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, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, AND COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

Reply Brief of the California Defendants to the Answering Briefs of the United States, Arizona, and Nevada

(See list of attorneys on next page.)

October 2, 1961

(Legislative History Appendixes are in an accompanying volume.)

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

For the State of California

STANLEY MOSK
Attorney General
State Building
Los Angeles 12, California

NORTHCUTT ELY
Special Assistant
Attorney General
Tower Building
Washington 5, D. C.

CHARLES E. CORKER
Assistant Attorney General
State Building
Los Angeles 12, California

BURTON J. GINDLER
Deputy Attorney General

GILBERT F. NELSON
Assistant Attorney General

JOHN R. ALEXANDER
Deputy Attorney General
909 South Broadway
Los Angeles 15, California

SHIRLEY M. HUFSTEDLER
610 Rowan Building
Los Angeles 13, California

HOWARD I. FRIEDMAN
523 West Sixth Street
Los Angeles 13, California

C. EMERSON DUNCAN II
JEROME C. MUYS
Tower Building
Washington 5, D. C.

For Palo Verde Irrigation District

FRANCIS E. JENNEY
STANLEY C. LAGERLOF
Special Counsel
500 South Virgil Avenue
Los Angeles 5, California

For Imperial Irrigation District

HARRY W. HORTON
Special Counsel

R. L. KNOX, JR.
General Counsel
Law Building
El Centro, California

For Coachella Valley County Water District

EARL REDWINE
Special Counsel
207 Lewis Building
Main Street at 10th
Riverside, California

For The Metropolitan Water District of Southern California

JAMES H. HOWARD
Special Counsel

CHARLES C. COOPER, JR.
General Counsel

H. KENNETH HUTCHINSON
Deputy General Counsel
306 West Third Street
Los Angeles 13, California

FRANK P. DOHERTY
Special Counsel
433 South Spring Street
Los Angeles 13, California

For the City of Los Angeles

ROGER ARNEBERGH
City Attorney
City Hall
Los Angeles 12, California

GILMORE TILLMAN
Chief Assistant City Attorney for Water and Power
207 South Broadway
Los Angeles 12, California

For the City of San Diego

ALAN M. FIRESTONE
City Attorney
Civic Center
San Diego, California

For the County of San Diego

HENRY A. DIETZ
San Diego County Counsel

ROBERT G. BERREY
Deputy County Counsel
Court House
San Diego, California

REPLY BRIEF OF THE CALIFORNIA DEFENDANTS TO THE ANSWERING BRIEFS OF THE UNITED STATES, ARIZONA, AND NEVADA

October 2, 1961

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REPLY BRIEF

This consolidated reply brief of all eight California defendants, together with accompanying appendixes in a separate volume, is filed in reply to the answering briefs of the United States, Arizona, and Nevada pursuant to the notice accompanying the Court's order of January 16, 1961.[1]

THE BASIC CONTROVERSY

The United States says that "so long as California gets its 4,400,000 acre-feet, plus one-half of the surplus over 7,500,000 acre-feet, it cannot complain that its rights are not being fully met" (U.S. Ans. Br. 51). But the decree which our opponents endorse does not do this. Under the Special Master's decree, California would receive no more than 3,800,000 acre-feet whenever the Colorado River Compact's "ceiling on appropriations" is enforced against the lower basin. It is fatuous to assume that it will not be enforced.

If the Compact is not enforced against the lower basin, there is no justiciable controversy now, because all of the claims for the future here presented by Arizona, California, and Nevada can be readily satisfied if past recorded flow at Lee Ferry continues without further depletion. It is only because the Compact permits the upper basin to further diminish that flow, and to correspondingly restrict satisfaction of lower basin

[1] 364 U.S. 940. Abbreviations used in citations are the same as in our previous brief filed August 14, 1961. See Calif. Ans. Br. 1 n.1.

appropriations of it, that the claims exceed the dependable supply which is the subject matter of the controversy. Only on this basis is the case justiciable. On the premises of the Master's Report it is not.

The United States, endorsing the Master's recommended decree, invites every state and Congress to proceed on a collision course, with expansion in both basins relying on a supply already largely committed to constructed or authorized projects.

We challenge, basically, two elements of the decree: (1) the severance of the Compact from the California limitation agreement, and (2) the proration of the resulting shortage in disregard of the priorities of California's long-established projects.

The United States says that California seeks a decree protecting her future at the expense of Arizona's present (U.S. Ans. Br. 54). This is not so. The decree we seek would not deny water to any existing project in any state, nor indeed to the proposed Central Arizona Project, if the gamble on the water supply is taken by the new project. The priorities of California's existing projects up to our agreed limitation of 4.4 million acre-feet must be respected, just as we respect our agreement that beyond 4.4 million acre-feet our rights are limited to one half of any "excess or surplus" waters. This is the agreement between Congress and California that our opponents would break.

The United States apparently concedes that California's existing projects will be impaired if the decree takes effect, perhaps by 1990. This is less than 30 years from now, a span of time shorter than that since enact-

ment of the Project Act. (The Reclamation Bureau has published plans which would result in reducing California's present uses within 14 years.)

But, the United States argues: Shortages which will occur in 30 years are too remote to be given any consideration now; it is "undesirable to abandon needed development in Arizona and Nevada" (U.S. Ans. Br. 19) and in the upper basin merely because the water supply will not sustain all the projects that are built; California's projects and, indeed, projects in every other Colorado River basin state should depend for their security upon scientific advances not yet discovered which will save or create water. See U.S. Ans. Br. 53-54. No decree has yet been entered by this Court based upon such speculation. The Project Act did not require California to underwrite the cost of Hoover Dam in order to dedicate to Arizona most of the additional waters it would make available, while relegating California to finding ways to use the Pacific Ocean to supply our cities and farms.

Before or after a decree in this case is entered, its effect on present projects and the prospects of future projects must be appraised. We urge that this be done before, rather than afterward. The purpose is not to persuade the Court to rewrite the law of the river to avoid a harsh result, but to persuade the Court that the Master's proposed rewriting of that law frustrates its intent and purpose.

The Metropolitan Water District's Colorado River Aqueduct would be wholly deprived of water by the decree recommended, even if new projects are not built

to divert from the main stream above Lake Mead. This is not because of drouth, which everyone in California recognizes has diminished the supply. Disaster is in prospect because the Master proposes to write a decree which reverses both the clear language of the Project Act and the California Limitation Act, and an interpretation of those acts accepted and asserted by both Arizona and California in the decades since 1928, both in this Court and in every other forum: (1) the limitation on California incorporates the Colorado River Compact; (2) priority interstate characterizes water rights within the limitation.

Water rights are property rights, and these two positions, correct in the first instance, have become rules of property.

SUMMARY OF THE ARGUMENT

I. California Claims

California seeks only the 4.4 million acre-feet annually plus the one half of excess or surplus to which her appropriative and contract rights are restricted by the California limitation.

The two major errors in the Master's Report are (1) severance of the Colorado River Compact from the limitation and (2) abrogation of priorities in "Article III(a) waters" (considered *infra* parts II and III, respectively). The combined effect of these errors is to restrict California to less than the 4.4 million acre-feet specified in the first component of the limitation. California can receive no more than 3.8 million acre-feet within the lower basin's Compact ceiling of 8.5 million acre-feet imposed by Article III(a) and (b).

California can receive no more than 3.5 million acre-feet on any realistic appraisal of the permanent water supply.

Reversal of either one of the Master's errors would probably assure California of at least 4.4 million acre-feet. We do not oppose full development of present projects in Arizona and Nevada, or initiation of any new projects if the priorities of our long-established projects to 4.4 million acre-feet are protected, and our rights to one half of excess or surplus are recognized.

II. The Severance Issue

The answering briefs of the other parties invoke a legislative history which cannot itself serve as the basis for any construction of the limitation, and much less as the basis for the Master's severance of the Colorado River Compact from the limitation.

That legislative history would relate the "Article III(a) waters" in the limitation to 7.5 million acre-feet of flow of water at Lee Ferry, 275 miles above Lake Mead. The Master himself rejected this legislative history for compelling reasons about which the opposing briefs are silent. That legislative history could not bear its plain meaning, even had it been expressly incorporated in the statute, because of the immutable laws of nature which neither Congress nor this Court can alter, amend, or revoke: The 7.5 million acre-feet of flow at Lee Ferry cannot produce 7.5 million acre-feet of consumptive use (diversions less returns) below Lee Ferry, because of nonbeneficial losses such as evaporation and transpiration which occur before water is diverted for consumptive use. Attempted allocation of those nonbeneficial losses presents almost insuperable legal and

administrative difficulties, the solution of which no one has attempted.

The Master construes the limitation's reference to "Article III(a) waters" apportioned by the Compact to mean 7.5 million acre-feet of consumptive use of water from the "mainstream," Lake Mead and below. If this legislative history selected by Arizona and the United States were to be the attempted basis for a decree, that decree would not resemble the one recommended by the Master. His decree is based on a "contractual allocation scheme" deduced from Lake Mead contracts. Nothing the Secretary may conceivably be authorized to do by such contracts can allocate waters "let down" at Lee Ferry, 275 miles above the headwaters of Lake Mead.

III. The Priority Issue

The answering briefs of the other parties give almost cavalier treatment to this major issue: Does any provision in the law of the river provide that priorities in "Article III(a) waters" are arrested at state lines? Part III is long because we must prove a negative: the provision destroying priority does not exist, whatever may be the basis of the water right—appropriation or contract, or both.

The Master recognizes that *intra*state priorities apply to "Article III(a) waters." He recognizes that *inter*state priorities prevailed throughout the lower basin prior to the Project Act and continue effective since the Project Act (within the ceilings imposed by the Compact on the lower basin) in every part of the lower basin except the "mainstream." No party seriously chal-

lenges these conclusions. The law of the river confirms that interstate priorities in "Article III(a) waters" have not been abrogated either expressly or by implication.

These conclusions, we believe, are unchallengeable:

(1) The principles underlying the law of prior appropriation, which have prevailed throughout the arid West for 100 years both interstate and intrastate, dictate priority except where priority principles have been expressly and unmistakably modified.

(2) The Colorado River Compact, essentially an *inter*basin agreement, expressly recognizes priority as the only basis of *intra*basin water rights, except where modified by agreement.

(3) Section 5 of the Project Act authorizes the Secretary to contract for the storage of water in Lake Mead and for its delivery to water users at agreed points below Lake Mead, but no word suggests priority between two contractees on one side of the river, but proration if they are on opposite banks. The Project Act's preservation of interstate priorities among contractees, which is supported by sections 8(a), 14, and 18, is conclusively established by two prior decisions of this Court.[2]

Contrary to the extended argument in Arizona's answering brief, the legislative history does not prove that the Project Act either made or authorized any federal interstate allocation of Colorado River waters within the lower basin. In a separate volume of appen-

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[2]Arizona v. California, 283 U.S. 423, 464 (1931); United States v. Arizona, 295 U.S. 174, 183 (1935).

dixes accompanying this reply brief, we supply the relevant legislative history which Arizona omits and the context for that which Arizona includes.

(4) The limitation on California is correctly recognized by the Master as a limit and not a grant. The limitation cannot be a pro rata allocation, since it is not an allocation of any kind. If the Master is correct that the Colorado River Compact is merely a limitation on appropriations, then the quantities specified for Arizona and Nevada in the proposed tri-state allocation in the second paragraph of section 4(a) (which proposed no allocation for California) are also no more than limitations—certainly not allocations, pro rata or otherwise.

(5) The 1944 water delivery "contract" with Arizona, an essential part of the "contractual allocation scheme," expressly negatives any intent on the part of the Secretary to create a pro rata allocation.

(6) The asserted administrative practice, custom, or usage supporting proration—never pleaded, proved, or otherwise supported—is nonexistent.

IV. The Jurisdictional Issue

The jurisdictional issue is raised by two aspects of the proposed decision: (1) truncation of the river at Lake Mead and a decree confined to Lake Mead and below; (2) failure to determine water supply or to give any effect to the Colorado River Compact.

If Arizona had sought to quiet an alleged title to water from Lake Mead or below, and had alleged a determination to build the Central Arizona Project

from a still undecided location, possibly above Lake Mead and possibly below, her complaint would have disclosed on its face the absence of a justiciable controversy.

If Arizona and California had alleged in their respective complaint and answer that there is water for Arizona's immediate demands and enough for California's existing uses "unless and until many vast new projects, some of which are not even contemplated at this time, are approved by Congress and constructed" (Rep. 115), the pleadings would have disclosed on their face the absence of a justiciable controversy.

Yet this is the posture of the "controversy" which the Master's Report describes. We believe that he is wrong. The controversy which the parties brought to this Court, and tried, relates to the dependable water supply in the lower basin. That controversy is justiciable. That controversy the Master declines to decide.

The effect of the premises on which the Master bases his recommended decree is to encourage both upper and lower basins to continue to develop economies on the same very small margin of presently uncommitted water. The end result would not only be the destruction of the water supply of one of California's great existing projects (the Colorado River Aqueduct of the Metropolitan Water District) within the near future; it would also be a regional disaster, seriously injuring every part of the Colorado River basin.

ARGUMENT

I. CALIFORNIA SEEKS ONLY TO PRESERVE RIGHTS OF CALIFORNIA USERS TO 4.4 MILLION ACRE-FEET PER ANNUM PLUS ONE HALF OF "EXCESS OR SURPLUS WATERS"

A. The Decision Proposed by the Special Master Would Restrict California to No More Than 3.8 Million Acre-Feet Annually of the Lower Basin's Compact Waters

The briefs of our adversaries misstate the effect of the Special Master's recommended decision and California's reasons for opposing it. Arizona has said that California is bound by the covenant of the limitation and "should be estopped from repudiating her act." (Ariz. Op. Br. 72.) The United States says (U.S. Ans. Br. 51):

> "So long as California gets its 4,400,000 acre-feet, plus one-half of the surplus over 7,500,000 acre-feet, it cannot complain that its rights are not being fully met."

California claims no greater right to Colorado River system waters than is permitted by the California limitation:

(1) 4.4 million acre-feet from the 7.5 million acre-feet of "waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact," plus

(2) one half of any "excess or surplus waters unapportioned by said compact" over and above that 7.5 million.

