment and Senators Johnson and Shortridge opposed. The amendment carried. 70 Cong. Rec. 574-75 (1928).

At one time Senator King thought that Imperial Valley should be assessed for the cost not only of the All-American Canal but of the dam as well and intended to introduce an amendment so providing. He later changed his mind. 70 Cong. Rec. 474, 528 (1928).

[13] 70 Cong. Rec. 169 (1928).

So that there may be no possible doubt about the matter we set forth in the margin the full text of Senator King's statement in the context of the Borah-Hayden discussion.[14]

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[14] "Mr. Borah. I can see how Arizona might lose her rights, not by reason of this legislation, but by reason of acts of appropriation going on in carrying out the terms of this bill in case Arizona did not assert her rights in court. If she stood by and water were appropriated to beneficial use in other States, she might lose her rights. She would not lose them, however, by reason of this legislation, but by reason of the acts of appropriation.

"Mr. Hayden. That is exactly what we fear—that if, subsequent to the passage of this legislation, a great dam is erected in the Colorado River without the consent of the State of Arizona, the water impounded behind that dam will be claimed and controlled by the Federal Government, and the State of Arizona will have no jurisdiction over it. *The Secretary of the Interior may then enter into contracts to permit the use in California of a much larger quantity of water out of that dam than is fair to the State of Arizona.* The State of Arizona will be helpless unless it does proceed, as the Senator suggests, by filing a suit in the Supreme Court of the United States to determine its rights.

"Mr. King. Mr. President—

"Mr. Hayden. I yield to the Senator from Utah.

"Mr. King. I desire to suggest to my friend from Idaho this situation:

"By this bill the Federal Government is asked to appropriate more than $100,000,000 to construct a dam in the States of Arizona and Nevada particularly for the purpose of generating power. *The bill requires that the Secretary of the Interior shall make contracts for the sale of power and stored water.* It is obvious that Arizona, not being ready to utilize all of the water of the river to which she believes herself entitled, may lose her right largely because of the acts of the Federal Government. The construction of the dam and the use of a portion of the water for the generation of power places the Government in the position of aiding California in appropriating water which Arizona claims.

"By this bill the Government is aiding California, by taking money out of the Treasury of the United States, to appropriate a part of the river flow for power, irrigation, and domestic purposes. This appropriation may be, and probably is, a part of the stream to which in all justice Arizona is entitled. *Under the terms of the bill we are requiring contracts to be entered into by the Secretary of the Interior to raise sufficient sums to annually meet the expenditures made by the Government.* These contracts will require that power be developed by utilizing a portion of the water claimed by Arizona. *Contracts are to be made requiring that a portion of the waters of the river be diverted therefrom and*

In attempting to answer Arizona's position that §§4(a) and 5 of the Project Act constitute a formula for the allo-

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taken to Los Angeles and other coastal cities for domestic and other purposes; so that the United States is asked to become a party to a policy which may deny to Arizona the future consumptive use of her just share of the waters of the Colorado River.

"Arizona is vitally interested in this proposed legislation, and in securing an agreement with California as to a division of the water; doubtless she feels that before she can vote to ratify the compact there should be an agreement dividing the water of the river. She may feel that if no agreement is entered into and she is not in a position to utilize her share of the water for some time, California, with the aid of the Government, will use for power and other purposes water which is justly hers. In this situation, when Arizona is in a position to require the water, and it is claimed by California, a demand might be made upon the upper States for a portion of the quantity allocated to them.

"It will be observed that there are serious problems involved in the proposed legislation which we are considering.

"Mr. Borah. Mr. President, of course it would have been extremely satisfactory to all members of the Senate if the seven States could have agreed. They have been unable to agree, however; and we must, therefore, make our choice of whether we will do nothing, or whether we will pass such legislation as is now proposed.

"Then, again, here is a river some 1,700 miles long, I think, national and international in its scope, affecting immediately seven States, and indirectly as many more. There is no one except the Government of the United States who can deal with that river so far as flood control and such matters are concerned. No one else is able to do it; no one else could do it; no one else really has the authority to do it; and, fundamentally, the flood-control proposition is what most immediately concerns me.

"Undoubtedly, if Arizona stands idly by and does not protect her rights, either by appropriation or by such action in the courts as will protect them, she will lose her rights ultimately. That is one of the penalties of living under the doctrine of prior appropriation. If an individual has a farm or ranch, and the water is running by it, if he does not use it, his neighbor below him or above him can appropriate it and take it away from him, ultimately. So here, I presume, if Arizona should not act, she perhaps would be prejudiced by this legislation in the sense that the acts carrying it out would result in appropriations by others. It would not be the act of Congress which took away her rights, however, but the acts of appropriation following as a result of it.

"Mr. Hayden. Mr. President, that is why we oppose the passage of a bill which authorizes large appropriations of money to construct a dam and other works which will inevitably lead to appropriations

cation of water among the Lower Basin main stream states, California argues:

> "The 'conform to' provision in section 5 was offered before the language of the second paragraph of section 4(a) was offered; the genesis of each was unrelated to the other." (Cal. Ans. Br. 127) (footnote omitted)

The footnote references in support of this statement create the erroneous impression that when Senator Phipps first offered the amendment to §5, requiring secretarial contracts to conform to §4(a), the second paragraph of §4(a) was not even before the Senate. A brief review of the evolution of these provisions establishes that the California contention is erroneous.

Senator Phipps did not offer his amendment in May, 1928, he merely had it printed.[15] The same is true of an amendment, printed by Senator Pittman, which later became the Hayden amendment.[16] Neither of these two suggestions was offered and therefore neither had any status as an amendment during the First Session of the 70th Congress.

On December 6, 1928, the second day of the Second Session of the 70th Congress, Senator Hayden offered his proposed amendment to §4(a), providing for a limitation of 4,200,000 acre-feet on California and containing the first

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of water which are adverse to the State of Arizona, unless and until there is an agreement between Arizona and California apportioning these waters. We desire an agreement so that if Arizona is not in position to use her share of the water immediately, it will be reserved for her. In other words, Arizona's position in this matter is exactly and identically on all fours with the position of the States of the upper basin. We ask no more and no less in the way of protection from immediate development in California than do the States of the upper basin." 70 Cong. Rec. 391-92 (1928).

[15] 69 Cong. Rec. 9144 (1928), Ariz. Legis. Hist. 20-21.

[16] 69 Cong. Rec. 10,259-60 (1928), Ariz. Legis. Hist. 21-26.

proposal for a tri-state compact and an interstate allocation of water.[17] Four days later, Senator Phipps stated his understanding that the pending amendment was the one offered by Senator Hayden and then proposed his amendment, which was substantially the same as the first paragraph of the Hayden amendment except that it fixed the California limitation at 4,600,000 acre-feet, provided for six-state ratification of the Compact and added the provision to §5 that the Secretary's contracts "shall conform to paragraph (a) of section 4 of this Act".[18] Thus, at the time Senator Phipps proposed this amendment to §5 both paragraphs of §4(a) were the subject of debate by the Senate.

On December 11th Senator Hayden pointed out that since the Phipps amendment to his amendment was in the second degree the Phipps amendment was not subject to amendment. He then asked for a ruling whether under parliamentary procedure he might withdraw his amendment in order that there might be a separate vote on three questions: (1) the division of water; (2) six or seven-state ratification of the Compact; and (3) a limitation on the authority of the Federal Power Commission to issue licenses. After a ruling that his suggested procedure was in order, he withdrew his amendment without prejudice and requested Senator Phipps to re-offer his amendment so that "we can proceed to debate it, to amend it, and to vote upon it". Senator Phipps then re-offered his amendment to §§4(a) and 5 with the obvious understanding that Senator Hayden's proposal for a tri-state compact and an interstate allocation of water would be reoffered subsequently.[19]

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[17] 70 Cong. Rec. 161-62 (1928), Ariz. Legis. Hist. 27-29.

[18] 70 Cong. Rec. 324 (1928), Ariz. Legis. Hist. 72.

[19] 70 Cong. Rec. 382 (1928), Ariz. Legis. Hist. 84-86.

After the California limitation was fixed at not to exceed 4,400,000 acre-feet per annum and six-state ratification of the Compact was accepted, Senator Hayden again offered his amendment which added the second paragraph to §4(a).[20]

Before the vote on the Hayden amendment, Senator Phipps stated:

> "Mr. President, as I understand, this amendment is to the one offered by myself and which is now the pending amendment. I desire to say that I am willing to accept the amendment."[21]

The Hayden amendment was then agreed to.[22] The Phipps amendment, as amended by the Hayden amendment, was then approved by the Senate.[23]

At that time, the second paragraph of §4(a) had been added and the provision in §5 requiring secretarial contracts to conform to §4(a) was approved simultaneously, so that at the time §5 was thus amended the complete water allocation to which the Secretary was required to conform was approved by the Senate.

All of these provisions were in the bill when it was approved as a whole by the Senate[24] and when the House approved the bill without further change.[25]

California's claim that the legislative history negates any congressional intent to make an interstate allocation of water is simply untenable. As the Special Master concluded:

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[20] 70 Cong. Rec. 387-88, 459 (1928), Ariz. Legis. Hist. 97-99, 101.

[21] 70 Cong. Rec. 472 (1928).

[22] 70 Cong. Rec. 472 (1928), Ariz. Legis. Hist. 132.

[23] 70 Cong. Rec. 473 (1928), Ariz. Legis. Hist. 132.

[24] 70 Cong. Rec. 603 (1928), Ariz. Legis. Hist. 132.

[25] 70 Cong. Rec. 837-38 (1928), Ariz. Legis. Hist. 132.

> "The congressional debates are almost unintelligible except on the premise that the legislators considered that they were providing, in the Project Act itself, the authority for the allocation of impounded water among the states." (Rep. 154)

B. As to the Main Stream Versus System Allocation Issue

We repeat what was demonstrated in Arizona's Opening Brief—that the historical background and legislative history of §4(a) show that Congress intended by the enactment of that section to deal with main stream water only (Ariz. Op. Br. 61-67; see also Ariz. Ans. Br. 61-67). In reviewing this legislative history we referred to the proposal made by the Governors of the states of the Upper Division at the 1927 Governors' Conference that, "of the average annual delivery of water to be provided by the States of the upper division at Lees Ferry, under the terms of the Colorado River Compact", there be apportioned to Nevada 300,000 acre-feet, to Arizona 3,000,000 acre-feet and to California 4,200,000 acre-feet. We then demonstrated that this recommendation of the Governors was the starting point for the compromise effectuated in §4(a) of the Project Act whereby California was limited to 4,400,000 acre-feet and Arizona was allotted 2,800,000 acre-feet of water from the main stream of the Colorado River (Ariz. Op. Br. 62-63).