The major issue is: Will California receive the 4.4 million acre-feet specified in the first component of the limitation?

The decree recommended by the Special Master would, in effect, erase the figure 4.4 million acre-feet and substitute a figure of no more than 3.8 million. That decree would also, in effect, erase totally the second limitation component which stipulates one half of any "excess or surplus waters." These consequences flow inevitably from the joint operation of two separable aspects of the Master's proposed decision:

1. *The "severance issue"*

The Colorado River Compact confers upon the lower basin a right to a total consumptive use from the Colorado River system in the lower basin (the main stream from Lee Ferry and below plus all tributaries) of no more than 8.5 million acre-feet per annum, characterized by the Master as a "ceiling" or "embargo" on lower basin appropriations. (See Rep. 142-44.) About 2 million acre-feet of that 8.5 million acre-feet is now used from the dependable supply of the lower basin tributaries (Calif. Op. Br. 20, 22-23; Calif. Ans. Br. 10 n.7), leaving not more than 6.5 million acre-feet to be claimed within the Compact "ceiling" from the main stream.

Section 4(a) of the Project Act (the first paragraph of which specifies the terms of the limitation accepted by California) refers to (1) the waters apportioned to the lower basin by Article III(a) of the Colorado River Compact and (2) any excess or surplus waters unapportioned by the Compact. The Master severs these express references to the Compact from section 4(a) as "inap-

propriate" (Rep. 173) and relates both funds of water solely to "mainstream" waters (Lake Mead and below). All uses made by projects diverting from the lower basin tributaries or from the main Colorado River between Lee Ferry and Lake Mead are excluded from consideration. See Rep. 173, 183.

That severance produces the following disparity in the "mainstream" between supply and demand: Against a "mainstream" supply which cannot exceed 6.5 million acre-feet when the Compact ceiling is enforced (because 2 million acre-feet of the lower basin's 8.5 million acre-foot Compact allocation is accounted for by present uses on lower basin tributaries[1]), the effect of the Master's construction of section 4(a) of the Project Act is to marshal demands which vastly exceed that supply. The demands which the Master regards as assertable solely against the "mainstream" supply are: (1) Demands to 7.5 million acre-feet of "Article III(a) waters," *i.e.*, the 4.4 million acre-feet to which California agreed her claims are limited and the 3.1 million acre-feet which may be claimed only by Arizona and Nevada; plus (2) demands to all "excess or surplus waters" over and above that 7.5 million acre-feet.

The issue then arises whether the shortage of at least one million acre-feet to supply the III(a) demands recognized by the Master against the "mainstream" (7.5 less 6.5) is to be borne by the 3.1 million acre-feet

[1]At present, uses from the main Colorado River between Lee Ferry and Lake Mead are minimal. However, if any new project, such as the Central Arizona Project, is authorized to divert from that upper reach of the river, the present figure of 2 million acre-feet of uses on "tributaries" would increase accordingly and the "mainstream" supply in Lake Mead and below within the Compact ceiling would shrink correspondingly.

of claims (to the extent their priorities, over one half now unused, are junior to our own) from which we are excluded, or whether that shortage may invade the priorities of our long-established projects to 4.4 million acre-feet.[1a]

2. *The "priority issue"*

The Special Master's recommended decree would allocate to California 44/75 of the "Article III(a) waters" (defined as the first 7.5 million acre-feet (or less) of "mainstream" waters available for consumptive use annually), not a firm 4.4 million acre-feet thereof. If the Master's formula is confirmed, California's right to "mainstream" waters shrinks to no more than 3.8 million acre-feet annually (44/75 of 6.5 million acre-feet[2]) whenever the Compact ceiling of 8.5 million acre-feet is enforced against the lower basin.[2a] Yet, Cali-

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[1a]Within the Compact's ceiling of no more than 6.5 million acre-feet from the main river from Lee Ferry to Mexico, there is obviously no water to supply demands to "excess or surplus" above 7.5 million acre-feet.

[2]The Master derives the fractions 44/75, 28/75, and 3/75 (Rep. 233) from a "contractual allocation scheme" (or "system") (Rep. 221, 232) which he "deduced" (Rep. 237) from the Secretary's water delivery contracts construed with the following gloss: that the Secretary intended to effectuate substantially (although not precisely) the allocation set forth in the second paragraph of § 4(a) of the Project Act (authorizing an interstate compact which no state ratified) in conjunction with the limitation specified in the first paragraph of that section (Rep. 222-25). We deny that any "contractual allocation scheme" exists (Calif. Op. Br. 138-94). But if it does exist, we deny that it is the scheme described by the Master (Calif. Op. Br. 195-206) or that it abrogated priorities in "Article III(a) waters" and substituted parity (Calif. Op. Br. 206-31). See also Calif. Ans. Br. 36-75, 106-29, 136-40.

[2a]If, as we believe, the permanently dependable supply will support less than 6 million acre-feet of consumptive use from the Master's "mainstream," California's share, under the Master's formula, would not exceed 3.5 million, unless "present perfected rights" exceeded that quantity. The decree proposed would postpone determination of their magnitude to later proceedings.

fornia's annual consumption as of the date of the trial was 4.6 million acre-feet. By 1960 California uses had increased to about 4.9 million acre-feet. (See Calif. Op. Br. 14, 15.)

B. The Decision Proposed by the Special Master Should Be Modified To Preserve California's Firm Right to 4.4 Million Acre-Feet

It is improbable on anybody's theory that the dependable supply of the main river will furnish any substantial quantities of "excess or surplus."[2b] Therefore, we are concerned primarily with protecting the rights of California's long-established projects to 4.4 million acre-feet per annum as against proposed new projects in Arizona and Nevada. California's rights to 4.4 million acre-feet are clearly protected if the Court reverses the Master on both issues (the "severance" issue and the "priority" issue).

If the Court reverses only the Master's excision of the express reference in the limitation to the Colorado River Compact (the "severance issue"), California will probably receive her 4.4 million acre-feet. If the Court reverses only the Master's substitution of proration for priority in "Article III(a) waters," California's 4.4 million acre-feet is assured.

[2b]The permanently dependable supply in the main river, we believe, will sustain not more than 6 million acre-feet of consumptive use. Of this use, 5.5 million acre-feet would be identified, on California's contentions, with the water apportioned by Article III(a) of the Compact, the remaining 2 million being accounted for by presently existing uses of the dependable supply on the tributaries under long-established appropriations which were "rights which may now exist" in 1929. The "excess or surplus" in the main stream dependable supply thus would be not over 500,000 acre-feet (6 minus 5.5), and California's share not over 250,000 thereof, or 4.65 million acre-feet in all.

The reasons which compel reversal at least in one respect or the other (and we think in both respects) are discussed below in parts II and III, respectively. In part IV we deal with the overriding considerations of justiciability and water supply.

There can be no doubt that California has rights to at least 4.4 million acre-feet annually, plus one half of "excess or surplus waters" up to 978,000 acre-feet.[3]

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[3]The United States, in its answering brief, seems to say that it does not understand why, if California is limited to one half of excess or surplus, we can claim 978,000 acre-feet of it, while conceding to Arizona and Nevada only 180,000. (U.S. Ans. Br. 32 n.9.) We do not so contend. We say that if existing projects in California were fully served to the extent of 5.378 million acre-feet of constructed capacity, they would be dependent to the extent of 978,000 acre-feet on the existence of excess or surplus, whereas existing projects in Arizona and Nevada, which will require when fully developed about 1.3 million, would be dependent on excess or surplus to the extent of 180,000 acre-feet of that requirement. (That 180,000 acre-feet consists of 152,000 in Arizona plus 28,000 in Nevada; see Calif. Findings and Conclusions (April 1, 1959), table, p. XII-16.) Since Arizona and Nevada, even with their junior priorities, can claim a quantity of excess or surplus equal to California's one half, it follows that in the happy but unlikely event that the water supply will support use by California of that surplus to the extent of 978,000 acre-feet, it must do so for Arizona and Nevada, enabling them to expand by about 800,000 acre-feet (978,000 minus the 180,000 acre-feet of surplus which existing projects will need when fully developed). But if the water supply, as we believe, will support substantially less than the 6.5 million acre-feet of consumptive use from the main stream which will be permitted by the Compact ceiling whenever that ceiling is enforced, the "surplus" to be equally divided will not exceed, on a permanent basis, the million acre-feet referred to in Article III(b). Of this, on our contentions, California could use 4.9 (4.4 plus one half of the 1 million of III(b) water), and Arizona and Nevada 1.6 (1.1 plus one half of this 1 million). The true expectancy for all three states would be somewhat less because the dependable supply is about 6 million, thus less than the Compact ceiling of 6.5 million. See note 2b, *supra*.

Cf. Arizona's erroneous statement (Ariz. Ans. Br. 139): "[T]he California protestation that unless she receives 5,378,000 acre-feet of Colorado River water each and every year she will be visited with disaster is without substance." Arizona attempts to disprove a contention that we have never made.

However, it has been said that bases on which we claim our rights have not been made clear. The Government says (U.S. Ans. Br. Br. 16 n.3):

> "Throughout the trial of the case, and in the briefing for the Special Master, California's presentation has involved a number of alternative positions."

We have always asserted clearly and consistently the same two bases for our rights. In the phraseology used in the first paragraph of section 4(a) of the Project Act, the twofold bases of California's rights are: (1) "rights which may now exist," that is, appropriations made prior to and subsisting as of the effective date of the Project Act (June 25, 1929) which could be satisfied from the unregulated flow without Hoover Dam; and (2) "contracts made under the provisions of this Act," that is, appropriations initiated after the Project Act by contracts for the incremental supply ("waters stored" in the language of section 5 of the Project Act) made available by Hoover Dam. Our rights in both categories have been validly initiated and diligently pursued (Calif. Op. Br. 10-14 and appendix at A1-37), establishing our priorities upon both bases.

California has clearly and consistently asserted these same twin bases—existing rights and contracts—in 1953 in our pleadings,[4] in 1956 in our statement of position[5] and in our opening statement,[6] in 1959 in

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[4]Calif. Answer to Ariz. Bill of Complaint, First and Third Affirmative Defenses (pp. 1-38, 46-53, respectively).

[5]Statement on Behalf of Calif. Defendants 4-5 (Feb. 29, 1956).

[6]Tr. 6197, 6198-205, 6208, 6215-18 (Mr. Ely).

our briefs and proposed findings and conclusions,[7] and finally, in 1960 in our opening brief before this Court.[8] We reassert them now.

C. The Adoption of California's Contentions Would Not Halt Further Development in Arizona and Nevada

The answering briefs of the other parties reveal this misunderstanding of California's position, manifested in its most extreme form in the Government's answering brief (U.S. Ans. Br. 3):

> "[T]o follow the solution proposed by California would stymie further development in Arizona and Nevada, including the effectuation of present federal projects, and permit California, by default, to exceed the limitation on use in that State which, as a condition precedent to authorization of the Boulder Canyon Project, Congress imposed[9] in anticipation of California's ability to expand its uses of mainstream waters more rapidly than the other States."[10]

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[7] *E.g.,* Calif. Findings and Conclusions (April 1, 1959), introduction, p. iii; Calif. Rebuttal Brief 13-15 (June 30, 1959).

[8] *E.g.,* Calif. Op. Br. 37.

[9] (Footnote ours.) It is clear that the limitation was imposed not by congressional fiat (as the United States seems to suggest) but rather by the consent of California in her Limitation Act. See Calif. Op. Br. 128-29, 193-94.

[10] *Accord,* U.S. Ans. Br. 19: "It would be undesirable to abandon needed development in Arizona and Nevada in order to protect against possible future shortages which by reason of scientific discoveries or other factors may never occur." *Id.* at 54: "California would go too far in mortgaging the present to protect the remote future, perhaps because it is Arizona's present that will be sacrificed as security for California's future." See also Nev. Ans. Br. 26: "Nothing in the theory of judicial apportionment justifies what is, in effect, an economic block, or which, as California states, in effect, to Nevada: 'We will let you complete the projects presently existing, but beyond that you can never go.'"

See also Rep. 135.

This assertion is wholly wrong. California neither seeks such results nor makes any contention which would produce such results.

1. *As to presently authorized projects*

Under California's contentions, all existing main stream projects in Arizona and Nevada can proceed to full development. Our opening brief is explicit (p. 292): "The decree which California seeks . . . would fully protect all existing main stream projects in Arizona and Nevada, to the full extent of their ultimate development." More specifically, that development (with a very minor exception) would be assured water from the dependable and permanent supply of the main Colorado River in the lower basin (Calif. Op. Br. 16-19, 20-22, tables 2 and 3). Nevada, at least, recognizes this concession. (Nev. Ans. Br. 26; *cf.* Ariz. Ans. Br. 139-41.)

2. *As to proposed new projects, such as the Central Arizona Project*

Proposed new projects in Arizona and Nevada are not prohibited if California's contentions are accepted. Again, our opening brief is explicit (p. 292): "We do not oppose any such [new] projects [in Arizona and Nevada], if the risk of miscalculation of the water supply rests (as it does in every state of the arid West) on the new ventures, rather than on the existing projects built on the basis of decisions not now reversible and by investments not now recoverable." This principle is most conducive to "optimum development" (U.S. Ans. Br. 3) of the water resources of the lower Colorado River basin. (*Infra* part III-A, pp. 38-44). If Arizona believes her own contentions about the abundant water supply, the risk of accepting junior priorities for such new ventures is negligible.

II. THE LEGISLATIVE HISTORY OF THE PROJECT ACT DOES NOT SUPPORT SEVERANCE OF THE "COLORADO RIVER COMPACT" FROM THE CALIFORNIA LIMITATION AGREEMENT

A. The Legislative History of the California Limitation on Which Our Opponents Rely Cannot Be Read Literally

If there were any point to the quip that only when the legislative history is ambiguous do we turn to the language of the statute, here is that case!