California attacks as unsound (Cal. Ans. Br. 97-99) Arizona's contention that the legislative history of the Project Act supports the view that the Act authorized the apportionment among the Lower Basin main stream states of only main stream water because (1) a portion of the legislative history relied upon by Arizona is the recommendation of the Governors' Conference for the division

among the Lower Basin main stream states of the water delivered by the states of the Upper Division at Lee Ferry and (2) the Master construes the Project Act as authorizing the allocation of water among the Lower Basin main stream states in terms of diversions less returns measured at the points of diversion in the Lower Basin. California reasons that since a flow of 7,500,000 acre-feet at Lee Ferry cannot, because of natural losses, supply 7,500,000 acre-feet of water for consumptive use below Lake Mead, Arizona's legislative history of the Project Act is irrelevant to the construction of that Act. She relies upon the Special Master's statements regarding the part which the Governors' recommendation played in the deliberations of Congress in the enactment of the Project Act in support of her contention, notwithstanding the fact that the Special Master expressly found that the intent of Congress to authorize the allocation of main stream water only is clearly stated in the legislative history of the Project Act (Rep. 174).

A short answer to this California argument is that even if Arizona were mistaken in her belief that the Governors' recommendation throws light on the proper construction of the Project Act, that would not vitiate all the other phases of the legislative history which, as the Master holds, unmistakably evidence the intent of Congress to authorize the apportionment of only main stream water among the Lower Basin main stream states.

However, the Governors' recommendation is of assistance in determining the congressional intent. It is immaterial whether Congress appreciated that the Governors' proposal referred to Article III(d) water rather than III(a) water, as the Master finds, or whether Congress viewed that proposal as recognizing the correlation between Article

III(a) and III(d) of the Compact, as we believe. In either event, the subject matter of this proposal of the Governors was main stream water, and the deliberations of Congress concerning the limitation on California and the tri-state division of water approved by Congress started with and continued to deal with that same subject matter.

Moreover, the Master's discussion of the Governors' Conference relates only to his rejection of the contention, at one time urged by the United States, that uses should be measured at Lee Ferry (Rep. 187-94); it does not relate to the question of what water, *i.e.*, main stream or main stream and tributary, is dealt with in the Project Act. This latter question the Master had previously answered thus:

> "I have concluded that the limitation on California's consumption of water from the Colorado River contained in Section 4(a) of the Project Act and the correlative apportionment of this water among Arizona, California and Nevada effectuated by the water delivery contracts . . . apply only to water diverted from Lake Mead and from the mainstream of the Colorado River below Lake Mead. Hereafter, reference to the 'mainstream', except where otherwise specifically indicated, means Lake Mead and the Colorado River downstream from Lake Mead within the United States." (Rep. 185)

Thus, while Congress may not have understood that the Governors' proposal referred to Article III(d) water rather than to Article III(a) water (Rep. 189), Congress certainly understood that the Governors' recommendation referred to water of the main stream of the Colorado River to the exclusion of Lower Basin tributaries, since water to be delivered at Lee Ferry could mean nothing other than main stream water.

The fact that "the recommendation of the upper division governors did not exempt any lower basin tributaries from the Mexican Treaty burden" (Cal. Ans. Br. 89) is of no relevance to any issue presented by this case. The important point is that the Governors distinguished between water to be delivered at Lee Ferry—necessarily main stream water—and waters of the tributaries of the Colorado River "flowing in Arizona" or "emptying into the river below Lees Ferry" (Ariz. Op. Br. 63 and note 28).

The Master has not found nor even intimated that this distinction between main stream and tributary water, unmistakably made by the Governors, was not clearly understood by Congress in its use of the Governors' recommendations in the senatorial compromise effectuated by §4(a) of the Project Act (Rep. 188-93).

That the recommendations of the Governors' Conference were the basis of the discussion resulting in the compromise was recognized by both Senators Hayden and Johnson, the principal protagonists for Arizona and California, respectively:

> "Mr. Hayden. Is the Senator, then, to make it more specific, willing to use the recommendations of the governors of the States of Wyoming, Colorado, New Mexico, and Utah, as a basis for discussion.
>
> "Mr. Johnson. We can use them as a basis for discussion, but in the bill was inserted a reference to a certain amount of water, at the instance, I think, of the Senator from Wyoming, as the amount that should not be exceeded to the State of California, holding it to 4,600,000 acre-feet, I believe. That is in the bill.
>
> "Mr. Hayden. That is the amount of water which the State of California demanded at Denver and from which she would not recede.
>
> "Mr. Johnson. That is correct, is it?

> "Mr. Hayden. It is. The four governors awarded to the State of California, in their offer of mediation, 4,200,000 acre-feet of water. The State of California submitted a demand for 4,600,000 acre-feet, and has never receded by as much as one acre-foot from that demand."[26]

The Court's attention is invited to the fact that in the portion of Governor Dern's testimony excised by California (Cal. Ans. Br. 99-100), he stated in reference to the Governors' Conference:

> ". . . The State of Arizona made very material concessions toward accepting the proposals submitted by the governors. Arizona, for instance, accepted the amount of water the governors allocated to her *out of the main stream,* which was the most important item."[27]

Mr. Wilson, testifying at the same hearings, stated in the portion of his testimony immediately before that quoted by California:

> "But we took the position that, as regards the 75,000,000 acre-feet which the upper-basin States are obligated under the compact *to let go down by Lees Ferry* in any continuous period of 10 years, we could make a suggestion as to the division of those waters, which, after all, must necessarily be the bone of contention between California and Arizona, *because California had already at previous conferences between the two States conceded that the tributaries of Arizona should belong to that State.* So when we made the suggestion to them we said that all of the suggestions made should be subject and subservient

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[26] 70 Cong. Rec. 77 (1928).

[27] *Hearings on H. R. 5773 Before the House Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 264 (1928).

> to the provisions of the Santa Fe compact. Then we said: Of the average annual delivery of water to be provided by the States of the upper basin at Lees Ferry under the terms of the Colorado River compact, to the State of Nevada, 300,000 acre-feet; to the State of Arizona, 3,000,000 acre-feet; to the State of California, 4,200,000 acre-feet.'"[28]

In any event, entirely independently of the Governors' conference and without any reference to it whatever, the Special Master found:

> "Certainly Congress intended that the water, to a portion of which California was limited by Section 4(a), would be mainstream water only. . . . This intention is clearly stated in the legislative history." (Rep. 174)

II

The fact that a delivery of 7,500,000 acre-feet of water at Lee Ferry cannot be precisely equated with a consumptive use of 7,500,000 acre-feet of water down stream does not warrant the conclusion that §4(a) of the Project Act deals with system water.

California argues that since a delivery of 7,500,000 acre-feet of water at Lee Ferry cannot supply consumptive uses in that amount (measured by diversions less returns) at the diversion points in the Lower Basin states, neither Article III(a) of the Compact nor §4(a) of the Project Act could have intended a division of main stream water at Lee Ferry (Cal. Ans. Br. 84-87).

Arizona has fully developed her reasons for concluding that Article III(a) of the Compact apportions main stream water at Lee Ferry (Ariz. Op. Br. 72-81). But even if Arizona's interpretation of Article III(a) is not accepted,

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[28] *Id.* at 291-92.

it is the congressional intent in employing Compact terminology which governs the construction of §4(a) of the Project Act, as the Master has held (Rep. 173-85).

California first assumes, for the purpose of her attack upon Arizona's position, an actual delivery of 7,500,000 acre-feet of water each year at Lee Ferry. She next assumes it to be Arizona's contention that Congress must have envisaged that this identical water was to be delivered at the points of diversion in the three Lower Basin states.

This is not the case. We agree with the Special Master that the 7,500,000 acre-feet divided among the Lower Basin main stream states is the first 7,500,000 acre-feet of water available each year for consumptive use from Lake Mead and below (Rep. 173-85, 232-33, 305). Quite obviously, this quantity of water is not made up solely of water delivered at Lee Ferry pursuant to the delivery obligation of Article III(d) of the Compact since a release of 7,500,000 acre-feet at Lee Ferry would not result in the identical water so released reaching Lake Mead. Moreover, the Article III(d) delivery obligation does not require the delivery of 7,500,000 acre-feet each year, but only an average of 7,500,000 acre-feet per year in any period of ten consecutive years. Congress was well aware of these facts.

Congress did not intend that the annual delivery at Lee Ferry was to be piloted through the reservoir and down the river for diversion by the states. Congress knew that in a reservoir of the magnitude of Lake Mead water delivered at its upper end would remain in storage for a substantial period of time before reaching Hoover Dam and did not equate the actual annual delivery at Lee Ferry with the water to be supplied to the states each year.

When members of Congress spoke in debate of dividing the 7,500,000 acre-feet let down at Lee Ferry, it is not to be supposed that they intended the impossible. Rather, the

true significance to be attributed to these statements is that in the matter of division of water Congress had its attention focused upon, was concerned with, and intended to deal only with main stream water, and that water of Lower Basin tributaries was not considered as a part of the water to be divided.

Congress was faced with the responsibility of providing authority for the allocation and use of water which would be stored in the exercise of its dominant servitude over navigable water. In discharging that responsibility Congress undoubtedly was influenced by the fact that the water supply flowing in the main stream from the Upper Basin would average not less than 7,500,000 acre-feet per annum. But this fact does not compel the conclusion that Congress, in providing for an allocation of water to be made available by the vast storage facilities contemplated by the Project Act, intended to provide for the allocation among the Lower Basin main stream states of only that portion of the water delivered at Lee Ferry pursuant to Article III(d) of the Compact as should actually reach the diversion points below Lake Mead.

In any event, the fact that 7,500,000 acre-feet of water delivered at Lee Ferry cannot be equated with 7,500,000 acre-feet delivered at Lake Mead or with 7,500,000 acre-feet of consumptive use within the Lower Basin states does not establish the California thesis that Congress in §4(a) of the Project Act was dealing with system water rather than with water of the main stream only. The legislative history of the Act simply precludes any such conclusion. Even apart from the legislative history, the provisions and general operative scheme of the statute lead inevitably to the conclusion, as the Master found, that both §4(a) of the Project Act and the Limitation Act refer only to main stream water—to water in Lake Mead and flowing in the main stream below Hoover Dam (Rep. 138, 151-52, 173-85).

III

California's assertion of an "automatic shortage" is unfounded.

California's claim of "automatic shortage" (Cal. Ans. Br. 1-29) is epitomized in the following statement:

> "The proposed decision [the Master's Report and Recommended Decree] would permit California to receive only *3.8 million acre-feet* even if the lower basin water supply were sufficient to sustain all of the Compact allocations in full, plus all Mexican Treaty requirements and all losses of every description." (Cal. Ans. Br. 8) (California's italics)

California's fundamental error lies in her assertion that the meaning of Article III of the Compact, as she construes it, controls the intent and purpose of Congress in enacting the Project Act and that the water dealt with in §§4(a) and 5 of the Project Act includes Lower Basin tributary water as well as water of the main stream.

The Master was right in rejecting the California contention that the California limitation covered tributary as well as main stream water and in holding:

> "For the reasons stated above, Section 4(a) of the Project Act cannot be given a literal interpretation. Such an interpretation would fly in the face of what must have been the congressional intention; it would make no practical sense whatsoever. This being the case, I have construed Section 4(a) so as to comport with the purposes of Congress in enacting it and to effectuate a result which makes sense when the section is applied to the factual situation existing in the Colorado River Basin.
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> * * * * * *
>
> "Thus I hold that Section 4(a) of the Project Act and the California Limitation Act refer only to the

water stored in Lake Mead and flowing in the mainstream below Hoover Dam, despite the fact that Article III(a) of the Compact deals with the Colorado River *System,* which is defined in Article II(a) as including the entire mainstream and the tributaries.