We shall not restate the argument from our opening brief. (Calif. Op. Br. part Two, pp. 69-137.) We shall confine ourselves to the significance to be attached to the legislative history presented by the United States, Arizona, and Nevada to buttress the Master's conclusions. That history in fact contradicts the conclusion of the Master, who says he has considered it and rejected it, and for compelling reasons to which none of the other parties even refer. If the decree were to be written from that history, the Master's decree would have to be altered at least as drastically as the Master has altered the literal meaning of the limitation.

All of the other parties ignore (as does the Master) all contradictory indications in the legislative history, in the terms of section 4(a) of the Project Act, and in all other provisions of the Project Act which recognize that the Compact applies to the Colorado River system including tributaries. Instead, they rely upon statements of some Senators that the first term of the limitation restricts California to 4.4 million acre-feet of the average annual flow of 7.5 million

acre-feet at Lee Ferry which Article III(d) obligates the upper states to "let down" or which "went down" at Lee Ferry to the lower states.[1] On the same assumptions, the tri-state compact which was authorized in the second paragraph of section 4(a) would refer to that 7.5 million acre-feet at Lee Ferry and would have apportioned 2.8 million acre-feet of this flow to Arizona and .3 million acre-feet to Nevada. This is the whole message of the Senators' statements that the United States, Arizona, and Nevada reply upon in the opening and answering briefs.

Thus, the California limitation would be read as if it limited California to the "aggregate annual consumptive use (diversions less returns to the river)" of 4.4 million acre-feet "of the waters apportioned to the lower basin States by paragraph (*d*) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact." If so read, Senator Phipps when he inserted the perfecting amendment which specifies "paragraph (*a*)" and Senator Hayden when he expressed approval were both colossally mistaken.[2] In the second paragraph (tri-state compact) of section 4(a), "paragraph (a) of Article III" must likewise be rewritten.

The Master gives two reasons why this legislative history cannot be followed, and one why it should not be followed. It cannot be followed because:

(1) Physically, the 7.5 million acre-feet of Lee Ferry

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[1]U.S. Ans. Br. 38-46; Ariz. Ans. Br. 62-67; Nev. Ans. Br. 55-57. *Accord,* Ariz. Op. Br. 63-67, 71-72.

[2]70 CONG. REC. 459 (1928), quoted in Calif. Ex. 2015 (Tr. 11,173), at 54.

flow cannot sustain 7.5 million acre-feet of consumptive use (diversions less returns) at any point below Lee Ferry (Rep. 144, 188).

(2) Almost insuperable administrative difficulties would attend tracing water downstream from Lee Ferry to points of diversion and assigning the nonbeneficial losses among users thereof (Rep. 187, 193). No one has yet attempted even to suggest the terms which would go into such a decree, let alone how it would be administered.

These two "cannots" overshadow the tremendous "should not" which would otherwise be compelling even if it stood alone. The legislative history thus relied on results, as the Master concedes (Rep. 188-93), from the failure of Senators Pittman and Hayden to understand the proposal of the upper division Governors' Conference in 1927 to divide the flow of the river at Lee Ferry.[3] This confusion should not be permitted to frustrate the clear intent and purpose of Congress, undeviatingly expressed in both the text of the Project

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[3]The United States (U.S. Ans. Br. 39), Arizona (Ariz. Ans. Br. 66-67), and Nevada (Nev. Ans. Br. 56-57) all rely upon the recommendation of the upper division governors in 1927 for a tri-state allocation of the Article III(d) flow at Lee Ferry. The Master states that "Congress never clearly understood" that the governors' recommendation related to their states' Article III(d) obligation. Senator Pittman "did not adopt, or perhaps failed to grasp, that portion of the governors' resolution which expressly found the source of the allocated waters in the Article III(d) obligation of the Upper Division" so that he described the governors' proposal "in apparent misunderstanding of the governors' recommendation." Finally, the Master concludes that "all subsequent discussion in the Senate flowed in the same channel." (Rep. 189-90.)

Act[4] and throughout the legislative history, that the Compact, whatever it meant,[5] must control the Project Act, the limitation, the contracts, and all rights arising under or recognized by any of these inseparable documents.[6]

One can speculate here about what other term in the limitation must yield if "paragraph (*a*)" were to be written "paragraph (*d*)." Speculation is not useful, however, except to demonstrate one thing: Any of the modifications which suggest themselves would yield a

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[4]The Master writes (Rep. 173 n.32): "It is true that certain sections of the Project Act apply to the Colorado River System. The explanation for this is that in those sections Congress was dealing with problems which had system-wide application. . . . But it is clear that many other sections of the Project Act apply only to the mainstream, and this is understandable because in them Congress was dealing only with mainstream problems." The Project Act references in explicit terms in §§ 6, 13(b), 13(c), 13(d), 15, 16, and 20 to "tributaries" or Colorado River "system" in fact show that Congress recognized that the Compact applies to tributaries. Moreover, the cause of concern in the limitation provision, § 4(a), was water rights, and specifically water rights in the event of only six-state ratification of the Colorado River Compact. No reason is suggested, and none can be discovered, why if Congress was concerned with subjecting the *system* to the Compact, it was interested with respect to the limitation only in the water rights in the "mainstream."

[5]The Government contends that the Compact should not be construed in this suit in the absence of the upper states. (U.S. Ans. Br. 30-31 n.7.) The law of this case to the contrary was established by this Court's per curiam order denying California's motion to join the upper states. 350 U.S. 114 (1955), *rehearing denied,* 350 U.S. 955 (1956). *Accord,* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110-11 (1938). The pleadings ask for construction of the Colorado River Compact, and all parties including the United States explicitly recognized in those pleadings the necessity that it be construed.

[6]Arizona asserts that California has "bottomed her position upon an over-simplified and purely theoretical equation: Project Act = Compact = System water (main stream + tributary)" (Ariz. Ans. Br. 60). Arizona misses the point; the reference to the Compact is compelled by the purposes of the limitation. See Calif. Op. Br. 112-17; see also p. 29 *infra.*

total net result to California substantially more favorable than the Master's recommended decree.

If the statements of some Senators that they were dividing the Lee Ferry III(d) delivery is accepted as a premise, the consequence is to eradicate the term "consumptive use," expressly defined in the limitation as "diversions less returns to the river," as the thing divided. Conceivably, this eradication of the term "consumptive use" might produce a decree specifying 44/75 of the gross diversions to California, 28/75 to Arizona, and 3/75 to Nevada. Because only the smallest of the three California projects (Palo Verde) has significant return flow and because all of the large existing Arizona projects have return flow, this would provide much more water proportionately for California.

There is legislative history to support this view. Senator Hayden told the Senate expressly that the 2.8 million acre-feet that Arizona would receive upon ratification of the tri-state compact which his amendment authorized (the second paragraph of section 4(a)) would allow Arizona gross diversions of that quantity, leaving nearly one million acre-feet of return flow available to satisfy Mexico (70 CONG. REC. 463, 464, 465). In terms of consumptive use ("diversions less returns to the river"), the 2.8 million acre-feet would provide 1.8 million acre-feet only for Arizona.[7] This is the only explanation which even partially[8] squares his

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[7]The language of the second paragraph which provides 2.8 million acre-feet "for [not "of"] exclusive beneficial consumptive use" (not defined) in Arizona would easily yield to this construction.

[8]We say "partially" because 7.5 million acre-feet of flow at Lee Ferry would not produce 7.5 million acre-feet of gross diversions (much less diversions less returns) at points downstream from Lee Ferry.

proposed allocation of 7.5 million acre-feet with his explanation of where the water so divided was to come from—the III(d) delivery at Lee Ferry.

B. No Legislative History Supports the Master's Construction of the Limitation

The Master's decree is not supported by any legislative history at all. He rejects the literal language of the debates which would equate "Project Act III(a)" with "Compact III(d),"[9] as clearly as he does the literal language of the statute which would equate "Project III(a)" with "Compact III(a)." His synthesis of a third equation of "Project Act III(a)" with "7.5 million available from Lake Mead and below" cannot be justified on any view that it conforms to what any member of Congress thought the Colorado River Compact means. No one in Congress, directly or indirectly, expressly or impliedly, suggested that the Colorado River Compact in any of its provisions refers to a cate-

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[9]The United States, Arizona, and Nevada also reject the literal meaning of the debates.

The United States includes in the scope of § 4(a) the depletions on lower basin tributaries, such as the Little Colorado, above Lake Mead. These tributary waters rise in the lower basin and never pass Lee Ferry (Calif. Op. Br. plate 11). See, *e.g.*, U.S. Op. Br. 20: "We suggest that the 100,000 acre-feet of Little Colorado depletions is part of the total mainstream supply available for allocation. This is necessary to achieve Congress' purpose to impound and regulate 'substantially all of the mainstream water' and to accomplish the interstate allocation established by the Section 4(a) limitation on California . . . . We urge the Court to adopt this view."

Cf. Rep. 187: "The United States at one time urged . . . that Section 4(a) limits California to a part of the water flowing at Lee Ferry."

Nevada, and sometimes Arizona, endorse the Master's definition of the "mainstream," by necessary implication rejecting the legislative history which is quoted equating Articles III(a) and III(d) of the Colorado River Compact. (See Calif. Ans. Br. 77-78, 96-106, 135.)

gory of uses from the "mainstream" which begins at Lake Mead.[10] The site of Hoover Dam was undecided when the Compact was negotiated. The Compact is deliberately written to encompass the possibility of construction of the proposed dam "within or *for the benefit of* the Lower Basin" (Art. VIII; emphasis added), *e.g.*, at Glen Canyon in the upper basin.

Even today, there is no contention by any party that Article III(a) of the Colorado River Compact is restricted to the "mainstream," Lake Mead to Mexico.

The case against the Master's construction, however, is far stronger than a total absence of legislative history to support it. His construction would totally frustrate the purposes of the limitation about which there can be no dispute.[1] His construction is based upon rewriting statutory language to give it a meaning which no rational legislative body would have accepted if express language incorporating that meaning had been presented. This can be simply demonstrated:

(1) Suppose that a limitation had been presented which said: "California agrees to be limited to 4.4 million acre-feet of the first 7.5 million acre-feet plus

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[10]We understand Arizona to argue that the Compact and limitation are reconcilable only on Arizona's alternative argument that the Compact applies to the main stream beginning at Lee Ferry but excludes all lower basin tributaries, or that Congress so construed it.

[1]Rep. 165. "Absent seven-state ratification of the Compact, the Upper Basin required protection against appropriations in the Lower Basin in excess of the Compact apportionment. The Upper Basin feared that Arizona might not ratify, in which event California, unless limited, would be able to appropriate from the mainstream substantially all of the Lower Basin apportionment, leaving Arizona free to make further appropriations from the mainstream outside the Compact ceilings. The limitation on California left a sufficient margin for exploitation by Arizona so as to secure the Upper Basin against undue encroachment by the non-ratifying state." *Accord,* U.S. Ans. Br. 38-41.

not more than one half of all waters available in excess of that quantity from the main Colorado River from Lake Mead to the Mexican boundary; California is not limited with respect to any diversion made above Lake Mead."

Obviously, this would not serve the purpose of the limitation, which was to protect the upper basin from the consequences of Arizona's failure to ratify the Colorado River Compact. When the Project Act was passed, Metropolitan Water District was exploring diversion routes for its aqueduct from the main stream above the site of Lake Mead. The Parker Dam route from below Lake Mead was not selected until more than a year after the Project Act passed. (Calif. Op. Br. 125-26.) A limitation on California to stated quantities of water in addition to what it might divert from above Lake Mead would have been as irrational as a decree in this case omitting from its scope Central Arizona Project diversions above Lake Mead. That is what this decree omits.

(2) The Master says that the secretarial contracts substantially effectuated the allocation contemplated by the tri-state compact, authorized by section 4(a) of the Project Act, but never ratified by any state. Suppose that Congress had been invited to authorize such a compact, rewritten to state what the Master finds in the second paragraph. It would say, in substance: "There is hereby allocated from the first 7.5 million acre-feet of consumptive use from the main stream of the Colorado River from Lake Mead to the international boundary 2.8 million acre-feet to Arizona and .3 million acre-feet to Nevada.[2] These quantities

[2]The tri-state compact would have made no allocation to California.

are not to be diminished by reason of whatever uses may be made by or in Arizona or Nevada of water from the main stream or tributaries above Lake Mead or from tributaries which supply water to that portion of the main Colorado River from which these allocations are made."

Such a proposal would never have received a moment's serious consideration. No decree, no contract, no compact, no appropriation, no water right, whether belonging to an individual or a state, has ever had these characteristics: (a) The parties whose agreement or consensual acts established the right are under no obligation to permit the water to continue to flow to the points of diversion agreed upon; (b) owners of the right may themselves divert the water before it has reached the points of diversion agreed upon without, however, diminishing their rights at the points of diversion.

Yet these are the irrational and self-defeating consequences which the Master's decree produces. The consequences flow from a disregard of a term in section 4(a) which language could not make more clear.

The most striking feature of the Master's decree is the liberation of the Central Arizona Project from the adjudication if that project diverts water above Lake Mead. The existence of a dependable water supply for a Central Arizona Project was the question which precipitated this suit. We have already called to the Court's attention the current studies of the United States and Arizona, given impetus by the circulation of the draft report, to make the diversion for a Central Arizona Project from the main stream above Lake Mead. (Thirteenth Annual Report of the Arizona Interstate

Stream Commission (1960), p. 31, quoted Calif. Op. Br. 125.) On March 17, 1961, Arizona enacted emergency legislation appropriating funds to be used "under contract with the bureau of reclamation for the purpose of making investigations and studies of a dam at the Bridge Canyon site on the Colorado River and of works necessary for the diversion and transportation of water *from the Colorado river* to areas in Arizona . . . ."[3] (Emphasis added.) We assume that the "Colorado river" as used in Arizona's statute includes the main stream from Lee Ferry to Lake Mead. On April 24, 1961, the United States and Arizona entered into the contract authorized by that legislation.