"It is clear that Congress intended Section 4(a) of the Project Act to apply only to the mainstream, where the works authorized by the Act were to be constructed. The United States cannot by its operation and control of Hoover Dam regulate the flow of water in the tributaries, nor can it deliver water on any of these streams" (Rep. 172-74) (footnote omitted; Master's italics).[29]

Subsidiary to California's fundamental error in reading her construction of the Compact into the provisions of the Project Act is the California concept that Article III(a) and (b) of the Compact impose an "embargo" or "ceiling" on the amount of water which the Lower Basin may legally put to beneficial consumptive use, regardless of the amount of water which is physically available for such use (Cal. Ans. Br. 19).

California says:

"Manifestly, if the Compact requires accounting for uses on the tributaries against the lower basin's III(a) ceiling of 7.5 million acre-feet, the lower basin states cannot claim against the upper basin (which is their major source of supply) the whole 7.5 million acre-feet out of the main stream as within that ceiling. Thus, if the limitation on California and the secretarial contracts effectuate an allocation of 7.5 million acre-feet from Lake Mead and below, this allocation exceeds the Compact 'ceiling' or 'embargo' (Rep. 140, 196). Since the Secretary is required by statute to operate Lake Mead (and each of the dams

[29] See Ariz. Op. Br. 32-46, 57-81; Ariz. Ans. Br. 58-72.

> above Lake Mead) in conformity with the Compact, shortage in the allocations made by the Master's 'contractual allocation scheme' is automatic and certain whenever the Secretary restricts either the inflow to, or releases from, Lake Mead to enforce the Compact 'ceiling.' " (Cal. Ans. Br. 19-20) (footnotes omitted)

And further:

> "If the Compact is enforced, the Master's formula produces a built-in shortage." (Cal. Ans. Br. 20) (footnote omitted)

This argument is frivolous. The Master held directly to the contrary:

> "... it is clear that the Lower Basin may utilize and consume more than the 8,500,000 acre-feet of water per annum apportioned to it by subdivisions (a) and (b) of Article III of the Compact, if the water is actually available, but against the Upper Basin it can acquire appropriative rights to no greater quantity than is sufficient to satisfy a consumptive use of that magnitude." (Rep. 140)

The language of the Compact not only fails to support California's assumptions, but points clearly to a contrary conclusion. Article III(e) of the Compact provides:

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

California ignores realities and deals in computations using assumed figures which have no factual basis in the record. Her "legal drouth" is as mythical as her previously asserted "disaster" (Cal. Op. Br. 50). By her unrealistic computations and assumptions California produces her "built-in shortage" (Cal. Ans. Br. 20), despite the fact that, according to authoritative estimates, uses in

the Upper Basin will not exceed 4,800,000 acre-feet of its apportioned 7,500,000 acre-feet per annum in the foreseeable future (Ariz. Ans. Br. 128).

IV

The California contention that Hoover Dam and Lake Mead can and must be operated in satisfaction of prior appropriative rights is unsound.

We adhere to our position that the recognition and satisfaction of appropriative rights in point of quantity and priority date would be incompatible with the management of Hoover Dam and Lake Mead for the improvement of navigation and flood control pursuant to the mandate of the Project Act (Ariz. Op. Br. 41-42). This position is not inconsistent, as California asserts (Cal. Ans. Br. 111), with that which we have taken with respect to §18 of the Project Act.

The subject under consideration at page 99 of Arizona's Opening Brief, to which California refers for support of her statement that "Arizona agrees with the Master that section 18 of the Project Act requires 'that state law shall govern intrastate water rights and priorities' " (Cal. Ans. Br. 111), was Article 7(d) of the Arizona water delivery contract, which concerns tributary uses in Arizona above Lake Mead. It was and is our position that these provisions of the Arizona contract are invalid for the reason, among others, that they violate the direction of §18 of the Project Act that state law shall govern intrastate water rights and priorities. We contended that the provisions of §18 of the Project Act apply to the tributaries within the State of Arizona, but we did not contend that the provisions of §18

are applicable to water stored in Lake Mead. To the contrary, we stated in our Answering Brief:

> "In no event can §18 be construed as applying to the *interstate* allocation of water stored pursuant to the Project Act. Once that water is impounded by the United States, it ceases to be water subject to the sovereign dominion of any state. Otherwise, its release and delivery from Lake Mead would be controlled by state law and policy instead of by contracts which the Secretary of the Interior is authorized by §5 of the Project Act to make and without which 'no person shall have or be entitled to have the use for any purpose of the water stored as aforesaid. . . .' " (Ariz. Ans. Br. 9) (italics in original)

The purpose of §18 was to insure that nothing in the Act or any water delivery contract should override the then existing rights of the states in the tributary streams within their borders or should prevent the states from controlling the use of such water in accordance with whatever policies they might deem appropriate (Ariz. Ans. Br. 159-60).

California attempts to identify the provisions of §6 of the Project Act with those of §2 of the Rivers and Harbors Act of 1937.[80] She then quotes from this Court's decision in *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725, 734 (1950), thereby creating the erroneous impression that it was there held that a dam of the Central Valley Project in California had to be operated so as to satisfy existing rights under state law (Cal. Ans. Br. 112-14).

The *Gerlach* case did not so hold or even intimate. It held that in undertaking the project Congress recognized that state-created water rights would necessarily be taken from their owners but did not intend that the taking should be without compensation. 339 U. S. at 739. The situation in the case at bar is far different.

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[80] 50 Stat. 850.

Finally, California's assertion that "there is no evidence that Hoover Dam and Lake Mead have been operated without regard to appropriative rights, nor may any such inference be drawn from the evidence" (Cal. Ans. Br. 115) is flatly contradicted by the record.[81]

V

California's criticism of the Master's invalidation of Article 7(d) of the Arizona contract is predicated upon the erroneous claim that the United States concurs in California's position that the doctrine of prior appropriation survived the Project Act.

Answering the Opening Brief of the United States, California once again argues her thesis that principles of priority of appropriation and equitable apportionment are relevant and controlling in the determination of the rights of the Lower Basin main stream states in the water of the Colorado River. California attempts to distort the argument made by the United States in support of the validity of Article 7(d) of the Arizona water delivery contract and Article 5(a) of the Nevada contract into an asserted reliance on the doctrine of prior appropriation and the principles of equitable apportionment (Cal. Ans. Br. 36-46).

We do not understand the United States to rely on the doctrine of prior appropriation to support the validity of these provisions of the Arizona and Nevada contracts nor do we believe that the Government's argument is fairly susceptible of that interpretation. We cannot find any justification for the California assertion that the United States, by "implication, inference, and other interpretive techniques [attempts] to mold water delivery contracts

[81] Tr. 21,212-14; and see Tr. 828-29, 857-67, 876-78, 893-95.

into instruments having the effect of recreating equitable apportionment" (Cal. Ans. Br. 37). To the contrary, the briefs of the United States repeatedly assert its position that principles of priority of appropriation and equitable apportionment are not material to a determination of the entitlements of the Lower Basin main stream states to the use of Colorado River water. For example, the Answering Brief of the United States asserts:

> "The principles of priority of appropriation and equitable apportionment are irrelevant, therefore, once it is shown that Congress has made or authorized a federal allocation. Recognition of this proposition removes the underpinning from California's attack upon the decree recommended by the Special Master, for the essence of California's claim is that the principles of prior appropriation and equitable apportionment, when applied to the waters of the Colorado River, give her a right to a water supply adequate to permit full utilization of the capacities of her present projects, which should not be at the hazard of sharing shortages in the total main stream supply with future projects in Arizona and Nevada.
>
> "There is no merit in California's claim that her citizens could acquire 'prior rights' (Calif. Opening Br., p. 37) in the navigable waters of the Colorado River before the United States exercised its powers over the stream. Any claimed rights recognized under the State law were subject to, and could be displaced by, the exercise of the superior federal authority" (U. S. Ans. Br. 24-25).

Contrary to the California claim, the authority to charge tributary uses against contract entitlements in main stream water, for which the United States argues, is not predicated on the enforcement of claimed prior rights downstream, but is based upon the Government's interpretation of the Project Act (U. S. Op. Br. 4, 8-21). In fact the contention of the United States is that these contractual provisions

are necessary to avoid frustration of the purposes of the Act (U. S. Op. Br. 10-11).

Even if the United States were correct, the charge against the entitlements of the states to stored water resulting from the enforcement of these provisions of the Arizona and Nevada contracts would not be in recognition of claimed senior priorities below Lake Mead. The result would be to increase the supply available for apportionment under the authority of the Project Act without reference to claimed appropriative rights below Lake Mead. Since this is true, the "unworkable system of water rights" resulting from the example hypothesized in the California Answering Brief (Cal. Ans. Br. 44-45) would not and could not arise. The basic fallacy which underlies the California contention and her supposed example is that rights to the use of Colorado River water originate in and are predicated upon appropriative rights. This concept cannot be squared with an administration of the river predicated upon the premise that such rights are derived from the United States and are fixed by the allocation authorized by the Project Act. Any attempt to read principles of priority of appropriation into the Project Act or to reconcile the incompatible concept of appropriative rights with that of a statutory allocation is bound to produce "an unworkable system of water rights".

When it is appreciated that Congress elected to exercise its dominant servitude only over the water in the main stream of the Colorado River and to authorize an allocation among the Lower Basin main stream states of the main stream water stored by the United States in carrying out its powers under the Commerce Clause, the problems posed by California disappear. All rights to the use of water below Lake Mead are limited to the supply created under the authority of the Project Act and do not extend to the water of tributary streams, over which Congress did not attempt

to exercise any control and which Congress did not intend should constitute a part of the water included in the Project Act allocation (Ariz. Ans. Br. 156-57).

VI

California's criticism of Arizona's proposed amendment to Article II(B)(8) of the Special Master's Recommended Decree is unwarranted.

California takes exception to Arizona's suggested amendment (Ariz. Op. Br. 106-08) of Article II(B)(8) of the Special Master's Recommended Decree[32] and argues

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[32] California's assertion (Cal. Ans. Br. 129) that Arizona's proposal was "rejected by the Special Master" is incorrect. The proposed amendment set forth in Arizona's Opening Brief (108) was not presented to the Master. The proposal submitted to and rejected by him was substantially different and read as follows:

"ARIZONA'S SUGGESTED CHANGES TO SUBDIVISION (B)(6) OF ARTICLE II OF THE RECOMMENDED DECREE (DRAFT REPORT, pp. 306-309)

"(Deletions struck, additions underlined)

"II(B)(6) 'If, in any one year, water apportioned for consumptive use in a state will not be consumed in that state, whether for the reason that users therein do not have delivery contracts for the full amount of the state's apportionment, or that they cannot apply all of such water to beneficial uses, or for any ~~another~~ other reason, ~~nothing in this decree shall be construed as prohibiting the the Secretary of the Interior from releasing such apportioned but unused water during such year for consumptive use in the other states. No rights to the recurrent use of such water shall accrue by reason of the use thereof.~~ the Secretary of the Interior may, in his discretion and to the extent such storage will not be inconsistent with the objects and purposes of the Project Act, permit such state to accumulate and store such unused waters. Any losses occasioned by reason of such storage shall be a charge against the water so stored.' "

For the discussion of this suggestion before the Special Master see Reporter's Transcript, Conferences on Recommended Decree, New York, N. Y., August 19, 1960, pp. 85-122.

that should flood control require the release of water from Lake Mead the proposed amendment requires the Secretary "to compel the waste of that water to the ocean rather than to permit its use by a state thereby exceeding its allocation" (Cal. Ans. Br. 129).