The recommended decree constitutes judicial legislation rather than construction. For convenience we have at times used the word "construction" in discussing the Special Master's treatment of the California Limitation Act. In fact, the Special Master does not construe the words used by the Congress and the California Legislature. He does not ascribe some shade of meaning to those words or adopt the more reasonable as between two or more possible meanings. Instead he strikes the controlling words entirely as an "inappropriate reference to the Compact" (Rep. 173), and substitutes different words having a completely different meaning. Under the constitutional division of powers, it is the function of the legislative branch, not the judicial, to rewrite or amend statutory language. The adoption of

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[3]ARIZ. LAWS 1961, ch. 39, § 2, at 107. Reference is also made to diversion "to the Central Arizona Project area," § 2, at 108; see also the title, referring to "diversion and transportation of water to Central Arizona Project and other areas." *Id.* at 107. Text of this Arizona statute is quoted at 133-35 *infra*.

the Special Master's Report would constitute judicial legislation.

The law of contract applies to the statutory compact. Furthermore, our adversaries completely overlook the contractual nature of the "statutory compact" between the United States and California resulting from the Boulder Canyon Project Act and the California Limitation Act. That statutory compact should be construed under the law of contract. The words used should be accorded their ordinary meaning and not be modified by any intent on the part of one of the parties, not disclosed by the words used.[4]

C. The Legislative History, Like the Language of the Statute, Must Be Read in the Light of the Plain Purpose of Section 4(a)

None of the other parties or the Special Master consider the construction of the limitation in light of the most persuasive form of legislative history: the purposes of the limitation set forth in the first paragraph of section 4(a) of the Project Act. The transcendent purpose of the limitation was to provide protection to the upper basin substantially equivalent to the protection that would be afforded by seven-state ratification of the Colorado River Compact, as both the Master and the United States recognize.[5]

Achievement of that purpose required exact integration of the proposed tri-state compact with the Colorado River Compact to which it was made "subject in all particulars."

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[4]Hotchkiss v. National City Bank, 200 Fed. 287 (S.D.N.Y. 1911), *aff'd*, 201 Fed. 664 (2d Cir. 1912), 231 U.S. 50 (1913).
[5]Rep. 165, quoted *supra* p. 25 note 1; U.S. Ans. Br. 38-41.

The Master's construction of section 4(a) would permit diversions above Lake Mead by all three states, circumventing and frustrating the purposes of the limitation and the tri-state compact.

The Master, supported by our opponents, says that the Senate, in enacting section 4(a) of the Project Act, employed the reference therein to Article III(a) of the Compact as "shorthand" for 7.5 million acre-feet of consumptive use from Lake Mead and below. (Rep. 173, 190.) If so, the Senate (1) authorized the allocation in perpetuity among Arizona, California, and Nevada, from this segment of the river, of a quantity which is at least 1 million acre-feet in excess of the ceiling which the Compact imposed on appropriations from the whole main river, including the reach between Lee Ferry and Lake Mead, but (2) directed the Secretary to conform to the Compact in operating the reservoir from which their delivery should be made, and (3) therefore intended that whenever the Compact ceiling on lower basin appropriations was enforced, California should receive, not 4.4 million acre-feet, but 3.8 million of "Article III(a) water" and no "excess or surplus."

We believe that Congress intended that California should be permitted to appropriate and use 4.4 million acre-feet, not 3.8 million, of the waters within the Compact III(a) ceiling. This means that the 3.1 million from which Congress intended to exclude California must be found where Congress said it should be found, *i.e.*, in the waters of the system apportioned by Article III(a) of the Compact, and not merely in the waters of the main river or in the Master's still more restricted "mainstream."

It is unrealistic to believe that Congress, in writing

section 4(a) of the Project Act and under the anxious eyes of the upper basin Senators, either (1) proposed an allocation in perpetuity among Arizona, California, and Nevada of a million acre-feet in excess of the Compact ceiling, or (2) misled California to limit her rights to 44/75 of a quantity which could never come within 600,000 acre-feet of the agreed 4.4 million if the Compact ceiling were enforced, or (3) did not mean it when it directed that the Compact should be enforced in administering all contracts "anything in this Act to the contrary notwithstanding" (Project Act section 8 (a)).

D. California Is Not Excluded From Participation in Article III(b) Waters Under Any Construction of the Limitation

The answering briefs of all the other parties join the Master (Rep. 168-69, 180 n.40) in chiding California for the following purported inconsistency in our argument: We are charged with arguing that the limitation reference to "Article III(a) waters" should be read literally, but that the limitation to one half of the "excess or surplus waters" should not be read literally (supposedly the "literal" reading excludes California from the Article III(b) waters).

This misstates our argument, and is based on a premise which is utterly unsupportable. We say that "waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact" can only be read as a reference to Article III(a) of the Compact. More explicit language to effectuate that intention could not be devised.

We say that "excess or surplus waters unapportioned by said compact" must be read as referring to the Colorado River Compact and to Compact categories of water. Again, this is a necessary conclusion unless the word "compact" is to be erased altogether. That conclusion follows from a literal reading of the word "compact" wherever it appears, but it does not by itself answer two further questions about "excess or surplus":

1. To what Compact categories did Congress and the California Legislature intend to refer?

2. Is the one million acre-feet referred to by Article III(b) "apportioned" or "unapportioned" by the Compact?

This second question, while it may shed light on the answer to the first, cannot be conclusive. It is obvious that the Compact negotiators, whether they regarded III(b) as apportioned or unapportioned, did not intend to exclude California from its use.

The Master, in effect, answers the first question in our favor when he finds that Congress had no intent to exclude California from sharing in that one million acre-feet (Rep. 196-200); he answers the second against us. We think he was right in answering the first question, which is decisive, and wrong in answering the second, which is not. Only by inference is the second question answered against us: In Article III(f) reference is made to waters "unapportioned by paragraphs (a), (b), and (c)." This reference, the Master says, overrides the language of Article III(b) which avoids the words "apportioned in perpetuity" (used in Article III(a)) and substitutes the awkward phrase, "is hereby given the

right to increase its use."[6] Why did the Compact not expressly apportion 8.5 million acre-feet to the lower basin, if that was the intent? The Master attempts no explanation; there is none.[7]

If, however, there were a rule of "ambiguous in one is ambiguous in all," our choice is still clear. California would be hurt by exclusion from III(b) water, but ruined by rewriting the III(a) limitation based on the III(b) ambiguity.

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[6]Arizona's counsel in Arizona v. California, 283 U.S. 423 (1931), completely demolished the argument that the Compact "apportioned" the III(b) water. See quotation in Calif. Op. Br. 108-09.

The assumption of the Master and the other parties that a "literal reading" of the limitation and the Compact would exclude California from Article III(b) waters is wrong. The Master's Report itself states or implies at least three contradictory "literal" meanings of "excess or surplus waters," under one of which California would share in Article III(b) waters (Calif. Op. Br. 107 n.9). The Government purports to assert this "literal" meaning of the Compact (U.S. Ans. Br. 32) while simultaneously contending (erroneously, *supra* p. 22 note 5) that the Compact cannot be construed in the absence of the upper basin states (*id.* at 30 n.7).

[7]Arizona erroneously says that this argument modifies our position before the Master; we made the identical argument to the Master (Calif. Op. Br. 82-83 (April 1, 1959)).

III. THE PRIORITIES OF CALIFORNIA'S ESTABLISHED PROJECTS UP TO 4.4 MILLION ACRE-FEET ANNUALLY SHOULD BE PROTECTED FROM IMPAIRMENT BY NEW PROJECTS IN ARIZONA AND NEVADA

Statement of the Issue

The issue is: Do the priorities in "Article III(a) water"[1] (however defined) stop at state lines?

The issue relates only to "Article III(a) water."[2] It relates not to a general question of priority versus parity with respect to water rights under Project Act or reclamation law contracts, since there is no substantial argument with the Master's conclusion that priori-

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[1]We use "Article III(a) water" as a convenient term to refer to what the California limitation calls "the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact," however that descriptive term in the limitation may be defined.

[2]Allocation of shortages in "excess or surplus waters unapportioned" by the Colorado River Compact is not in issue for two reasons: (1) Because California's priorities absent the limitation would entitle California to more than one half, this term of the limitation has the effect of proration. It does not, however, prescribe proration, because priority would clearly apply to all rights in "excess or surplus" if the aggregate rights of states other than California in excess or surplus totaled more than one half. (2) If the Master's severance of the Compact from the limitation is upheld, "excess or surplus" is nonexistent, except on a short-term temporary basis, and unavailable to everyone as a basis for project planning, which requires a dependable supply (Rep. 133, 239). There can be no shortages in "Article III(a) water" until "excess or surplus waters unapportioned" by the Compact are exhausted; from that time all water rights must be satisfied, if at all, from "Article III(a) water."

ties prevail intrastate until a state line is reached.[3] It relates only to water used from the Master's "mainstream," since no alternative basis other than equitable apportionment and priority of appropriation for water rights from the rest of the river system is suggested.[4]

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[3]"Section 18 [of the Project Act] . . . directs that state law shall govern intrastate water rights and priorities . . . ." (Rep. 237.) Recommended decree art. II(C)(1), Rep. 350.

"We agree [with the Master] . . . that state law shall govern intrastate water rights and priorities . . . ." (Ariz. Op. Br. 99.) *Contra,* "The same considerations which led the Master to conclude that the Project Act envisions a ratable sharing of water between the states in the event of shortage impels the conclusion that Congress contemplated that ratable sharing among the users within a state should also obtain in times of shortage." Ariz. Ans. Br. 165. Compare the Arizona Act of March 17, 1961 (ARIZ. LAWS 1961, ch. 39, p. 107), subordinating Central Arizona Project rights to contracts of all water users in Arizona, quoted in part, pp. 92-93 *infra.* Nevada does not object to the Master's upholding of intrastate priority. The United States argument in its opening brief was directed to excising the word "state" and inserting the word "applicable" in the provisions of the Master's Report recognizing intrastate priorities, an exercise which may make no difference to the result, however the semantic problem is resolved. U.S. Op. Br. 24 n.5.

[4]The Master so concludes (Rep. 316).

Arizona's alternative argument is that "Article III(a) water" in the limitation refers to a Colorado River Compact applicable to the lower basin main stream only, beginning, however, at Lee Ferry, but no explanation is offered about the basis, under that construction, of any rights at all from the main stream above Lake Mead, where the Secretary cannot contract to store and deliver Lake Mead water.

Nevada's argument that we misuse the term "equitable apportionment" is disposed of by the Special Master. See Rep. 326-27 and cases there cited. "Equitable apportionment" is the Court's term employed in Wyoming v. Colorado, 259 U.S. 419, 464 (1922), the first interstate water rights case in the original jurisdiction to result in a decree. That decree applied priority of appropriation across state lines, as the Court had earlier done in its appellate jurisdiction. Bean v. Morris, 221 U.S. 485 (1911). *Cf.* Washington v. Oregon, 297 U.S. 517, 526 (1936): "The question remains whether the Oregon irrigators as a result of all their acts are taking to themselves more than their *equitable proportion* of the waters of the river, priority of appropriation being the basis of division." (Emphasis added.)

It relates only to the legal effect of the Colorado River Compact, the Project Act, the Limitation Act, and water delivery contracts which became effective on or after June 25, 1929, since it is clear that priority characterized all water rights interstate and intrastate prior to that date. (Rep. 316.)

Furthermore, it is an issue which perhaps need not be decided at all if the Master's conclusion severing the Compact from the limitation, considered in part II of this brief, is reversed. If "waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact" refers to the lower basin's Article III(a) Compact apportionment, the possibility of a shortage is sufficiently small that decision as to how that shortage might be allocated may be presently unnecessary. The dependable supply of the main river below Lee Ferry, *plus* that available for use on the tributaries, exceeds the Compact III(a) apportionment of 7.5 million acre-feet. (See Calif. Op. Br. 20-21.)

If, however, the Master's severance conclusion is sustained, the priority issue is critical. In that event, the priority issue means more than 600,000 acre-feet of annual consumptive use to California. Proration as applied by the Master to the quantity of water which the lower basin may use from the main river when the Compact ceiling of 8.5 million acre-feet is enforced would give California about 3.8 million acre-feet[5] (44/75 of 6.5 million available from the main river

[5]California would receive less than 3.8 million if the dependable supply will sustain less than the Compact ceiling of 6.5 million acre-feet of consumptive use from the main river. If that supply is 6 million or less, as we believe, California's share under the formula would be 3.5 million or less.

within that ceiling) whereas priority would probably give California 4.4 million acre-feet from the same supply.

The priority issue appears to be of urgent concern to only one party—California. Our adversaries insist that the shortage of which we complain is ephemeral and remote. If they are right, California is in any case assured of the 4.4 million acre-feet which the first term of the limitation specifies.[6] The issue is unique in adversary litigation, because its resolution in California's favor permits California at least 600,000 acre-feet on California's contention, without any other state losing anything on its own contentions.[7]

The basis for the conclusion that interstate priorities do not exist in "Article III(a) water" has never been clearly identified. The Master describes the principle as "sovereign parity" (Rep. 236), and suggests that it is gleaned from the periphery of a Colorado River Compact which he holds otherwise to be irrelevant. The Master applies "parity" only to the "mainstream," and there only to "mainstream" rights with respect to each other, although no one suggests that sov-

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[6]"California cannot complain that these [present perfected] rights are not given sufficient recognition because in its Limitation Act it specifically accepted, as the Project Act required, the 4,400,000 acre-foot allocation, plus one half of the surplus, in satisfaction of 'any rights that may now exist.' So long as California gets its 4,400,000 acre-feet, plus one-half of the surplus over 7,500,000 acre-feet, it cannot complain that its rights are not being fully met." (U.S. Ans. Br. 51.)

[7]Priority would also protect California if the water supply physically available is less than the 8.5 million acre-foot Compact ceiling, 6.5 million of which is from the main river. The "mainstream" supply could drop to about 5.5 million acre-feet before California's priorities up to the 4.4 million acre-feet could be challenged by priorities in Arizona. Calif. Conclusion 7A:201(3), p. VII-4, and table 2, p. VII-6.

ereignty or the Compact under anyone's construction is so confined. The other parties, who support the Master, are not much more specific. Therefore, since the source of "sovereign parity" appears to be a general but otherwise unidentified principle, we turn first to the principles which should control either in the absence of applicable statute or agreement, or if there is a hiatus in the applicable statutes or agreements.