California misunderstands the provisions of the Recommended Decree and the modification of Article II(B)(8) proposed by Arizona. The Recommended Decree enjoins the release of water for irrigation and domestic use in Arizona, California and Nevada, except in the quantities specified in Article II for consumptive use in the three states. Article II(B)(8) merely authorizes the release to one state of water which is apportioned to but will not be consumed in another. This exception has nothing to do with water released for flood control or other non-consumptive uses but is expressly limited to "water apportioned for consumptive use in a state".

Subdivisions (C) and (D) of Article III of the Recommended Decree enjoin each of the Lower Basin main stream states from diverting water from the main stream, the diversion of which has not been authorized by the United States for use in that state and from consuming water in excess of the quantities specified in Article II of the Recommended Decree.

Thus, even without the modification of Article II(B)(8) suggested by Arizona, the States of Arizona, California and Nevada are enjoined by the Recommended Decree as it now stands from diverting or consuming any main stream water in excess of that which is apportioned to them by the United States pursuant to Article II, or which has been apportioned to but will not be consumed by another state.

All that is intended by the proposed modification advocated by Arizona and all that may be properly attributed

to it is that the ceiling placed on consumptive uses in the Lower Basin main stream states by the Project Act, the Limitation Act and the water delivery contracts shall be observed and that this ceiling shall not be exceeded because of uses in one state of water apportioned to but unused in another.

Evasion of the ceiling placed on uses of Colorado River water by the Project and Limitation Acts and the water delivery contracts should not be sanctioned under the guise of prevention of waste. Glen Canyon Dam, together with existing and anticipated regulatory structures on the Colorado River, make it most likely that it will be possible to store and regulate the flow of the Colorado River so that the use requirements of the Lower Basin main stream states and the Mexican Treaty delivery obligations can be synchronized with releases required for flood control without the wasteful results predicted by California. The fact that the water available for use in the Lower Basin is not abundant leads all to deplore waste and to endorse any reasonable and lawful measure for its elimination. At the same time, we are mindful of California's relentless opposition to every Arizona effort to put to use Arizona's share of Colorado River water. Even though California attempts to disguise her true purpose by draping the "prevention of waste" cloak about it, we must oppose the incorporation into the Decree of provisions which would nullify the protection afforded by the limitations set by the Project and Limitation Acts and thereby supply California with the incentive to continue her opposition to Arizona's utilization of Colorado River water even after Arizona's legal entitlements in that stream are set at rest.

PART II

The Claims of the United States to Water

PART II

The United States attempts to support the Special Master's recommendations relating to its right to the use of main stream water for Indian Reservations and other federal establishments on either of two alternative theories:

First. That under the Project Act the Secretary of the Interior is empowered "to use, or to reserve the use of," a portion of "the waters of the mainstream of the Colorado River" for the lands of the United States (U. S. Ans. Br. 55).

Second. That the United States has "property rights" or "a proprietorship" in the use of the water of the Colorado River, which it exercised when the federal establishments were created by reserving such waters for use thereon in quantities sufficient to satisfy their ultimate needs (U. S. Ans. Br. 55-56).

The Master's recommendations cannot be sustained on either of these theories.

ARGUMENT

VII

The Master's recommendations regarding the right of the United States to use water of the Colorado River for federal establishments cannot be sustained on the basis of the authority given the Secretary by the Project Act.

The Special Master did not rely upon the Project Act as creating the rights which the United States claims to main stream water for use on federal establishments. He upheld those claims on the ground that the federal government has the inherent power to reserve water of both navi-

gable and non-navigable streams for the benefit of federal establishments and that the very creation of such establishments impliedly reserves in perpetuity sufficient water to satisfy their ultimate needs (Rep. 254-66).

Under the Master's theory, this reservation of water for the use of federal establishments was not effectuated by any act of the Secretary of the Interior in the exercise of the authority granted him by the Project Act, but rather by Congress or the President in creating the federal establishments, thereby automatically reserving water for their use.

Clearly, the priorities which the Master accorded these federal water rights do not and could not possibly originate in the Project Act, which did not become effective until June 25, 1929 (Rep. 152 note 20), since the priorities of all but three of the establishments are recognized by the Master as antedating the Project Act.[33]

The Master construed §6 of the Project Act as preserving whatever rights to main stream water were perfected when the Project Act became effective on June 25, 1929 (Rep. 152 note 20), and he held specifically that a reservation of water by the United States before June 25, 1929 is to be accorded the protection given by §6 to "present perfected rights", even though, as of that date, the rights were not perfected under state law and but a small fraction of

[33] The priority dates found by the Master for the various establishments are as follows: Chemehuevi Indian Reservation, February 2, 1907 (Rep. 267); Cocopah Indian Reservation, September 27, 1917 (Rep. 268); Yuma Indian Reservation, January 9, 1884 (Rep. 269); Colorado River Indian Reservation, March 3, 1865, November 22, 1873, November 16, 1874, May 15, 1876, and November 22, 1915 (Rep. 274); Fort Mohave Indian Reservation, September 18, 1890, and February 2, 1911 (Rep. 283); Lake Mead National Recreation Area, May 3, 1929, and April 25, 1930 (Rep. 295); Havasu Lake National Wildlife Refuge, January 22, 1941, and February 11, 1949 (Rep. 299); Imperial National Wildlife Refuge, February 14, 1941 (Rep. 300).

the water purportedly reserved had been put to beneficial use (Rep. 309-10). The Master's conclusion was based on the premise that

> "The water rights created by such a federal reservation do not depend upon state law or upon the actual diversion and beneficial use of a specific quantity of water." (Rep. 309)

This conclusion serves to emphasize the fact that the water rights of federal establishments were grounded by the Master not upon the Project Act but upon principles of decisional law,[34] which, he found, gave to those rights an existence, a special character and a priority wholly independent of the Project Act and which that Act only recognized and preserved.

Nor did the Special Master derive from the Project Act the quantities of water which he found had been reserved for federal establishments, *viz.*, quantities sufficient to irrigate all the irrigable acreage within the Indian Reservations (Rep. 254-66) or quantities reasonably necessary to fulfill the purposes and to meet the requirements of other federal establishments (Rep. 295, 299, 300).

It is thus too clear for dispute that the Project Act is not the basis of the Master's recommendations sustaining the claims of the United States to main stream water for the use of federal establishments. Rather, the entirely different, separate and independent "reservation" theory is the sole and exclusive foundation for those recommendations.

Indeed, the Master specifically held that the Project Act is not the origin of the rights claimed by the United States to main stream water for federal establishments. With

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[34] The Master relied on *Winters* v. *United States*, 207 U. S. 564 (1908).

respect to such a claim for the Coachella Indian Reservations, the Master stated:

> "The Boulder Canyon Project Act does not specifically invest the Coachella Reservations, or indeed any Indian Reservation, with rights to water from the Colorado River. Nor can any such rights be reasonably inferred from the Act's authorization of the Secretary of the Interior to deliver water to the Coachella Valley." (Rep. 289)

This holding, to which the United States did not except, is particularly significant in view of the facts found by the Master with respect to the claim.

The Indian Reservations referred to are located outside the drainage basin of the Colorado River—a fact which, as the Master found, "leaves no room for a presumption, absent a specific showing, that the United States intended to reserve water from the Colorado River for use on these Reservations" (Rep. 289). Perhaps this fact explains why the United States did not rely upon the "reservation" theory in claiming water for these Reservations, but rather based its claim on the Project Act, various federal statutes and several contracts between the Coachella Valley County Water District and the United States (Rep. 289). The Master found that none of these instruments created any rights in the United States to Colorado River water for the use of the Reservations concerned.

The 1934 contract between the Water District and the United States provided for the construction of Imperial Dam and the All-American Canal for the benefit, *inter alia*, of lands within the Coachella Valley. The 1947 contract provided for the construction of distribution and drainage works for the benefit of lands within the Coachella service area. As to these agreements the Master held:

> "Neither of these contracts purports in any manner to deal with water rights of the Coachella Indian Reservations and they cannot form the basis for assertion of such rights." (Rep. 290)

The Act of August 25, 1950[35] directed the Secretary of the Interior to designate the lands of the Coachella Reservations which could be irrigated by the facilities of the District and authorized him to enter into a contract with the District for the benefit of the designated Indian lands. As to this statute the Master held:

> "The Act does not create rights to water in favor of the Indians; it merely serves as a preliminary step towards possible acquisition of rights. It is apparent, therefore, that up to and including 1950 the Coachella Reservations had no enforceable right to water from the Colorado River." (Rep. 290)

Finally, in 1957 the District entered into an agreement with the Secretary of the Interior whereby he undertook to construct irrigation distribution works connected to the District's system to serve Indian lands designated by the Secretary. The contract provided, among other things, that after any major part of the irrigation system and drainage works were turned over to the District for care, operation and maintenance, the District should deliver water to specified lands within Improvement District No. 1 (including the Indian Reservation lands in question), which could be irrigated through such part of the system "under the same conditions, rules, and regulations, to the same extent, without discrimination, and for the same charges, . . . as water is delivered by the District to other lands similarly located within the District" (Rep. 290). This agreement was to become effective when Congress author-

[35] 64 Stat. 470.

ized the Secretary to fulfill the obligations undertaken by him and this authorization was given by the Act of August 28, 1958.[36] On the basis of these facts the Master concluded:

> "From the foregoing it is clear that rights of the Coachella Reservations to water from the Colorado River can be derived only from the 1957 contract between the Secretary and the District. But there has been no showing that the Indian distribution system has been constructed. Nor has it been established that 'any major part of such irrigation distribution system . . . has been turned over to the District. . . .' The obligation of the District to deliver water to the Coachella Reservations under the contract with the Secretary, therefore, cannot be said to have matured. Thus, there is no occasion on the facts and circumstances presented for a determination of what rights may accrue to the Coachella Reservations should the District become obligated to deliver water to them in the future." (Rep. 291)

The foregoing holdings of the Special Master regarding the claims of the United States on behalf of the Coachella Indian Reservations clearly indicate that, had the question been presented to him, the Special Master would have rejected as unsound the contention now made for the first time by the United States that, independent of the so-called "reservation" theory, rights to water of the Colorado River for use on federal establishments within Arizona may be derived from the Project Act or inferred from the Act's authorization to the Secretary of the Interior to deliver water for reclamation of "public lands" and other beneficial purposes (U. S. Ans. Br. 59-60).[37]

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[36] 72 Stat. 968.

[37] Elsewhere in its Answering Brief the United States correctly asserts that "reservations are not 'public lands' ", citing *FPC* v. *Oregon*, 349 U. S. 435, 448 (1955), and other cases (U. S. Ans. Br. 66).

The United States assertion that "since the Secretary of the Interior has the power to contract for the delivery of stored water 'for irrigation and domestic uses,' . . . he derives power from the same sources to use mainstream water for similar purposes on federal lands" (U. S. Ans. Br. 59) was in effect rejected as unsound by the Master's holding directly to the contrary in respect of the Coachella Indian Reservations (Rep. 289).

The Master's conclusions, reviewed immediately above, also indicate the unsoundness of the further contention of the United States that its claims on behalf of federal establishments may be sustained under Article 7(*l*) of the Arizona 1944 water delivery contract with the Secretary of the Interior (U. S. Ans. Br. 60). That portion of the contract provides in material part:

> "Deliveries of water hereunder shall be made for use within Arizona to such individuals, irrigation districts, corporations or political subdivisions therein of Arizona as may contract therefor with the Secretary, and as may qualify under the Reclamation Law or other federal statutes *or to lands of the United States within Arizona.*"

The United States relies on the italicized phrase of the quoted provisions to sustain its position. But this is surely a weak straw to grasp in view of the Master's holding that rights to water in favor of the Indians were not created by the far more specific provisions of the 1934 and 1947 contracts between the United States and the Coachella Valley County Water District "for the benefit of lands within the Coachella Valley" (Rep. 289) and the 1957 contract between the District and the Secretary of the Interior which contained explicit references to "Indian lands designated by the Secretary". If those agreements were

ineffective to create rights for the benefit of the Coachella Indian Reservations, certainly the general language culled by the United States out of the Arizona water delivery contract is insufficient to create any existing and definite rights to water for use on federal establishments within Arizona.

VIII

The Master's recommendations regarding the right of the United States to use water of the Colorado River for federal establishments cannot be sustained on the basis of the so-called "reservation" theory.

A. Basic Fallacies Underlie the Position of the United States.

The alternative theory by which the United States attempts to support the Master's recommendations relating to its claims to main stream water for Indian Reservations and other federal establishments is that the United States had "property rights" or a "proprietorship" in the use of water of the Colorado River and that when the federal establishments were created it reserved for use thereon the quantities of water sufficient to satisfy the ultimate needs of the establishments (U. S. Ans. Br. 55-56).

The United States fails to recognize the essential difference between the principles applicable to navigable and those applicable to non-navigable streams. This fundamental error vitiates the entire position of the United States with respect to the alleged reservation of the use of main stream water for federal establishments. Although it concedes that water rights which are not "owned" by the federal government cannot be reserved by it (U. S. Ans. Br. 64), the Government will not accept the teaching of the

long and unbroken line of decisions of this Court that the federal government does not "own" any rights in navigable waters, has no "property rights" in them and exercises no "proprietorship" over them (Ariz. Op. Br. 121-29).

As Mr. Justice Douglas stated in *United States* v. *Twin City Power Co.*, 350 U. S. 222, 224 (1956):

> "The interest of the United States in the flow of a navigable stream *originates* in the Commerce Clause. *That Clause speaks in terms of power, not of property.*"

The United States fails to give effect to fundamental principles of law repeatedly stated and applied by this Court:

1. Prior to statehood the rights of the United States in the navigable water of a territory, unlike its title to territorial land, are not absolute but are held for the benefit of the people and in trust for the future state (Ariz. Op. Br. 125-29).

2. Upon the admission of a territory to statehood sovereign rights in the water and beds of navigable streams become vested in the newly created state, which acquires absolute and complete sovereignty over them, subject only to the power of the United States over navigation under the Commerce Clause (Ariz. Op. Br. 121-29).

The United States also fails to recognize the corollary propositions which flow from these basic principles:

1. After statehood the United States has no power to reserve water of navigable streams within a state for federal establishments within the state (Ariz. Op. Br. 121-24).

2. Before statehood the power of the United States to reserve navigable water for use on federal establishments resides exclusively in Congress and no authority exists in

the Executive to dispose of navigable waters for federal purposes in the absence of an authorization from Congress (Ariz. Op. Br. 129-35).

3. The settled policy of the United States to hold navigable streams within federal territories in trust for future states raises a presumption against a disposal of those waters by the United States, which must be overcome in each case by a clear manifestation of an intention on the part of the United States to dispose of the waters (Ariz. Op. Br. 135-39).

Failure to recognize and apply the foregoing fundamentals and their corollaries has led the United States into a number of errors which permeate its Answering Brief. These will be considered in the discussion which follows.

B. Proprietary Rights to the Use of Navigable Water in Arizona Were Not Acquired by the United States Through Treaties With Mexico.

The United States argues that when it acquired the territory, part of which is now within the State of Arizona, by cession from Mexico, "it became the owner not only of the land itself, but of all rights pertaining thereto as well," and that the "right to use the appurtenant waters was one of the whole bundle of rights so acquired" (U. S. Ans. Br. 61) (footnote omitted). The Government thus fails to distinguish between the nature of its title to territorial *land,* which is absolute, and its rights in the navigable waters of a territory, which are held by the United States for the benefit of the people and in trust for future states. As this Court said in *Port of Seattle* v. *Oregon & W. R. R.,* 255 U. S. 56, 63 (1921):

> "The right of the United States in the navigable waters within the several states is limited to control

> thereof for purposes of navigation. Subject to that right Washington became, upon its organization as a state, the owner of the navigable water within its boundaries and of the land under same. . . . The character of the state's ownership in the land and in the water is the full proprietary right."

Similarly, in *Kean* v. *Calumet Canal & Improvement Co.*, 190 U. S. 452, 481 (1903), the Court said:

> ". . . by a consideration of the doctrine of public and private waters known to the common law, it was early decided, and has been repeatedly reiterated, that the navigable waters and the land under them belong to the states—as well the new as the old—in virtue of their sovereignty, to be held in trust for the people subject to the power of Congress to regulate commerce. And, in harmony with the principle just stated, it has been decided that such navigable waters and the land under them in the public domain of the United States within the territories, while subject to be disposed of by Congress, under the trust for public use, were yet held by the United States to be transmitted to the new states to be formed, and which should, when endowed with statehood, possess them with the same rights and powers as the original states" (citing many cases).[38]

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[38] *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U. S. 10 (1935), and *Knight* v. *United Land Ass'n*, 142 U. S. 161 (1891), cited by the United States (U. S. Ans. Br. 61), are not to the contrary. In both cases the Court held that title to the acquired territory vested in the United States, but also recognized that title to the tidelands were held "only in trust for the future states that might be erected out of that territory". 296 U. S. at 15.

United States v. *Grand River Dam Authority*, 363 U. S. 229 (1960), cited at U. S. Ans. Br. 62, is not in point because it involved the construction of a water power project on a non-navigable tributary of a navigable river.

The "see also" decisions of this Court, cited at U. S. Ans. Br. 62-63, are likewise inappropriate. All of them involved the dominant servitude of the United States over navigable waters in

C. Arizona's Rights In Navigable Water Are Not Dependent Upon a Transfer Thereof from the United States.

The United States makes reference to "the Desert Land Act of 1877, and its precursor Acts of 1866 and 1870" (U. S. Ans. Br. 63-66, 73-84). The Government's argument based upon this legislation runs as follows: In the Desert Land Act,[39] Congress provided for the acquisition from the United States of rights to use the surplus *non-navigable* waters on public lands by appropriation in accordance with local laws and customs. The Act did not authorize the appropriation of rights to use navigable waters on public lands. Therefore the "proprietary right" to use *navigable* water has never been "surrendered" by the United States. For this reason, the United States claims, it is still the "owner" of the right to use "the waters of the Colorado River appurtenant to its reservations" and this ownership

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exercise of its power to regulate navigation under the Commerce Clause, not the title of the states to the waters of navigable streams.

Winters v. *United States,* 207 U. S. 564 (1908), cited at U. S. Ans. Br. 64 is of course not relevant since it involved non-navigable water. *United States* v. *California,* 332 U. S. 19 (1947); *Utah Power & Light Co.* v. *United States,* 243 U. S. 389 (1917), and *Van Brocklin* v. *Tennessee,* 117 U. S. 151 (1886) (U. S. Ans. Br. 64), are simply authority for the proposition that the United States owns property rights to *land* in its public domain.

The quotation from 1 KINNEY, THE LAW OF IRRIGATION AND WATER RIGHTS, 692-93 (2d Ed. 1912), (U. S. Ans. Br. 62) is misleading, since the author was there referring to *non-navigable* waters. Speaking of navigable waters, the same author states:

> "[N]avigable waters and the land under them in the public domain of the United States within the Territories, while subject to be disposed of by Congress, under trust for the public use, were yet held by the United States to be transmitted to the new States to be formed, and which should, when endowed with statehood, possess them with the same rights and powers as the original States." *Id.* at 539.

[39] 19 Stat. 377 (1877), as amended, 43 U. S. C. §§321-29 (1958).

did not pass to Arizona upon her admission into the Union (U. S. Ans. Br. 64-65, 84).

This entire line of reasoning is specious, because it is based on the false premise that the United States at one time owned absolutely the right to use both navigable and non-navigable streams on public lands. This premise, as we have seen, is contrary to the many decisions of this Court holding that rights in navigable streams within territories of the United States are held by the federal government in trust for future states and that title to those waters becomes vested in the newly created state on admission to the Union.

In view of this settled law, it is not difficult to understand why the Desert Land Act "does not authorize the appropriation of rights to use *navigable* waters anywhere" (U. S. Ans. Br. 65). Since the Government never acquired any "proprietary rights" to navigable waters, it could not give away what it did not have. Indeed, in view of *Martin* v. *Waddell's Lessee,* 41 U. S. (16 Pet.) 367 (1842), *Pollard* v. *Hagan,* 44 U. S. (3 How.) 212 (1845), and numerous other decisions concerning proprietary rights in navigable waters, with which Congress was undoubtedly familiar, it is clear that Congress limited the Desert Land Act to non-navigable waters because it knew that the United States had no title to, and hence no right to dispose of, any proprietary interest in navigable waters.

On the same false premises the United States, although confronted with overwhelming legal authority to the contrary, denies "that ownership of navigable waters passed to the States upon their admission to the Union along with title to the bed of the stream" (U. S. Ans. Br. 84). This proposition is denied because, the Government says, it is based upon a "distinction between navigable and non-

navigable waters" and "there is no merit to the distinction" (U. S. Ans. Br. 84). It is much too late, we submit, to argue the "merit" of a legal distinction which has been consistently and invariably recognized since the formation of the United States as a nation and indeed long before.

Confronted with this impressive body of authority, the United States attempts to distinguish the cases by stating that, of those cited by Arizona in her Opening Brief (Ariz. Op. Br. 124-29), "with one exception, each involved the question of ownership of the shores of, or lands beneath, navigable waters; none involved the question of ownership of the water itself" (U. S. Ans. Br. 85-86) (footnote omitted).

But this attempted distinction is without validity and unsupported by authority. The Court has never drawn a distinction between proprietary rights in navigable waters and those in the lands underlying them and, historically, none has existed. Thus, the cases speak without distinction of the states' "absolute right to all their navigable waters and the soils under them", *Martin* v. *Waddell's Lessee,* 41 U. S. (16 Pet.) 367, 410 (1842); of the state's ownership "of the navigable waters within its boundaries and of the land under same", of "the state's ownership in the land and in the waters"; and of the state as "the absolute owner of the tidelands and of the waters over them", *Port of Seattle* v. *Oregon & W. R. R.,* 255 U. S. 56, 63 (1921). In the last cited case it was said:

> "The character of the State's ownership in the land and the water is the full proprietary right" 255 U. S. at 63.