A. In Any Competition of Principles, 100 Years of Experience Has Proved That Parity Must Yield to Priority

If it were clear that Congress had not legislated or the parties had not agreed how interstate shortages in Article III(a) waters are to be allocated, the rule of priority which governed all interstate rights prior to June 25, 1929,[8] must apply: Shortages in "Article III(a) water" are allocated by priority.

If it were clear that Congress had left to this Court the rule to be fashioned with respect to how these interstate shortages are to be allocated, the principles of priority which this Court and other federal and state courts have consistently applied[9] supply the answer: Shortages in "Article III(a) water" are allocated by priority.

If it were concluded that Congress by legislation or the parties by agreement had provided a rule as to how interstate shortages are to be allocated, but so am-

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[8]June 25, 1929, is the date of the presidential proclamation which made effective simultaneously the Colorado River Compact (among six states), the Project Act, and the California limitation. (Rep. 26-27.)

[9]See, *e.g.*, Weiland v. Pioneer Irr. Co., 259 U.S. 498 (1922), and cases cited in Wyoming v. Colorado, 259 U.S. 419, 470-71 (1922).

biguously as to leave in doubt what rule they had attempted to state, the experience plus the legislative and judicial wisdom of more than 100 years of western water law provide the answer: Shortages in "Article III(a) water" are allocated by priority.

The cardinal element of priority of appropriation is first in time, first in right. The purpose of priority of appropriation is to protect existing projects. Where its strict application in interstate adjudications does not best serve that purpose, the strict application is modified to suit the purpose.[10]

The proration principle protects no one: Every project exists at the hazard of every other project.

The disagreement in this case relating to the source of title to water rights does not affect the priority issue. The resolution of this issue does not, and should not, turn upon abstract legal concepts concerning source of title.[1] So far as the resolution of the issue depends on principle, the principle comes from the physi-

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[10]Nebraska v. Wyoming, 325 U.S. 589, 618-19, 621-22 (1945). Rep. 326-27.

[1]Endless mischief has been created by mechanically applying legal doctrines in resolving western water controversies. An outstanding example is Lux v. Haggin, 69 Cal. 255, 10 Pac. 674 (1886), in which the majority of the court decided that riparian concepts imported from humid England controlled water rights in arid California. A constitutional amendment, numerous statutes, and extensive litigation have not yet entirely succeeded in rectifying the court's mistake. See United States v. Gerlach Live Stock Co., 339 U.S. 725, 742-55 (1950), for a review of the development of California water law. In sharp contrast to Lux v. Haggin is Mr. Justice Holmes' opinion in Boquillas Land & Cattle Co. v. Curtis, 213 U.S. 339, 345 (1909). Mr. Justice Holmes crisply disposed of an argument that riparian concepts were transported to Arizona by statutory importation of the common law: "[I]t is far from meaning that patentees of a ranch on the San Pedro are to have the same rights as owners of an estate on the Thames."

cal conditions of the region where the principle must be applied.[2] Priority responds to the prevailing conditions, proration does not.

The principles of priority of appropriation make possible the optimum development of the Colorado River system in the lower basin. In the absence of those principles, there would have been no development throughout the area regarded more than a century ago as uninhabitable desert. The fundamental ingredients of that law—first in time is first in right,[3] relation back,[4] and beneficial use[5]—have been adopted by every western state as the essential part of its internal law. They also are an essential part of the reclamation law, with the result that federal-state jurisdictional conflicts, while highly publicized, have been infrequent and incon-

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[2]"The miner's need was more than a convenience—it was a necessity; and necessity knows no law. But conditions were favorable for necessity to make law, and it did—law unlike any that had been known in any part of the Western world." United States v. Gerlach Live Stock Co., 339 U.S. 725, 746 (1950), reviewing the genesis of the priority principle.

[3]One who first initiates a project to put water to beneficial use and proceeds thereafter with due diligence has priority over rights later initiated. In the event of water shortage, its burden is visited in inverse order of the priorities established by the dates of initiation of their respective rights.

[4]A water user is entitled to the full requirement of his project upon its diligent completion with his priority dated back to the first initiation of his right.

[5]Beneficial use is the basis, the measure, and the limit of the appropriation right in every state, as § 8 of the Reclamation Act of 1902 declares shall be true of rights served by federal reclamation projects.

sequential.[6] With one possible exception, it is not neces-

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[6]The most widely noticed case is Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955), approving the Federal Power Commission's license for a hydroelectric development on a non-navigable stream in Oregon over opposition of Oregon. But, with respect to priorities versus proration, article 28 of the approved FPC license provided:

"Any rights to the use of waters in the Deschutes River and its tributaries in connection with the licensee's project under this license shall be subordinate to:

"(i) All existing rights, whether or not perfected, to the waters of the Deschutes River and its tributaries for domestic, stock, municipal and irrigation purposes, including the right to store any such waters in the proposed Benham Falls, Post and Prineville reservoirs and in the existing Crane Prairie, Crescent Lake, and Wickiup reservoirs; and

"(ii) The use of additional flows of the Deschutes River and its tributaries pursuant to rights which may be initiated hereafter for the diversion and storage of waters for domestic, municipal, stock, and irrigation purposes in connection with any reclamation projects undertaken pursuant to the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and acts amendatory thereof or supplementary thereto) the amounts of water to be used under the additional rights, together with the uses under existing rights whatever they may be, not, by reason of the additional right, to exceed these quantities:

"(a) Deschutes River and its tributaries above Cline Falls—entire flow; (b) Squaw Creek—all flows during the non-irrigation season; (c) Lake Creek—20,000 acre-feet annually; (d) Crooked River and its tributaries—all the flows above the highway bridge at the place where U.S. highway 97 crosses the Crooked River Canyon; (e) Crooked River below the highway bridge not to exceed 2,500 acre-feet annually for the proposed Deschutes project domestic water system; and (f) an additional 400 second-feet that may be taken above the licensee's project either from the Deschutes River below Cline Falls or the Crooked River below the highway bridge during the irrigation season." Portland Gen. Elec. Co., 10 F.P.C. 445, 458-59 (1951).

sary to resolve such conflicts here.[7] Necessity created and shaped this body of law; no legislative body has changed it, or ratified any agreement to change it, and no agreement has changed it with respect to "Article III(a) water."

The rationale for the creation of each element in priority of appropriation has been stated in our opening brief;[8] the reasons for the rules have not been and cannot be successfully challenged by any party. One hundred years of history cannot be ignored.

Priority principles do not stop projects from being built. They do permit risk of shortage to be calculated by placing risks primarily upon new projects rather than old ones.

If any doubt remained as to the choice of priority or proration, the foundation principle of equitable apportionment should resolve that doubt. This Court in *Wyoming v. Colorado,* 259 U.S. 419, 465 (1922), adopted the policy of the United States: "to recognize and give its sanction to the policy which each [state] has adopted." In the Colorado River basin the policy

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[7]The only dissent from the principles here stated which requires notice is the apparent contention of the United States that navigable waters are not subject to appropriation (U.S. Ans. Br. 64-65). That gratuitous contention cannot be taken seriously, since most waters of the West are legally navigable, or tributary to navigable waters to which the commerce power of the United States clearly extends. The evidence in this case should have put that contention to rest forever. The Secretary of the Interior has issued several thousand patents of desert land under the Desert Land Act based on express secretarial determinations, repeatedly made, that appropriations from the Colorado River main stream are valid. Such patents have been issued on these determinations in both Arizona and California before and since the enactment of the Project Act. See Calif. Op. Br. A5-6, A10-11; Calif. Finding 6E:101, pp. VI-14 through 16.

[8]Calif. Op. Br. 54-68.

which each state has adopted in its own law is priority (Rep. 22).

With respect to shortages in "Article III(a) water" no reason has been offered for curtailing priorities at state lines. Interstate proration is an anomalous exception to the general rule of priority. Priority prevails, under the Master's decision, (1) in all parts of the lower basin except the "mainstream," (2) on the "mainstream" to determine conflicts between rights below Lake Mead and competing rights above Lake Mead, (3) within each state throughout the lower basin as determined by state law, (4) with respect to federal "mainstream" reservations intrastate, and (5) with respect to "present perfected rights," interstate and intrastate. The United States, Arizona, and Nevada argue to support proration interstate of rights to "Article III(a) water," but none of them have offered any reasonable explanation of who did it, how it was done, or why.

It is conceded that no statute, federal or state, and no agreement, federal or state, expressly abrogated priority or expressly imposed proration in allocating shortages in "Article III(a) water." The parties endorsing proration rest their contention on inference, but they agree neither with the Master nor with each other upon the source of that inference.

Sources for the inference of proration variously relied upon by the Special Master, the United States, Arizona, and Nevada are these: (1) The Colorado River Compact, (2) some of the terms of the Boulder Canyon Project Act, (3) part of the background and history of the Boulder Canyon Project Act, (4) si-

lence (congressional, secretarial, or both), (5) assumed custom, usage, and administrative practice. None of these sources sustain any inference of proration of shortages in "Article III(a) water" interstate.

B. The Colorado River Compact Confirms Priority as the Characteristic of Rights to "Article III(a) Water"

1. *The terms of the Compact explicitly recognize and preserve appropriative priorities as the basis of water rights within each basin*

There are two provisions which are explicit:

(1) *Article III(a).* The Compact provides that the apportionment of 7.5 million acre-feet of consumptive use to each basin from the Colorado River system "shall include all water necessary for the supply of any rights which may now exist." When the Compact was negotiated there were only three kinds of rights in existence in the Colorado River basin:

(a) Appropriative rights;

(b) Rights of federal reservations (characterized by priority at the date of creation of the reservation (Rep. 350-53));

(c) Riparian rights, limited to California, which alone had any riparian elements in its law, and which were and are of no quantitative significance on the Colorado River.

(2) *Article VI.* The Compact provides:

> "Should any claim or controversy arise between any two or more of the signatory States: (a) with respect to *the waters of the Colorado River System not covered by the terms of this compact;*

> . . . the Governors of the States affected, upon the request of one of them, shall forthwith appoint Commissioners with power to consider and adjust such claim or controversy, subject to ratification by the Legislatures of the States so affected.
>
> "Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method or by direct future legislative action of the interested States." (Emphasis added.)

The Master explains as follows the words which we have emphasized above in Article VI (Rep. 144):

> "As between Lower Basin states 'the waters of the Colorado River System [are] not covered by the terms' of the Compact. (Colorado River Compact, Art. VI(a); see Ariz. Exs. 46, 49.)" (Bracketed word inserted by Master.)

"The adjustment of any such claim or controversy by any present method" is a clear reference to the law of equitable apportionment, applied by this Court in the exercise of its original jurisdiction (Rep. 140-41):

> "Throughout the Colorado River Basin, when the Compact was negotiated, the law of prior appropriation governed the acquisition of water rights. In 1922, before the opening of the Sante [*sic*] Fe meetings of the Compact commissioners, the Supreme Court had applied the law of prior appropriation as the guiding principle in an equitable apportionment suit on an interstate stream. *Wyoming v. Colorado,* 259 U.S. 419, decided June 5, 1922. As appears from the commissioners' re-

ports, Article III(a) and (b) is intended to prevent the application of the priority rule between the two Basins, a result accomplished by placing limits on the acquisition of appropriative or other water rights in each Basin (Ariz. Exs. 49, 51)."

These express terms of the Compact conclusively negative any contrary inference. So also does the obviously catastrophic consequence of any inference that interstate rights within each basin were destroyed. Even if no express language in the Compact could be found, it is irrational to infer an intent to destroy both existing rights and the basis for acquisition of rights within each basin, leaving nothing to take the place of that which is destroyed.

2. *The Compact provides no "background" principle of parity*

The Master writes:

"[T]he Project Act approved the Colorado River Compact, and thus the Compact provides the background for the enactment of the Project Act. The Compact treats the Upper and Lower Basins on a parity one to the other in regard to the division of water; priority of appropriation is not an operative factor under the Compact." (Rep. 235.)

The Master himself recognizes that this is not true. "Although Article III(a) and (b) is not expressed in terms of appropriative rights, this is the purport of that Article." Rep. 140.[9] Article III(d), described

[9]To the same effect, see Rep. 196: "The Compact puts an embargo upon the acquisition of appropriative rights in excess of the limits set by Article III(a) and (b). The first call upon any remaining water goes to supply Mexico. . . . In effect, Article III(a) and (b) establishes quotas of allowable appropriations."

as the "guarantee of the Compact" (Rep. 144), established a priority in favor of requirements below Lee Ferry for the purpose obviously of satisfying "rights which may now exist" recognized in both the Compact and California limitation in identical terms.

The Compact is instinct with the principle of priority. Article III(c) recognizes a priority in the rights covered by the III(a) and (b) quantities, as against rights dependent on existence of a surplus in excess of those quantities. This III(c) surplus is to be sacrificed to Mexico before rights in the other two categories are to be diminished.

The Master himself recognizes that priority, not parity, characterizes rights in "Article III(a) water" when he finds in both Compact and limitation a word clearly there, although unstated—"first." He says these words mean the "first" 7.5 million acre-feet. Rep. 305-06.

"First" as used by the Master takes its meaning from principles of priority. It does not mean the "first" 7.5 million acre-feet used in the first months of the year, but "first" referring to the first or prior rights. The water used by a long-established project in December is within the "first" 7.5 million acre-feet, although the water used earlier in January by a new project is not. The Master has thus proved, without conceding, that priority principles are implicit and unavoidable, and that these principles are the essential background against which every document in the law of the river must be read if the documents are to make sense.

C. The Project Act Did Not Substitute Proration for Priority in Interstate Rights to "Article III(a) Waters" nor Did It Authorize the Secretary of the Interior To Do So

The Master and all parties who have filed briefs substantially agree that priorities control all intrastate water rights. The only material disagreements relate to the source of the right (federal or state) and whether priority is determined by a state appropriation or by a federal contract. These differences have no apparent interstate consequences. In terms of the recommended decree, the major controversy appears to be whether article II(C)(1) should specify "state law" (the Master's term) or "applicable law" (the United States term). The United States does not say what substantive difference this amendment would make.[1]

Are priorities in "Article III(a) water" limited to their intrastate effect? The Compact can have no such effect within the lower basin. Neither can the Project Act.

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[1]The Master concludes that § 18 of the Project Act "provides in effect that state law shall govern water rights and priorities intrastate." Rep. 240. Arizona sometimes agrees (Ariz. Op. Br. 99) and sometimes disagrees with this result (Ariz. Ans. Br. 165), but offers no objection to article II(C)(1) of the recommended decree. Rep. 350. Neither does Nevada. The United States objects to the provision of article II(C)(1) which enjoins the United States from releasing water for "any use or user in violation of state law" but indicates that the prejudicial effect of this asserted error would be cured by substituting "applicable law" for "state law." U.S. Op. Br. 24 & n.5. The United States by footnote suggests that "presumably" the "rule of ratability would apply" as between contracts with Arizona projects since they make no provision as to relative priority. *Id.* at 30 n.10. The United States urges that priorities attaching at the date of execution of contracts determine relative rights of appropriators above Lake Mead and contractees below Lake Mead, at least intrastate, but fails to explain how water rights of contractees who have priorities vis-a-vis upstream appropriators are to be prorated vis-a-vis each other. See Calif. Ans. Br. 44-45.

1. *Section 5 provides no basis for a pro rata interstate "contractual allocation scheme"*

The search focuses on section 5. If the Project Act authorized the Secretary to create a "contractual allocation scheme" which stops priorities in "Article III-(a) water" at state lines, it did so in section 5 (first paragraph), or not at all. Section 5 is the source and the measure of whatever authority Congress delegated to the Secretary to affect water rights—intrastate or interstate—by contracts. Simply reading its text establishes that section 5 cannot support even a reasonable argument that Congress conferred on the Secretary a power it disclaimed in itself to allocate water or water shortages by a "contractual allocation scheme" with the attributes of an interstate compact.[1a] The other sections of the Project Act, its legislative history, and its administrative construction overwhelmingly reinforce the conclusion from the textual analysis.

The terms of section 5 of the Project Act are simple and straightforward. Section 5 authorizes the Secretary to contract with water users for storage of water

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[1a]Water delivery contracts authorized by § 5 of the Project Act do not create any interstate "allocation." We here use the word "allocation" to describe the creation of any interstate right (whether characterized by parity or priority) like that created by an interstate compact. Article III(a) of the Colorado River Compact is an "allocation" in this sense. In a different sense, an appropriation made under state law and given recognition across state lines by the doctrine of Wyoming v. Colorado, 259 U.S. 419 (1922), may be an "allocation" both to the appropriator and to the state whose rights are recognized in the original jurisdiction. Likewise a contract with a water user who thereby acquires a right to water stored in Lake Mead may be called an "allocation." However, it is only the assertion that the Secretary made compact-like "allocations" by secretarial "commitments" to states which creates any issue in this case.

in Lake Mead and delivery of the water stored at agreed points on the river on charges that will defray expenses of the United States. The contracts shall be "for permanent service" and shall "conform to" section 4(a) of the Project Act. No person may have the use of water stored without a secretarial contract.[2]

The "permanent service" requirement was undoubtedly designed to assure, so far as humanly possible, the stability of deliveries from Lake Mead storage (see Rep. 238-40). The need for stable water deliveries shaped the law of prior appropriation (*supra* pp. 39-42). Parity impairs stability of water deliveries and thus tends to defeat permanent service. Contracts for permanent service should not be transmuted to contracts for impermanent service by permitting "commitments" for future section 5 contracts to dilute existing contracts for "Article III(a) waters."

Section 5 presents no difficult questions of construction in the absence of an effort to convert it to a pur-

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[2]Section 5: "That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this Act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

pose for which it manifestly was not intended. It is impossible to find in it the authorization for a contractual allocation scheme which establishes proration—interstate only—of shortages in "Article III(a) water." There are at least three major obstacles.

a. The "contracts" asserted to create the "contractual allocation scheme" are not contracts authorized by section 5

The scheme derives, in essential part, from the 1944 Arizona contract, concerning which the United States says (U.S. Ans. Br. 47-48):

> "It is our understanding that this contract with Arizona does not by itself authorize the actual delivery of water in compliance with Section 5 of the Project Act, since that Section requires that the contracts be entered into with the actual users of the water. Rather, this contract is in the nature of a commitment by the Secretary to enter into contracts with users in Arizona up to the limit of 2,800,000 acre-feet. In this sense it is an allocation by the Secretary of that amount of water for future contractual use."

The United States is manifestly correct that the "contract" fails to meet the requirements of section 5, but the United States cannot find in the statute or anywhere else authority for a "commitment" which is "in this sense" an "allocation."

Even if the "commitment" is a binding obligation, to which this Court should give full effect, it cannot be a commitment to do more than to write section 5 water

delivery contracts.[3] These contracts are characterized by priority, not parity. A commitment to do any act cannot have greater consequences than the act itself.

b. No term in section 5 curtails priorities at state lines

Section 5 authorizes contracts for storage and delivery at agreed points of stored water. Nothing in the language suggests a difference between two contracts to serve two users, both of which are on the Arizona side of the river, and two contracts to serve two users, one of which is in California and the other in Arizona. If intrastate priority becomes interstate parity in "Article III(a) water," nothing in section 5 prescribes that result.

Nor does the requirement of section 5 that contracts shall "conform to paragraph (a) of section 4" produce that result. We agree with the Master's construction of that quoted phrase (Rep. 163): "In so far as Section 5 refers to the second [tri-state compact] paragraph of Section 4(a) it is for the purpose of requiring the Secretary to respect the compact if ratified by the [three] states." The Master rejects Arizona's contention that this paragraph established a mandatory formula controlling the Secretary's contractual authority.[4]

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[3]"Commitment" is not an apt description for the 1944 Arizona contract since the Secretary does not purport to commit himself to do anything at all. He might do nothing, or he might dispose of all waters covered by his "commitment" by creating one or more federal reservations, which, by the terms of article 7(*l*) of the 1944 contract would discharge *pro tanto* the obligations under the commitment. The Secretary has never been asked to write a contract for the proposed Central Arizona Project, and indeed, if the diversion for the project is above Lake Mead, he could write no such contract under the authority of the Project Act.

[4]Rep. 162-63, 202. We treat the legislative history refuting Arizona's argument in appendix E in our separate appendix volume.

Had there been a seven-state Colorado River Compact ratified within six months of passage of the Project Act with neither the tri-state compact nor California limitation, "conform to section 4(a)" in section 5 would have meant "conform to the Colorado River Compact" and nothing more. If the limitation is effective,[5] it means "conform to the Colorado River Compact" (a mandate repeated in section 8(a)) and "conform to the California limitation."

"Conform to" the limitation does not mean parity. The limitation is not a grant to California (Rep. 231) or to any other state. The limitation is written in the unmistakable language of appropriation—not parity. The limitation places a ceiling on the aggregate of California's "rights which may now [June 25, 1929] exist" and California's rights to "initiate" or "perfect" rights thereafter.[5a] The aborted tri-state compact, even if effective, could not be construed to make an allocation to three states on a parity, since no allocation is stated or

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[5]We excepted to the Master's determination "that the limitation upon use of water in California set out in the first paragraph of section 4(a) of the Project Act and accepted by the reciprocal California Limitation Act continues operative despite the Report's conclusion that Arizona effectively ratified the Compact on February 24, 1944, thereby effecting seven-state ratification of the Compact (Report, pp. 27, 166-67)." Calif. Exception IV-3, p. 24. We have not argued this exception, since it would not appear to result in a more favorable treatment for California than acceptance of the limitation and a seven-state Compact, both properly construed. Our contracts were all executed when the limitation was clearly applicable to California rights.

[5a]Consistently with the Master's construction of the Colorado River Compact (Rep. 141-42, 149) and the limitation on California (Rep. 231), the quantities specified with respect to Arizona and Nevada in the second paragraph of § 4(a)—if the "conform to" language in § 5 has any relation at all to that paragraph—can mean no more than limitations on appropriations of those states, not "a source of rights as against the other Lower Basin States" (*ibid.*).

intended to any states other than Arizona and Nevada. Priority of appropriation would still be the basis of California's right.

c. The contracts authorized by section 5 are limited to "water stored" in Lake Mead

The "contractual allocation scheme," of which the "commitment" to Arizona is an essential part, is an invention which requires "water stored" in Lake Mead to be coextensive with the water to be allocated. This is an impossibility for at least two reasons relating to the definition of "water stored" in section 5:

(1) "Water stored" in Lake Mead cannot be the "waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact" to which the California limitation refers. This is true whether Article III(a) of the Compact includes both the main river and tributaries in the lower basin, as the Master holds, or whether it is applicable only to the main river in the lower basin beginning at Lee Ferry, as Arizona argues. The Master seeks to hurdle this obstacle to the "contractual allocation scheme" by construing the limitation to refer to 7.5 million acre-feet from a newly defined "mainstream" which begins at Lake Mead. This is a formidable hurdle. No one can imagine any compact which would divide waters between two basins or territories which are not contiguous by 275 miles, the length of the Colorado River between Lee Ferry and Lake Mead.

Although the Master breaks the "conform to" link between section 5 and the tri-state compact authorization in section 4(a) (Rep. 162-63), he nevertheless welds the tri-state compact into section 5 by a discovery that the Secretary voluntarily did what neither section

5 nor 4(a) commands him to do: The Secretary imposed on the states an allocation that Congress authorized the states to impose upon themselves, substantially effectuating by contracts the unratified tri-state compact. Rep. 222-24.

That tri-state compact, if ratified as the Master has rewritten it, would be the strangest interstate agreement ever executed. None of the three compacting states are obligated to respect the compact apportionments, but all are left free to make diversions unlimited by the compact from above the "mainstream" to which the compact alone applies. The compact would lay the foundation only for litigation, since it would settle no interstate right except as the states might choose "mainstream" points of diversion. Can anyone seriously suggest that if the tri-state compact actually authorized by section 4(a) had been accepted by the states, the Central Arizona Project diverting above Lake Mead would be exempt from its scope? This analysis proves that section 5 and section 4(a) were never intended to be and were never conceived to be coextensive. Section 5 applies to "water stored" in Lake Mead, section 4(a) to the 7.5 million acre-feet apportioned to the lower basin by the Colorado River Compact and the "excess or surplus" above that apportionment. The attempt to make sections 5 and 4(a) mirror images of each other does violence to the language and the purpose of both sections.

(2) "Water stored" in Lake Mead cannot include all the water used from the Master's "mainstream" (Lake Mead and below). By no one's definition of "water stored," which section 5 authorizes the Secretary to contract to deliver to users, does it include either inflow from tributaries which reach the main

stream below Lake Mead, or water required to satisfy natural flow rights which existed before Hoover Dam was authorized.

Nevertheless, the Master's "mainstream" invention is essential to the "contractual allocation." Without his invention the resource to be allocated cannot be coextensive with the contract device which is the exclusive basis of his allocation.

The Master justifies including the inflow from the Bill Williams in the "water stored" and subjecting it to secretarial allocation because (in part) he says, the Project Act treated it as *de minimis*. Rep. 184. In fact, its inflow has averaged about 117,800 acre-feet per year (see Rep. 121), which is almost twice the amount of the combined diversion requirements of three of the five main stream Indian reservations adjudicated by the Master (Decree art. II(C)(2)(a)-(c), Rep. 350-51).

The Master's inclusion of the water required to satisfy natural flow rights with "water stored" has no justification whatever. That "water stored" does not include water required to satisfy natural flow rights is firmly established by (1) the law of water rights; (2) the administration of the Project Act; (3) the construction of that act by this Court.

Stored water is the water made available for use by a storage reservoir, not available for use from the previously unregulated natural flow.[5b] See *Gila Valley Irr.*

[5b]See S. REP. No. 592, 70th Cong., 1st Sess., pt. 1 (March 20, 1928), on the fourth Swing-Johnson bill at 4: "The . . . amendment to the effect that no charge shall be made for irrigation water through the all-American canal is to avoid duplication of charge on the lands. *These lands already have a water right,* and since they are to reimburse the Government under the reclamation law the act should be perfectly clear that the lands are not to pay additional charges for water service." (Emphasis added.)

Dist. v. United States, 118 F.2d 507, 508-09 (9th Cir. 1941). The definition of stored water there stated is from the decree entitled Globe Equity No. 59 (Ariz. Ex. 103 (Tr. 382)), where it is applied to the San Carlos Reservoir on the Gila River.[6]

The same meaning was given to the term by the Acting Secretary of the Interior when he advised Palo Verde Irrigation District (Calif. Ex. 351, Tr. 9929):

> "Section 5 of the Boulder Canyon Project Act approved December 21, 1928 (45 Stat. 1057), provides that the Secretary of the Interior is authorized, under such general regulations as he may prescribe, to contract for the storage of water and for its delivery at such points on the river as may be agreed upon, to be used for irrigation and domestic purposes. Contracts for the purchase of stored water for the uses stated shall be for permanent service. No person, irrigation district, or other entity shall have, or be entitled to, the use of stored water for any purpose, except upon execution of the necessary contract.
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> "If no stored water is required by the Palo Verde Irrigation District, no contract between that district and the United States will be required. Those possessed of prior rights to the unregulated flow of the river will be privileged to continue the

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[6]The Court employed a somewhat different definition of stored water in Nebraska v. Wyoming, 325 U.S. 589, 631 (1945). The Court recognized, however, that "stored water" is not all the water which flows through a dam impounding a storage reservoir. After citing the *Gila Valley* case, the Court indicated that the definition employed on the North Platte was "perhaps a departure from the ordinary meaning of storage." *Ibid.*

enjoyment of those rights without interference by storage in the Boulder Canyon reservoir."