In *United States* v. *Oregon,* 295 U. S. 1, 14 (1935) it was said:

> "Dominion over navigable waters and property in the soil under them are so identified with the

> sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself. See *Massachusetts* v. *New York,* 271 U. S. 65, 89. For that reason, upon the admission of a State to the Union, the title of the United States to lands underlying navigable waters within the State passes to it, as incident to the transfer to the State of local sovereignty, and is subject only to the paramount power of the United States to control such waters for the purposes of navigation in interstate and foreign commerce. But if the waters are not navigable in fact, the title of the United States to land underlying them remains unaffected by the creation of the new State."

It is therefore obvious that the states acquire sovereignty over and title to lands under navigable water only because they acquire sovereignty over and title to the navigable water itself.

The extent to which the United States misconceives the essential nature of rights in navigable streams is sharply illustrated by its great reliance on the opinion of Mr. Justice Field in *Moore* v. *Smaw,* 17 Cal. 199 (1861), decided when he was Chief Justice of the Supreme Court of California. The holding of that case that ownership of minerals in land passed by the cession of the territory from Mexico to the United States is completely beside the point. The United States, having become absolute owner of the *land,* became absolute owner of the minerals in the land and did not, as was there claimed by the defendants, hold them in trust for the future State of California. Entirely different principles apply to rights in navigable streams. The attempt of the United States to substitute "navigable waters of the Colorado River" in place of minerals in lands within the scope of *Moore* v. *Smaw* (U. S. Ans. Br. 86-89)

manifests an unwillingness to recognize the true nature of rights in navigable streams.

The United States overlooks the fact that Mr. Justice Field had become a member of this Court when it handed down its unanimous decision in the leading case of *Shively* v. *Bowlby,* 152 U. S. 1 (1894), which traced the historical development and defined the nature of the respective rights of the federal and state governments in navigable waters. In fact, Justice Field wrote the opinion of the Court in *Weber* v. *State Harbor Comm'rs,* 85 U. S. (18 Wall.) 57 (1873), quoted in Arizona's Opening Brief (Ariz. Op. Br. 122-23). He also wrote the prevailing opinion in *Illinois Central R. R.* v. *Illinois,* 146 U. S. 387, 435 (1892), in which he said:

> "It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. *Pollard* v. *Hagan,* 3 How. 212; *Weber* v. *Harbor Commissioners,* 18 Wall. 57."

Clearly, then, the states have sovereignty over and title to not only the beds of navigable streams but the water thereof as well. The rights of the states are, of course, subject to the "dominant servitude" or dominant "power" of the United States under the Commerce Clause. *United States* v. *Twin City Power Co.,* 350 U. S. 222, 224 (1956).

United States v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53 (1913), cited by the Government (U. S. Ans. Br. 86), is an example of the exercise of this dominant servitude. The Court there held that Congress has the power to decide conclusively, as a purely legislative question, whether the entire flow of a navigable stream should be conserved for navigation. Moreover, in that case the interest which conflicted with the dominant servitude of the United States was the claim of a private company—not that of a sovereign state—to the use of the flow of a navigable stream. State sovereignty over and title to the waters or to the land under them was not involved. Similarly, it was held in *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 425 (1940), cited by the Government (U. S. Ans. Br. 86), that since "the flow of a navigable stream is in no sense private property", the United States, in the exercise of its powers over navigation, could take over without compensation a power project on a navigable river privately operated under state license.

State ownership of navigable waters and federal dominion over them under the Commerce Clause are not inconsistent or incompatible. Actually, it is because the United States does not own the water of a navigable stream that the Commerce Clause "speaks in terms of power, not of property". *United States* v. *Twin City Power Co.*, 350 U. S. at 224. The failure of the United States to recognize this distinction between the rights of the states and the dominant servitude of the federal government under the Commerce Clause leads it to confuse the two and to find "inconsistency" where it does not exist, *i.e.*, between the position of Arizona with respect to the power of Congress under the Commerce Clause to impound the water of the Colorado River and to apportion the stored water among the states and the power of the United States to reserve the

water of the Colorado River, whether impounded or not, for federal establishments (U. S. Ans. Br. 57-58). The two powers are entirely distinct and governed by wholly different principles and considerations. Significantly, the Master does not resort to the Commerce Clause to sustain the reservation of navigable water for federal establishments.

D. The Mere Creation of a Federal Establishment Does Not Operate to Reserve Navigable Water for Its Use.

Completely disregarding the considerations peculiar to navigable waters, the United States relies on *Winters* v. *United States,* 207 U. S. 564 (1908), to sustain its thesis that the very establishment of an Indian Reservation implies an intention to reserve the use "of all appurtenant waters" necessary for the fulfillment of the purposes for which the lands were reserved (U. S. Ans. Br. 65). The United States ignores the fact that the case involved water of a non-navigable stream reserved for use on an Indian Reservation created by treaty in the Territory of Montana. The Government again makes reference to the Desert Land Act and argues:

> "The only real difference in this respect between navigable and non-navigable waters may be that *as to the former there is no need for reservation to preserve* the rights against appropriation by others because there is no statute which provides for their transfer or appropriation." (U. S. Ans. Br. 66)

Thus, from its refusal to recognize rights of the states in navigable streams, the Government reaches the strange conclusion that in the case of navigable water there need

be no reservation for federal use. The argument proves too much. If sound, there is no necessity for the reservation of navigable water for use on any federal establishment.

E. In the Absence of Congressional Authority the Executive is Without Power to Reserve the Use of Navigable Water for Federal Establishments.

The United States asserts that the argument of Arizona questioning the authority of the President to reserve navigable water (Ariz. Op. Br. 129-35), "is really directed toward the authority of the President to establish federal reservations" (U. S. Ans. Br. 69). The Government misconceives our position. The misconception is caused by the false notion that "the reservation of the use of waters appurtenant to federal areas results from the reservation of the land" (U. S. Ans. Br. 69). Once again, the failure to distinguish between the title of the federal government in publicly owned *land* and its rights in *navigable water* on that land, leads the United States into error.

We do not question the power of the President to establish federal reservations. The constitutional doubts which beclouded his power were finally dispelled by *United States* v. *Midwest Oil Co.*, 236 U. S. 459 (1915). However, we do contend that the power to reserve by executive order federally owned lands, title to which is in the United States as absolute owner, is one thing, and the power to reserve navigable territorial water, which is held by the United States in trust for future states, is quite another. As we said in Arizona's Opening Brief:

> "We have found no statute which authorizes the President to reserve navigable water for the benefit of federal establishments nor, so far as we have been able to determine, are there any cases which have

> passed upon the existence of such executive power in the absence of statute." (Ariz. Op. Br. 130-31) (footnote omitted)

The United States has not come forward with any authority supporting either the express or implied power of the Executive to reserve navigable water (U. S. Ans. Br. 69-72).[40] Actually, even the inferred presidential authority to establish Indian Reservations out of public lands, recognized in *United States* v. *Midwest Oil Co., supra,* was expressly terminated by Congress with regard to New Mexico and Arizona in 1918 (U. S. Ans. Br. 70).[41] The United States says that "these statutes constituted a clear change in the congressional policy with regard to the establishment of Indian Reservations by executive order" (U. S. Ans. Br. 70). We agree. But we see in this legislation a determination by Congress to severely restrict, indeed to abolish, as far as Arizona and New Mexico are concerned, the power of the President to reserve land for Indian Reservations which this Court in 1915 had recognized in the *Midwest Oil* case. Certainly this legislation cannot be construed as recognizing by inference any presidential power to reserve navigable streams for federal purposes. To the contrary, Congress would undoubtedly be opposed to presidential assumption of that power in view of the duties of trusteeship over navigable water with which Congress is charged.

Nor does Arizona contest the power of the President to establish by executive order, as he did, the Lake Mead

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[40] The General Indian Allotment Act, 24 Stat. 388 (1887), recognized and confirmed only "the power of the President to reserve public *lands* for the Indians" (U. S. Ans. Br. 69). By the Act of June 25, 1910, 36 Stat. 847, 43 U. S. C. §141 (1958), the President was "authorized to reserve public *lands*" for specified purposes (U. S. Ans. Br. 70).

[41] Act of May 25, 1918, 40 Stat. 570, 25 U. S. C. §211 (1958).

National Recreation Area, the Havasu Lake National Wildlife Refuge and the Imperial National Wildlife Refuge. As the United States asserts, these federal establishments were created under the "powers of the President to deal with public *lands*" (U. S. Ans. Br. 71). We do, however, contest the power of the President to reserve navigable water for any Indian Reservation or other federal establishment in the absence of a delegation by Congress of the authority to do so. The United States has presented no authority to the contrary.

In discussing the federal establishments created by executive order, the United States makes no distinction between those established before and after Arizona became a state. The Cocopah Indian Reservation, the Lake Mead National Recreation Area and the Havasu Lake and Imperial Wildlife Refuges were all created after Arizona was admitted to statehood. Hence, regardless of whether the President has or has not the power to reserve navigable territorial waters, the federal government was without power to make any reservation of water of the Colorado River for the use of these establishments (Ariz. Op. Br. 121-24).

F. There Must Be a Clear Manifestation of Intent to Reserve Navigable Water.

The United States, still ignoring the distinction between rights in navigable and non-navigable water, can find "no logical reason . . . for requiring an express intent to reserve rights with respect to navigable waters when implied intent is sufficient for all others" (U. S. Ans. Br. 72-73). Again, Arizona's position is misconstrued. We do not urge that a stated "intent to reserve" is indispensable in the case of navigable water. We do assert, upon the authority of this Court's decision in *United States* v. *Holt*

State Bank, 270 U. S. 49, 55 (1926), that "disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain".

We shall not review our analysis of the events surrounding the establishment, enlargement and maintenance of the Indian Reservations here involved which demonstrates that there is no justification for a finding or conclusion that the United States in establishing those Reservations intended to reserve water of the Colorado River for their use (Ariz. Op. Br. 139-53).

The United States refers to the various congressional appropriation Acts passed after 1910, which were designed to supply funds for the construction of irrigation works on the Colorado River Indian Reservation "for the purpose of securing an appropriation of water" (Ariz. Op. Br. 144-48). The plain language of these appropriation statutes is irreconcilable with the view that by the very creation of the Reservation water had been reserved for use upon it (Ariz. Op. Br. 144). Quite the contrary, the language discloses Congress' clear understanding that no water rights had been reserved by the mere creation of the Reservation.

The Government attempts to answer by asserting that this legislation shows "Congress' purpose through the years to develop an irrigation project on the Colorado River Indian Reservation of the magnitude of 150,000 acres" (U. S. Ans. Br. 75). But this legislation is significant, not as showing Congress' intention to develop an irrigation project for the Colorado River Indian Reservation, but as clearly demonstrating Congress' understanding of the manner in which water rights could be acquired for this project. Even accepting, arguendo, the Government's

contention that this legislation shows an intent on the part of Congress to establish an irrigation project of 150,000 acres exclusively for the Indians of the Colorado River Indian Reservation, the fact remains that Congress considered it necessary to acquire water for the project under the local law of prior appropriation. Congress would hardly have recognized such a necessity, if, as the Government urges, the mere creation of the Reservation had the effect of reserving the right to use whatever quantity of water should be required to meet the ultimate needs of the Reservation.