On August 25, 1931, Dr. Elwood Mead, Commissioner of Reclamation, wrote to W. P. Whitsett, Director, Metropolitan Water District, as follows:[6a]

> "My attention has been called to the use of certain extracts from my letter of February 28 to Mr. S. C. Evans, Executive Director, Boulder Dam Association, in reply to his letter of February 3, which, taken separate from their context, are being construed by opponents of the Metropolitan District as casting doubt on the water right conferred by your contract with the United States. The interpretation which apparently is being attributed to these extracts was not intended. The letter of February 3 from Mr. Evans and my reply of February 28 relate chiefly to the design and construction of Hoover Dam. The matter of storage and distribution of water is involved only incidentally.
>
> "The extracts to which reference is made read as follows:
>
> " 'You will, however, realize that authoritative answers to the various phases of the matter can only be given by the courts. It might not be amiss also to bear in mind that the Secretary of the Interior has no authority to designate the

[6a]The letter is Calif. Ex. 7703, incorporated in the California Offer of Proof, the documents which are before the Court as volume 25 of the California exhibits. Arizona faults us for referring "to these excluded documents as if they had been admitted in evidence as competent." Ariz. Ans. Br. 26. All of the documents are certified; their contents are judicially noticeable. United States v. Louisiana, 363 U.S. 1, 12-13 (1960).

ownership of waters released from the Hoover Dam.'

"The last sentence above quoted was intended to apply to vested and inchoate rights in the unregulated flow of the Colorado River, with which it had been suggested storage in the Hoover Dam might interfere. My letter intended to convey the view that determination of such vested and inchoate rights in the unregulated flow of the river is a matter for the administrative officers of the State and the courts. The disposition of water stored in Hoover Dam, however, stands upon an entirely different basis. Section 5 of the Boulder Canyon Project Act expressly authorizes the Secretary of the Interior to contract for the storage of water in the reservoir and for the delivery thereof at such points as may be agreed upon. Accordingly there can be no doubt of the right of the Government to dispose of waters stored in the reservoir.[6b]

"Secretary Wilbur has heretofore requested the State to recommend an allocation of water designed to cover the natural flow as well as the floods stored in the reservoir in order that the whole subject-matter may be covered.

"This letter is written in order that you and others interested may be more fully informed regarding what was intended by the quoted portion of my letter of February 28.

Sincerely yours,

ELWOOD MEAD, *Commissioner.*"

[6b] (Footnote ours.) Metropolitan's 1930 contract (art. 6) had been "without prejudice to any additional rights which the District may have or acquire in or to the waters of the Colorado River . . . ." Ariz. Ex. 38, Tr. 251.

The judicial definition by this Court is found in *Arizona v. California,* 298 U.S. 558, 570 (1936):

> "Without more detailed statement of the facts disclosed, it is evident that the United States, by Congressional legislation and by acts of its officers which that legislation authorizes, has undertaken, in the asserted exercise of its authority to control navigation, to impound, and control the disposition of, the surplus water in the river not already appropriated.[7] The defendant states contend, and Arizona does not deny, that the natural dependable flow of the river is already over-appropriated, and it does not appear that without the storage of the impounded water any substantial amount of water would be available for appropriation."[8]

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[7](Footnote ours.) The Master sometimes recognizes the distinction between the water subject to contracts and the water not so subject: "[T]he [Project] Act clearly contemplates that *water unappropriated* as of that date [June 25, 1929] is to be made available for use within a state only if the Secretary, within his discretion, contracts for the delivery of the water to that state." (Rep. 153; emphasis added.) He also refers to the Secretary's power "to allocate the *unappropriated water* impounded in Lake Mead." (Rep. 210; emphasis added.) He inconsistently disregards the distinction when he asserts that "the Project Act was designed by Congress to establish the authority for an allocation of *all of the available water in Lake Mead and in the mainstream of the Colorado River downstream from Lake Mead*" (Rep. 152; emphasis added), and it is the latter concept which is embodied in his recommended decree.

[8]It is inconceivable that Mr. Justice Stone misspoke himself when he said "appropriation" or intended to use the term to describe a right devoid of priority. He defined the term in the same opinion (298 U.S. at 565-66):

> "It is conceded both by the bill of complaint and the returns that all the states in the Colorado River basin except California, and California so far as material to the present case, apply the doctrine of appropriation to the waters of flowing streams in their respective territories. Under this

Arizona does not dispute the Secretary's definition of "water stored" as the term stood in the statute in 1930 when the Secretary interpreted section 5. See pp. 57-58 *supra*. She seems to argue that the Palo Verde contract of 1933 somehow amended the statute. Arizona points to the recital in that contract that it was to the mutual interest of the parties that "the rights of the District in and to waters of the river be hereby defined." Arizona says that the district's "rights thus defined were to *stored* water, not to *natural flow.*" Ariz. Ans. Br. 23.

The Palo Verde contract itself refutes this argument. In it the Secretary undertakes, as in the other contracts, to deliver to the district from storage "so much water as may be necessary to supply the District a total quantity, including all other waters diverted for use of the District from the Colorado River, in the amounts and with priorities in accordance with the recommendation of the Chief of the Division of Water Resources of the State of California, as follows . . . ." Rep. app. 424.

"All other waters diverted for use of the District from the Colorado River" refers to water diverted by

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doctrine, diversion and application of water to a beneficial use constitute an appropriation, and entitle the appropriator to a continuing right to use the water, to the extent of the appropriation, but not beyond that reasonably required and actually used. The appropriator first in time is prior in right over others upon the same stream, and the right, when perfected by use, is deemed effective from the time the purpose to make the appropriation is definitely formed and actual work upon the project is begun, or from the time statutory requirements of notice of the proposed appropriation are complied with, provided the work is carried to completion and the water is applied to a beneficial use with reasonable diligence."

Palo Verde which is not "water stored" and delivered from Lake Mead; "all other waters" are waters which Palo Verde receives by virtue of its preexisting right in natural flow. Arizona says that the phrase "all other waters" was "inserted in the Palo Verde contract (and the other California water delivery contracts) to make certain that all Colorado River water diverted by the District, whether consisting solely of water released for delivery by the United States at the diversion point specified in the Palo Verde contract or made up in part of water released for other purposes or diverted by the District at other diversion points, should be charged to the District under its contract." Ariz. Ans. Br. 29.

Arizona's assertion is clearly wrong; it cannot bear any logical analysis. How could "water stored" in Lake Mead become "other waters" not stored in Lake Mead because diverted at a point other than that specified in the Palo Verde contract? Or, to put a harder question, how do "other waters" from the Bill Williams River, whose confluence with the main river is below Lake Mead, become "water stored" in that reservoir whatever may be the point of diversion?

Finally, the consequences of treating "water stored" as all water in the river from Lake Mead to Mexico have violently inequitable results, quite the converse of anything appropriately described as "sovereign parity."[9]

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[9]The principle of sovereign parity has received expression in two interstate cases: "One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none." Kansas v. Colorado, 206 U.S. 46, 97

Arizona conceded to California 2.9 million acre-feet of natural flow rights as of 1929.[10] Our uncontroverted evidence shows our 1929 rights were much greater than Arizona conceded,[10a] but in any case if California now uses 4.4 of "III(a) water" no more than 1.5 million acre-feet of that quantity is stored water. Arizona's natural flow rights were about 250,000 acre-feet, and if she receives 2.8 million acre-feet, 2.55 million acre-feet of this quantity is "water stored as aforesaid."

Thus, while the Master's formula gives to California 44/75 of the first 7.5 million acre-feet of all water available for consumptive use from the "mainstream," or 58.6 per cent, most of this (at least 29/44) is represented by natural flow rights. But of the incremental or stored water, he gives Arizona approximately 58.6 per cent if the total supply reaches 7.5 million acre-feet for allocation. If, more realistically, the main stream supply is only 6 million acre-feet, Arizona's share of this stored

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(1907). In Wyoming v. Colorado, 259 U.S. 419, 465 (1922), the Court explained its statement in Kansas v. Colorado: "What was there said about 'equality of right' refers, as the opinion shows (p. 97), not to an equal division of the water, but to the equal level or plane on which all the states stand, in point of power and right, under our constitutional system." The rule then applied was priority of appropriation across state lines. 259 U.S. at 470.

[10]Arizona alleged "that on June 25, 1929, projects had been constructed and were in operation in California for the irrigation of no more than 473,500 acres of land which required a net main stream depletion of about 2,902,000 acre-feet of water per annum." Ariz. Reply to Calif. Answer, par. 28(b), p. 26. Arizona calls this an "argumentative allegation" which we misinterpret and to which Arizona, because this is an original case, should not be held. Ariz. Ans. Br. 103 n.116.

In Colorado v. Kansas, 320 U.S. 383, 396 (1943), the Court said the force of Kansas' evidence was weakened by Kansas' allegations in Kansas v. Colorado, 206 U.S. 46 (1907).

[10a]See Calif. Op. Br. 12 n.5.

water under the decree is 69.8 per cent and California's only 21.8 per cent.[11]

No one has offered any explanation whatever of why the Arizona delegation in Congress opposed the Project Act, why Arizona sought to upset it in this Court, if this is truly its consequence.

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[11]See Calif. Op. Br. 265:

ALLOCATIONS OF BENEFITS OF STORAGE RESULTING FROM THE MASTER'S FORMULA

A. If the supply will sustain only 6 million acre-feet of consumptive use:

State	Allocation	Use of natural flow	Incremental use of new water	Percentage of total incremental use of new water
Arizona	2,240,000	250,000	1,990,000	69.8
California	3,520,000	2,900,000	620,000	21.8
Nevada	240,000	0	240,000	8.4
Total	6,000,000	3,150,000	2,850,000	100

B. If the supply will sustain 7.5 million acre-feet of consumptive use:

State	Allocation	Use of natural flow	Incremental use of new water	Percentage of total incremental use of new water
Arizona	2,800,000	250,000	2,550,000	58.6
California	4,400,000	2,900,000	1,500,000	34.5
Nevada	300,000	0	300,000	6.9
Total	7,500,000	3,150,000	4,350,000	100

ALLOCATION OF SHORTAGES IN STORED WATER, CONTRASTED WITH ALLOCATION OF BENEFITS OF STORAGE, RESULTING FROM MASTER'S FORMULA

State	Percentage of shortage borne	Contrasting percentage of allocation of new water: If supply is 6 million	Contrasting percentage of allocation of new water: If supply is 7.5 million
Arizona	37⅓ (28/75)	69.8	58.6
California	58⅔ (44/75)	21.8	34.5
Nevada	4 (3/75)	8.4	6.9
Total	100	100	100

2. *Provisions of the Project Act other than section 5 negative proration in any "contractual allocation scheme"*

The arguments of the opposing parties center on various attempts (1) to explain away sections 18, 14, and 8(a) of the Project Act; (2) to draw inferences from sections 8(b) and 6 to support the Master's conclusions.

a. Sections 18, 14, and 8(a) of the Project Act are irreconcilable with a pro rata "contractual allocation scheme"

Section 18 of the Project Act was the basis of this Court's holding, expressly identified by Mr. Justice Brandeis as holding, "that the Boulder Canyon Project Act does not purport to abridge the right of Arizona to make, or permit, additional appropriations of water flowing within the State or on its boundaries," *Arizona v. California,* 283 U.S. 423, 464 (1931). Arizona and the United States insist that this is not the holding, although Mr. Justice Brandeis said it was.

It is only useful to reenter this argument to reiterate that the Court called it a holding, and that this statement is the Court's stated reason for its decision. Section 18 was quoted and relied on for that result. If the Court were wrong, can anyone explain any conceivable function for the final provision of section 18: "except as modified by the Colorado River compact or other interstate agreement"? What provision in the Colorado River Compact determines *intrastate* rights, or what prompted the odd notion that any other interstate agreement might do so? If the Master's view that sec-

tion 18 has only intrastate effect is correct, the Court erred in finding it even relevant to the problem.[12]

The unanswered question remains: If section 18 is not to be given the construction accorded it by the Court in the first Colorado River suit brought by Arizona, what is the function of that section?

There is an equally significant silence on the part of our opponents about section 14, which makes the Project Act a supplement to the Reclamation Act of 1902 and its amendments and supplements.[13] Section 8 of the Reclamation Act of 1902 is quoted by the Master and relied upon, along with section 18 of the Project Act, for the conclusion (incorporated in the recommended decree) that state law governs rights and priorities among intrastate users. Rep. 217-18.

Two cases in this Court, one before and one after passage of the Project Act, expressly take the view that section 8 has interstate effect. *Wyoming v. Colorado,* 259 U.S. 419, 463 (1922); *Nebraska v. Wyoming,* 325 U.S. 589, 612-14 (1945).

Section 8(a) of the Project Act is perhaps even more significant, since it leads Arizona and California to something close to agreement about its purpose. Sec-

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[12]Arizona castigates us for relying on Senator King, the author of § 18, "who bitterly opposed the Swing-Johnson bills as providing for an interstate allocation of water in violation of state sovereignty, when California's Congressman Swing and Senator Johnson, the bills' authors, never denied this would be their effect, never attempted to modify those provisions which Senator King found obnoxious, but instead pushed the legislation through to final passage." Ariz. Ans. Br. 10. In fairness Arizona should have added that Senator King voted for the Project Act. 70 CONG. REC. 603 (1928).

[13]United States v. Arizona, 295 U.S. 174, 183 (1935), applies this rule to the Project Act. See Calif. Op. Br. 144-45.

tion 8(a) subjects, *inter alia,* "all users and appropriators" to the Colorado River Compact, anything to the contrary in the act notwithstanding. The term "appropriators" suggests at least an apprehension that there might be appropriators. Arizona says that this upper basin amendment was designed to protect the upper basin against "persons claiming rights" to more water than specified in the Compact. Ariz. Ans. Br. 16.

Arizona is correct, but she misses the important point. There was never any doubt, at least after the decision in *Wyoming v. Colorado,* 259 U.S. 419 (1922), that there were appropriators, and that there would be additional appropriators, particularly in Arizona. The easy solution would have been to provide that appropriation was abolished, but the Project Act did not say so, and what is said in section 8(a) is inconsistent with any notion that the Project Act had somehow inferentially prescribed that abolition.

b. No inference from sections 8(b) and 6 supports any "contractual allocation scheme"

The inference Arizona and the United States would draw from section 8(b) is unwarranted. This section provides that a future two-state or three-state compact relating to division of the benefits from the use of water, including power, shall be subject to earlier executed contracts under section 5. The inference they would have the Court draw is that Congress thus recognized that section 5 authorizes an interstate allocation based on proration.

In fact, section 8(b) is a wise, proper, and necessary provision. A compact should not attempt to alter property rights earlier established by section 5 con-

tracts with water users, but this does not by any inference conceivable convert the authorization to write section 5 contracts into authority to create a compact-like interstate allocation.