The suggestion made by the United States (U. S. Ans. Br. 75) that Congress intended that appropriative rights to the use of water should be for the purpose of supplementing the reserved right is frivolous. If, as the United States contends, the reserved right includes whatever quantity may be required to meet the ultimate needs of the Indians, there could be no occasion to "supplement" the reserved right with water available under the state law of prior appropriation.

Moreover, this series of enactments does not disclose a congressional purpose "to develop an irrigation project . . . of the magnitude of 150,000 acres" for exclusive use of the Indians, as the United States contends. The Act of April 21, 1904 provided for an allotment of five acres of irrigable land for each of the Indians on the Colorado River Indian Reservation, an allotment which was increased to ten acres by the Act of March 3, 1911.[42] In these statutes it was provided that the "remainder of the lands irrigable in said Reservation shall be disposed of to settlers under the provisions of the Reclamation Act"; and each of the appropriation Acts from 1910 through 1942 which are referred to by the Government provided that the funds

[42] 33 Stat. 224; 36 Stat. 1063.

expended should be reimbursable from the sale of these surplus lands of the Reservation (Arizona Opening Brief 175-76).

G. Indian Need, Rather Than Irrigable Acreage, is the Correct Measure of Any Reserved Water Right.[43]

Assuming that there has been an effective reservation of main stream water for federal establishments, the Government asserts that in the case of an Indian Reservation "the measure [of the amount reserved] is the quantity required to satisfy the ultimate needs of the Indians of the reservation". It then attempts to support the Master's conclusion that this quantity consists of " 'sufficient water to irrigate all of the practicably irrigable land in a Reservation and to supply related stock and domestic uses' (Rep. 262)" (U. S. Ans. Br. 79-80) (footnote omitted).

As pointed out in Arizona's Opening Brief, the total irrigable acreage standard has no relationship to actual Indian needs. Under that formula it is immaterial whether the water reserved will ever be used by the Indians resident on the Reservation or whether any Indians occupy or will ever occupy the Reservation or make use of the water reserved (Ariz. Op. Br. 157).

We agree with the Special Master that "the water rights of the five Reservations in question cannot be fixed at present uses" and that the Indians' future needs should be taken into account (Rep. 263). We disagree, however, with his conclusion that the future needs of Reservation Indians cannot be ascertained with reasonable accuracy (Rep. 264).

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[43] In connection with this subject see an excellent article, Sondheim & Alexander, *Federal Indian Water Rights: A Retrogression to Quasi-Riparianism?*, 34 So. CAL. L. REV. 1 (1960).

The regrettable fact is that the Government made no attempt to prove even the present needs of the Indians. All it did was to introduce evidence of "the present population of organized tribes entitled to reside on the several reservations" (U. S. Ans. Br. 82-83 notes 29, 31). Included in this tribal population are some who do not reside on any Reservation and some who do not even live in Arizona.

In addition, as we demonstrated in Arizona's Opening Brief, a number of Indians have in effect been counted twice, once for the Colorado River Indian Reservation and once again for other Reservations (Ariz. Op. Br. 170-79).

The unreasonableness of the Government's claims is demonstrated by its unrealistic estimate of "the expanding needs of the Indians of the Lower Colorado River Basin" (U. S. Ans. Br. 81). The total tribal population (not the unproved resident population of the Reservations) of the tribes presently entitled to occupy the five Reservations in question aggregates only 3,340 Indians (Ariz. Op. Br. 157). Yet, in measuring "expanding" Indian needs, the Government includes "in the neighborhood of 120,000" Indians in the Lower Basin which, it says, can be expected to increase to a total population of 130,000 by 1970 (U. S. Ans. Br. 81). The Government then apparently assumes that the five main stream Reservations are to be burdened with the water requirements of all these Lower Basin Indians regardless of where they presently reside or what their tribes may be, for it says:

> "The mainstream Indian reservations include 136,636 acres of irrigable land.[44] Certainly it cannot be said that water rights for 136,636 acres as the Special Master recommends is in excess of the future needs of the Indians of the reservations." (U. S. Ans. Br. 81-82) (footnote ours)

[44] The source of this figure apparently is the Recommended Decree, Article II(C)(2)(a) through II(C)(2)(e) (Rep. 350-52).

Thus the United States contends that the "matter of need" is not to be measured even "by the present population of the organized tribes entitled to reside on the several reservations" (U. S. Ans. Br. 82 note 29), but by the total of all the Indians in the Lower Basin, regardless of whether they reside on or off the Reservations and regardless also of whether they reside in Arizona, California or Nevada, or elsewhere in the United States, or even abroad.

The unfairness of this approach will be appreciated even more when it is remembered that the Government also asserted before the Master claims on behalf of Lower Basin Reservations, other than main stream Reservations, to water of Lower Basin tributaries sufficient to irrigate a total of 127,532 acres.[45]

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[45]

United States Irrigable Acreage Claims
(Main Stream Reservations Excluded)

Reservation	Acres	U. S. Proposed Conclusion
Zuni	8,570	4.1
Navajo	8,490	4.2
Hopi	731	4.3
Coachella	9,348	4.9
Havasupai	204	4.10
Hualapai	83	4.11
Kaibab	84	4.12
Moapa	591	4.13
Salt River	12,625	4.14
Ft. McDowell	1,300	4.15
Camp Verde	187	4.16.1
	29	4.16.2
Ft. Apache	7,197	4.17.1
Papago	1,885	4.18
Ak Chin	12,998	4.19
San Xavier	3,825	4.20
Gila Bend	954	4.21
San Carlos	1,572	4.22.1
	1,903	4.22.2
Gila Bend and San Carlos Maricopa District	1,080	4.23.1
Gila Crossing	3,330	4.23.2
San Carlos	50,546	4.23.3
TOTAL	127,532	

The United States takes issue with Arizona's position that when the Colorado River Indian Reservation was initially created in 1865 the statutory phrase, "the Indians of said river and its tributaries", meant only those tribes which were found in the area of the Lower Basin near the main stream (Ariz. Op. Br. 170-74).

The administrative construction of the statute creating the Colorado River Indian Reservation accords with Arizona's view. Under date of September 15, 1936, the Solicitor of the Department of the Interior sent to the Commissioner of Indian Affairs a memorandum[46] in which he stated:

> ". . . The designation in the act of the Indians of the Colorado River and its tributaries is so general and vague as to be almost meaningless without reference to administrative action taken thereunder. It would be absurd today to say that this reservation belongs to all the Indians of the Colorado River and its tributaries, since that would embrace most of the Indians of the Southwest. The only practical solution of the situation is to refer to the administrative action which has been taken and completed many years ago in settling on this reservation the wandering Indians along the Colorado River, and to take the position that this action finally determined to which Indians the reservation belonged. This position is substantiated by the fact that the Indians of this reservation have long been officially known as the Colorado River Indian Tribes and have funds in the Treasury under that name."

In a subsequent memorandum dated November 24, 1936, the Solicitor stated:

> "The Colorado River Reservation was created by the act of March 3, 1865 (13 Stat. 559), and its bound-

[46] C 4571, Tr. 20,674.

aries were subsequently fixed and determined by various Executive orders. The act of 1865 declared that the reservation should be set apart 'for the Indians of said river (Colorado) and its tributaries.' The Annual Reports of the Commissioner of Indian Affairs for the years 1864 and 1866, at pages 21 and 27 respectively, show that the reservation was created with the object in view of placing thereon 'the Yumas, Mojaves, Yavapais, Hualapais, and Chemihuevis', numbering some 10,000 persons. This object failed of accomplishment, however. The principal reason for the failure, aside from the aridity of the soil of the Colorado River Reservation lands and hostilities among the Indians themselves (see Commissioner's Annual Report 1870, page 8) was the reluctance of some of the tribes to locate on the reservation.

* * * * * *

"The language of the act of 1865 and the Executive orders issued pursuant thereto to the effect that the reservation was set aside for Indians of the Colorado River and its tributaries obviously was not intended to vest all Indians coming within that descriptive phraseology with immediate rights in the reservation lands. The language used merely defines the class of Indians eligible for collection and colonization on the reservation and removal to and continued residence on the reservation necessarily were conditions essential to the acquisition of rights on the reservation. Clearly there was no intent to create or vest rights in Indians such as the Yumas, the Hualapais and the Navajos who refused to locate on the Colorado River Reservation, obtained reservations elsewhere and received allotments or other benefits there. Now to permit such Indians to receive tribal benefits on the Colorado River Reservation would be in direct contravention of the rule long recognized by this Department and recently

approved by the Tenth Circuit Court of Appeals in *Mandler* v. *United States*, 52 Fed. (2d) 713, that no Indian is entitled to receive dual tribal benefits."[47]

Despite the fact that it is necessary in the instant litigation to determine for the indefinite future the rights of the parties litigant to the use of main stream water, the United States has failed to produce evidence which would enable the Court to ascertain the reasonable future water needs of the Government's Indian wards. The net result is an anomalous one indeed, for in effect the United States has been awarded the largest conceivable quantity of main stream water for future use on Reservations because it made no effort to produce any proof as to what those future needs will actually be.

The position of the Government regarding the Fort Mohave Indian Reservation typifies its indifferent attitude with respect to establishing the actual requirements of the Indians and its surprising willingness to waste an invaluable natural resource. That Reservation contains 18,974 irrigable acres for the irrigation of which there has been reserved, in accordance with the Government's contention, either 122,648 acre-feet per annum of diversions from the "mainstream", or the quantity of "mainstream" water necessary to supply the consumptive use required for irrigation of 18,974 acres and for the satisfaction of related needs, whichever of these two alternative quantities is less (Rep. 351). Yet, no Indians reside in the Arizona and California portions of this Reservation, and only one Indian family lives in the Nevada section. No land whatever is being irrigated on the Reservation and the maximum which has ever been irrigated is 23 acres. No major irrigation project has ever been developed for

[47] C 4574, Tr. 20,678.

the Reservation and it has long been recognized that any such project is impracticable (Ariz. Op. Br. 166-67).

Confronted with this history of inaction, the United States responds:

> "The fact that the United States has not gone forward with development does not support the argument that the rights reserved for the benefit of these Indians should now be foreclosed." (U. S. Ans. Br. 83)[48]

Certainly "these Indians" are not Indians resident on the Reservation, for there are almost none. The 450 members of the Fort Mohave tribe entitled to reside on the Fort Mojave Indian Reservation have shown no disposition to reside there. We submit that the United States should not be permitted, by a failure to perform its trust duties toward its Indian wards, to achieve for them a reservation of thousands of acre-feet of water to the prejudice of the needs of all citizens, Indian and non-Indian alike.

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[48] The Government seeks to explain its failure to develop irrigation on this Reservation by asserting:

> ". . . efforts to develop the valley lands of the Reservation were frustrated by the flood hazard prior to the closure of Hoover and Davis dams. With the completion of the dams referred to and channelization of the river through the lands of the Reservation, this hazard is *now* eliminated and development of the lands of the Reservation for irrigation can *now* go forward." (U. S. Ans. Br. 83 note 31)

Hoover Dam, which controls Colorado River floods, first impounded water on February 1, 1935. Davis Dam serves merely to reregulate releases from Hoover Dam (Rep. 32-33). The Government evidently regards the past 25 years as "now".

H. Principles of Equitable Apportionment May Be Applied to Measure Indian Water Rights.

In Arizona's Opening Brief we argued that should the Court find there has been no reservation of water on Indian Reservations, or should the Court find such a reservation of water but reject Indian needs as the test of the quantity reserved, the amount of water to which the Reservations are entitled should be determined in accordance with principles of equitable apportionment (Ariz. Op. Br. 181-92).

The Government sees inconsistency between this proposition and Arizona's contention that the Project Act renders principles of equitable apportionment inapplicable (U. S. Ans. Br. 91-92). No inconsistency exists. It is true that as to the *interstate* allocation of water Arizona took the position, with which the Master agreed, that the Project Act governs and renders principles of equitable apportionment inapplicable (Ariz. Op. Br. 32-41). The Project Act allocated or authorized the allocation for use annually in Arizona of a portion of the water impounded in Lake Mead. Nothing in the Act or its legislative history indicates any intention on the part of Congress to undertake the division of this fund of water allocated for use in Arizona as between non-Indian and Indian users.

There is therefore no inconsistency between Arizona's position that, as to water allocated under the Project Act between the three Lower Basin states of Nevada, California and Arizona, principles of equitable apportionment are inapplicable, and that as to the fund of water allocated to Arizona, but undivided by the Project Act, principles of equitable apportionment are applicable. When there is a conflict between sovereigns as to water rights, principles of equitable apportionment have been traditionally applied.

The United States argues further that even in an interstate allocation uncontrolled by statute its "reserved rights . . . are not subject to . . . apportionment between the states" (U. S. Ans. Br. 92). But no precedents are cited or reasons given supporting this position and we know of none. There appears to be no sound reason for a distinction between a case where both sovereigns appear as *parens patriae* for their citizens and a case in which one sovereign appears in that capacity and the other appears as guardian for its Indian wards.

Finally, the Government argues that even under principles of equitable apportionment it is entitled to all that the Master has awarded—sufficient water to irrigate every irrigable acre in each Reservation. This result is neither "realistic" nor "fair" (U. S. Ans. Br. 93). We do not suggest, as the United States asserts, "that use of water . . . should be subject to defeasance because of a claim that the water could be better used elsewhere within the State" (U. S. Ans. Br. 93). We do contend, however, that to reserve in perpetuity large quantities of water for Indian Reservations which have never used or demonstrated a need for any quantity approaching the amount reserved is unrealistic and inequitable. It is only in the effort to reach a just result that we have advanced the proposal that principles of equitable apportionment be applied.

IX

The United States has not reserved water from the Gila and San Francisco Rivers for the purposes of the Gila National Forest.

The United States predicates its asserted rights to the use of non-navigable water for the Gila National Forest upon its claim of a federal proprietorship of the usufruct of non-navigable water on the public domain.

It is argued that when the territory comprising the Lower Colorado River Basin was ceded by Mexico to the United States it became the owner not only of the land but also of "all rights pertaining thereto" and that the right to use "the appurtenant waters was one of the whole bundle of rights so acquired" (U. S. Ans. Br. 61) (footnote omitted).

This claim poses a perplexing and difficult problem as yet unresolved by this Court. The Government does not explain why the United States necessarily acquired the ownership of the use of the water within this territory. Mere ownership of land does not inevitably carry with it the ownership of the right to use the water to which the land is riparian. Whether the right to use water is a right pertaining to and accompanying the ownership of land depends upon the applicable law of property in that regard. Where the rule of prior appropriation is followed, the ownership of land, in and of itself, carries with it no rights to the use of water. The United States, while describing its claimed right to non-navigable water as a right pertaining to the public land, seems to envisage a water right in gross, which is not appurtenant to any particular lands within the public domain. The United States, however, asserts it has the right to attach a portion of this gross water right to

specific lands which are withdrawn from the public domain for designated federal purposes and establishments. In fact, it appears to be the position of the Government that neither the riparian nor the appropriative rights doctrine was applicable to this water when the United States became the owner of the lands in the territory (U. S. Ans. Br. 61-62 note 19).[49] Thus the water rights, as conceived and claimed by the United States, exist independently of any rule of property law. They apparently are based upon the notion that ownership of the right to the use of all water must rest somewhere and that, since there were no other "owners" in whom this proprietorship could vest, it necessarily vested in the United States when it became the proprietor of the lands.

An attempt to resolve the long-existing conflict between the United States and the public land states with respect to rights in non-navigable water by determining who "owns" that water serves only to complicate further an already difficult problem. The power of either the national or the

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[49] The riparian doctrine has never applied in the territory acquired from Mexico by the Treaty of Guadalupe Hidalgo and the Gadsden Purchase. The law of prior appropriation and not the riparian rights doctrine was in force in that area, from which Arizona and a part of New Mexico were later formed, when it was a part of Mexico. *Boquillas Land & Cattle Co.* v. *Curtis,* 213 U. S. 339 (1909). Congress enacted no legislation making the common law riparian doctrine applicable to this territory. One of the first acts of the United States after acquisition of the territory was to declare that "the laws heretofore in force concerning water courses . . . shall continue in force." H. R. Doc. No. 19, 29th Cong., 2d Sess. 72 (1846). The territorial legislatures of both New Mexico and Arizona, agents of Congress, kept in force the doctrine of prior appropriation which had maintained before the acquisition of the territory by the United States. *Boquillas Land & Cattle Co.* v. *Curtis, supra; Clough* v. *Wing,* 2 Ariz. 371, 17 Pac. 453 (1888). The laws and constitutions of both the States of Arizona and New Mexico continued the law of prior appropriation in force. ARIZ. CONST. art. XVII, §1; Ariz. Rev. Stat. §45-101 (1956); N. M. CONST. art. XVI, §2; N. M. Stat. §75-1-1 (1953).

local government to prescribe rules of property in the use of water and to establish principles governing the acquisition of specific rights in water is so essentially an exercise of sovereign power that it cannot be predicated on the basis of proprietorship of the rights to the use of water.

But, as we have stated in Arizona's Opening Brief, it is not necessary that this important and serious question be decided in this litigation in order to dispose of the claims of the United States to the use of water of the Gila and San Francisco Rivers on the Gila National Forest (Ariz. Op. Br. 194).

Even if it be assumed that the United States became the absolute proprietor of the right to use all non-navigable water on or appurtenant to the public lands within the territory acquired from Mexico, it does not necessarily follow from that assumption that by the creation of a national forest water was reserved for use on the forest reserve. Mere existence of power does not establish its exercise. In our Opening Brief we referred to the Acts of Congress, legislative history and administrative construction which negative the existence of any intent on the part of Congress that the mere creation of a national forest should operate to reserve water for the needs of the forest (Ariz. Op. Br. 192-98).

The United States disputes our conclusions. It claims that the Arizona argument based upon the Act of June 4, 1897[50] ignores the fact that the Act "expressly provides that water on the national forests may be used in accordance with state or *federal* law" (U. S. Ans. Br. 77) (footnote omitted; United States italics). But the United States contends that the very establishment of a national forest accomplishes a reservation of water for forest purposes (U. S. Ans. Br. 65). If this contention were correct, the

[50] 30 Stat. 36.

United States would have no possible reason for resorting to "federal law" to acquire by "reservation or otherwise" rights to use "unappropriated waters which pertain to the national forest lands" (U. S. Ans. Br. 78). Nor could any purpose be served by the provisions of the Act of June 4, 1897, that all water on forest reservations may be used "under the laws of the state wherein such forest reservations are situated".

The United States denies that there has been any consistent administrative interpretation that its rights to use water on the national forests must be obtained in accordance with state law. It is claimed that the rules and regulations quoted from the Forest Service Manual (Ariz. Op. Br. 197-98), which state the policy followed by the Department for more than fifty years, are robbed of all value and meaning by the statement of the Secretary of Agriculture made on June 21, 1961, and quoted at pages 78 and 79 of the Government's Answering Brief. Whatever may be the correct meaning of these very recent remarks of the Secretary of Agriculture, they do not warrant the Government's conclusion that the uniform and long-adhered to policy of the Department, specifically anchored in the Act of June 4, 1897, of making water filings with appropriate state agencies pursuant to state law is merely for the purpose of giving information and not of establishing legal rights to the use of water under state law.

The assertion of the Government that this uniform course of conduct over a fifty year period was for informational purposes only wholly lacks merit. Mere letters would have served this purpose. In fact, this course of conduct, if not intended to evidence a recognition that state laws control the acquisition of such rights, would have the effect of misleading state officials and those "seeking to

use the waters from the National Forest" rather than informing them.

The Government contention cannot be reconciled with the policy stated in the formal rules and regulations of the Department that *rights* to the use of water for national forest purposes *will be obtained* in accordance with state law and that the authority of the Department to *secure water rights* under state law is based on the Act of June 4, 1897, and confirmed by the Department of Agriculture Organic Act[51] (Ariz. Op. Br. 197-98).

The United States makes no effort to explain why, if Congress intended that the creation of national forests should result in a reservation of all water required to serve the purposes of the forests, it found it necessary repeatedly to appropriate funds for the purchase and establishment by the Forest Service of water rights for use on the national forests or why Congress was concerned that filings on water rights for national forests be made by the Government before filings were made "by adverse claimants" (Ariz. Op. Br. 195-96).

The United States at one point appears to argue that, entirely independent of any intent to reserve non-navigable water for any particular federal establishment, the mere withdrawal of public lands accomplishes an automatic withdrawal of the "sources of water supply" upon the land reserved. The reasoning in support of this claim is that since the United States owns all the unappropriated non-navigable water upon the public domain, rights to the use of such water cannot be acquired without the consent of the United States; that only by the Desert Land Act of 1877 and its precursor Acts of 1866 and 1870 has the United States granted such consent and that such consent

[51] 58 Stat. 734 (1944).

is "restricted to sources of water supply upon the public lands". It is argued that since reserved lands cease to be public lands the sources of water supply upon the reserved lands cease to be available for "purposes of private acquisition" (U. S. Ans. Br. 64-66).

The argument of the United States, if pursued to its logical end, compels the conclusion that the only reservation of water accomplished by the withdrawal of public lands is the water originating on the land withdrawn. Yet the Government's claim of reserved water rights for use on federal establishments is limited only by the ultimate needs of the particular federal establishment and is not confined to the quantity of water available from sources of water supply actually existent on withdrawn lands. This leaves completely unexplained how such a withdrawal of the source of water supply on withdrawn lands operates to reserve the right to use waters having their source on other public lands not withdrawn.

The utter confusion and insurmountable obstacles which would result from the acceptance and application of the Government's theory are apparent. Rights to the use of water, both for federal establishments and by private appropriators, would depend on the ability to identify and segregate water as to its source, so that water which has its source on the public lands may be distinguished from that which has its source on reserved lands, as well as from that having its source on private lands and state-owned lands.

It is evident that Congress never contemplated or intended that the mere withdrawal of lands from the public domain should have these absurd consequences.

CONCLUSION

The Report and Recommended Decree of the Special Master should be adopted by the Court, with the modifications requested by Arizona.

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October 2, 1961
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