Section 8(b) has never been recognized as having the effect which our adversaries seek to give it. If they were correct, the secretarial "commitment" to execute water delivery contracts is beyond the power even of an interstate compact to alter. Yet both the Master and the United States note that this suit is here because efforts at settlement have been unsuccessful. No one has supposed that settlement by compact was statutorily foreclosed ever since secretarial "commitments" were executed.

The United States and Arizona emphasize an argument based on section 6 of the Project Act: Satisfaction of "present perfected rights in pursuance of Article VIII of said Colorado River compact" as a function to be served by Hoover Dam implies a refusal to recognize rights which do not satisfy the definition of "present perfected rights." U.S. Ans. Br. 49-50; Ariz. Ans. Br. 53-57.

"Present perfected rights" was written into section 6 as an amendment insisted upon by the upper basin. The purpose is clear: the provision says, in effect, that Lake Mead is *the* reservoir to which Article VIII of the Compact refers, and it is to be used for the purpose Article VIII describes—that is, to satisfy lower basin present perfected rights to the end that they

may not be asserted against the upper basin.[14] Thus, it is perfectly clear that section 6 means what it says, and is a direction that Lake Mead is to be used to honor present perfected rights. Section 6 supports no inference whatever that perfected rights or any other rights within the lower basin are destroyed or impaired.

The Master's conclusion permits a dubious inference to override a clear mandate, which is anything but inferential. The mandate, in section 18, is described by the Master with complete accuracy except for his discovery of the word "intrastate" (Rep. 218):

> "The fact that the Project Act is denominated as a supplement to the Reclamation Acts buttresses the conclusion, apparent from the plain language of Section 18 itself, that state law governs rights and priorities among *intrastate* users." (Emphasis added.)

The inference, however, leads the Master to qualify this mandate, preferring a junior right, "perfected" on June 25, 1929, to a senior right not "perfected" on that date. This is, as he says, "in certain particulars inconsistent with principles of priority of appropriation." Rep. 234. The inference thus overrides the

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[14]Article VIII (first paragraph) of the Compact provides (Rep. app. 376):

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

mandate of section 18 which is prefaced: "Nothing herein shall be construed . . . ."

Should Congress have said, "Nothing herein, including inferences subsequently discovered, shall be construed . . . ."?

The inference which our adversaries would draw from section 6, insofar as it is offered to support the Master's conclusion, falls far short of achieving that purpose even if valid. The Master does not hold that all priorities except "present perfected rights" are abolished. To the contrary, he holds that priorities of rights other than "perfected rights" survive but are operative only intrastate. The abolition of their interstate effect is accomplished, say our opponents, by a provision (section 6) which Arizona elsewhere stoutly argues has only interbasin and not intrabasin significance. See Ariz. Op. Br. 46-56; Ariz. Ans. Br. 55-57. The argument disproves this inference.

3. *The legislative history of the Project Act confirms the nonexistence of the "contractual allocation scheme"*

Reference to the legislative history of the Project Act confirms that (1) Congress did not make an interstate allocation of "Article III(a) waters" and did not authorize the Secretary to do so; (2) Congress did not abrogate priority principles interstate and did not authorize the Secretary to substitute proration for priority as the guiding principle for distributing shortages of "Article III(a) waters" interstate.

a. No federal allocation was authorized

The legislative history of the Project Act leaves no room for Arizona's argument that Congress intended

to impose a federal apportionment of III(a) waters upon the states, either directly or by authority delegated to the Secretary.[1]

Members of Congress who shaped the Project Act were agreed that interstate compact or equitable apportionment by this Court were the only ways in which an interstate allocation could be accomplished. The assumption of the states and of Congress was made explicit in the closing debates by Senator Bratton, one of the principal architects of the provisions of section 4(a):[2]

> "There are only two ways known to me through which title to water of an interstate stream, either for purposes of irrigation or development of power, may be adjudicated. One is by a compact or agreement—the method sought to be followed in this case—and the other is by a decree rendered in a suit instituted originally in the Supreme Court of the United States."

The Arizona assertion that "no one denied that the various Swing-Johnson bills provided for a federal allocation of water among the states" (Ariz. Ans. Br. 35) is demonstrably wrong.[3] Supporters of the bills consistently and often pointed out that the bills did not

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[1]Ariz. Ans. Br. 35, 43-44.

[2]70 CONG. REC. 330-31 (1928). Senator Bratton's view was shared by all of his contemporaries in Congress who spoke upon the subject. We collect pertinent legislative references on this point in appendix A in our separate appendix volume.

[3]In our answering brief we cited representative statements of authors and proponents of the bills refuting Arizona's statements. See Calif. Ans. Br. 51-56. Appendix B to this brief is a compilation of pertinent legislative history on this subject.

purport to make or authorize any kind of federal allocation.[4]

Arizona's assertions to the contrary are based upon extracts from the legislative history which, in context, are not relevant to the points for which Arizona cites them. Arizona says that the Project Act was passed over the "bitter cry of the opposition" that "this federal allocation" was unconstitutional (Ariz. Ans. Br. 35). She implies that "this federal allocation" was the California limitation and the tri-state compact authorized by section 4(a) transported into federal water delivery contracts by the "conform to" language of section 5. But the numerous extracts Arizona cites (Ariz. Ans. Br. 35-43) are wholly unrelated to those provisions of sections 4(a) and 5. No one found Arizona's "federal allocation" in the limitation provision, the tri-state compact authorization, or the future water delivery contracts. The conversation Arizona cites was primarily about congressional approval of the Colorado River Compact without seven-state ratification.[5]

Senator Hayden's "bitter cry" was not about a "federal allocation" by the limitation, the tri-state compact, or the water delivery contracts. His cry was that any attempt to effectuate the Colorado River Compact

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[4]Provisions of the bills which made the Colorado River Compact effective without seven-state ratification were attacked on the ground that congressional approval of the Compact without unanimous ratification amounted to a "federal allocation" of water. Sponsors of the legislation refuted that objection by repeating the truism that no state could be bound by a compact without its consent, an answer affirmed by Mr. Justice Brandeis in Arizona v. California, 283 U.S. 423, 462 (1931). See app. B.

[5]In appendix C to this brief we put a representative number of Arizona's selections in their context.

without Arizona's ratification amounted to a federal allocation and as such was unconstitutional. Senator Hayden fought every effort to condition the effectiveness of the act upon less than seven-state Compact ratification[5a] because Arizona could thus stop authorization for the dam by withholding her own ratification of the Compact. Arizona could retain her favorable bargaining position in negotiating an intra-lower basin compact only so long as California's efforts to obtain Hoover Dam were thwarted.

Senator Hayden knew that the limitation provision and the tri-state compact authorization did not impose a federal allocation upon the states directly or indirectly. He voted against the bill after the mandatory tri-state compact authorization was withdrawn.[6]

If Congress in the Project Act had abrogated priorities in the lower basin and had apportioned lower basin waters or authorized the Secretary to institute a pro rata apportionment of those waters, Senator Hayden should have announced a great Arizona victory. He did no such thing. In 1930, he pleaded with Congress not to appropriate funds for the construction of Hoover

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[5a]See, *e.g.*, 70 CONG. REC. 388-94 (1928).

[6]70 CONG. REC. 603 (1928). The rejected version of the tri-state compact (Calif. Ex. 2011, Tr. 11,173) would indirectly have effected an allocation because the Project Act would not have become effective without ratification of the tri-state compact. Even as it was originally drafted, however, it did not impose a federal allocation. By its terms ratification by the states of the tri-state compact, as well as the Colorado River Compact, was a condition to effectiveness of the act; those allocations (to Arizona and Nevada only, with no allocation to California) were not imposed unilaterally by Congress, but were to become operative only by the action of the state legislatures. See Calif. Op. Br. 183-85.

Dam,[7] explaining that if the dam were built, California's accelerated appropriations would give California an undue share of the waters of the river. Senator Hayden told the Senate committee which held hearings on the appropriation bill why the negotiation of an interstate compact dividing lower basin waters was necessary to Arizona after the Project Act had been enacted:[8]

> "Senator GLASS. Do you construe the provision of the law which you have just read so as to make the whole plan contingent upon the completion of the agreement?[9]

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[7]Pursuant to § 4(b) of the Project Act, the Secretary of the Interior had executed power contracts to provide adequate revenue to insure reimbursement to the United States for the cost of the dam. The contracts were expressly conditioned upon the appropriation of funds by Congress for construction of the dam and were to become effective "as soon as the first Act of Congress appropriating funds for commencement of construction of Boulder Canyon Dam has become law." See arts. 26 and 20 in the Secretary's contracts with Los Angeles and Metropolitan Water District, respectively, in HOOVER DAM POWER AND WATER CONTRACTS, Sp. M. Ex. 2 for iden. (Tr. 212) at 309, 336.

[8]*Hearings on H.R. 12902 Before a Subcommittee of the Senate Committee on Appropriations,* 71st Cong., 2d Sess. 170-71 (1930).

On the Senate floor, Senator Hayden later stated that "constitutional lawyers in this body said that it was impossible for the Congress of the United States to divide the waters of rivers." 72 CONG. REC. 11770 (1930).

Similarly, he told the Senate (*id.* at 11755):

> "[I]f the dam shall be built at Boulder Canyon and if Congress shall appropriate the money to build the all-American canal, and the cities of southern California do divert the water, as they contemplate doing, out of the Colorado River over on to the coastal plain—if those things shall be done first without an agreement between Arizona and California, California will acquire a *prior vested right* to the greater and an unfair proportion of the waters of the Colorado River." (Emphasis added.)

[9](Footnote ours.) Senator Hayden had just read the language of the second paragraph of § 4(a) of the Project Act, authorizing a tri-state compact among Arizona, California, and Nevada.

"Senator HAYDEN. No. I say to you, Senator, very frankly, that that is not true. It could not be true, because the Congress of the United States does not possess the power to divide the waters of rivers among States. That is a result which could only be accomplished by the States through compacts.

"Senator MCKELLAR. Senator Hayden, suppose the agreement is not made; suppose Arizona and Nevada and California are unable to agree. Then what happens?

"Senator HAYDEN. What will happen is that the waters of the Colorado River will be impounded in the Boulder Canyon Reservoir and made available for use; large quantities of water will be taken out of the Colorado River into the great all-American canal; over 1,000,000 acre-feet will be further taken out of the river by a pumping plant, and taken over into the coastal plain of California in the vicinity of Los Angeles; they will be put to beneficial use; and, once having acquired a prior right to its use, no other State can obtain the use of those waters.

"Senator MCKELLAR. What are the chances of an agreement? How far apart are you?

"Senator HAYDEN. That is why I asked Colonel Donovan to come here to testify regarding the negotiations between the States of Arizona and California.

"In answer to the question asked by Senator Glass—and then I shall ask Colonel Donovan to

proceed—you will remember that the Senators from Arizona strenuously opposed the enactment of the Boulder Canyon project act. After many days of discussion we were approached, principally through the Senator from Wyoming, Mr. Kendrick, who said to us, 'If we can work out in this bill a fair division of the waters of the lower Colorado River Basin, will you cease your opposition?' Senator Ashurst and I answered, 'That is exactly what it is all about. If you can do that, we are ready to quit right now.' The Senator from Wyoming said, 'I shall see what can be done.' Senator Kendrick afterwards came back and reported to us that it was impossible for Congress to make such an apportionment, because it is not within the power constitutional [*sic*] of Congress to divide waters. The Senator, however, said, 'We will come the nearest thing to it. Congress will limit California to 4,400,000 acre-feet of water out of the primary apportionment of lower basin water, and will indicate in advance the kind of an agreement which ought to be made by the three lower basin States in dividing the water among them.'

"That is what was done in the Boulder Canyon project act. It was thoroughly understood at the time that there was no legal way of imposing such an agreement on the three States by an act of Congress. But the Arizona contention is that it was contemplated in the act that such an agreement would be made, and it was clearly indicated how it should be made; and I state to you that the Arizona and Colorado River Commission has earnestly and

in good faith sought to make that very kind of an agreement.

"Senator GLASS. Your proposition now is to enforce agreement by withholding appropriation?

"Senator HAYDEN. Exactly."

b. Priorities were not abrogated

The legislative history of the Project Act contradicts Arizona's contention that the act was intended to supersede equitable apportionment and priority principles interstate within the lower basin (Ariz. Ans. Br. 17-18). What the legislative history does reveal is that both friend and foe of the Swing-Johnson bills were in agreement that priority of appropriation would survive enactment of the Project Act and retain its interstate applicability in the lower basin except as modified by interstate agreement.[1]

Extracts from legislative history cited by Arizona do not relate to a congressional attempt to modify or destroy priorities and equitable apportionment within the lower basin. In context, the cited remarks relate to the modification of *interbasin* priorities by the Colorado River Compact.[2]

Arizona particularly relies upon a colloquy between Senators Walsh and Johnson which she argues clearly established Senator Johnson's intent to substitute secretarial water delivery contracts for the principles of ap-

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[1]In appendix D to this brief we collect representative extracts from the legislative history conclusively establishing this proposition.

[2]Appendix D includes a compilation of those extracts presented in the context in which the remarks occurred.

propriation and equitable apportionment as the basis for division of "mainstream" waters. Ariz. Ans. Br. 45-46. Read in the context in which this colloquy occurred it is apparent that Senator Johnson did not entertain any such intention and that his colleagues in the Senate did not attribute that intention to Senator Johnson.[3]

Any collection of clippings from congressional hearings and debates is far less revealing of congressional intent than the purpose which Congress intended to serve in enacting the limitation provision. The structure of the Project Act does not make sense if it is assumed that Congress really intended to impose a federal allocation upon the states in disregard of their rejection of the suggested allocation and in demolition of priority principles, notwithstanding the meticulous care with which Congress repeatedly established consensual compacts, not coercion, as the statutory pattern.

The objective of the upper basin was seven-state ratification of the Compact. Arizona refused to ratify, however, unless she secured similar protection against California's priorities in the lower basin through a tri-state compact. The Special Master has accurately identified the considerations which prompted Congress to require California to agree to limit her uses. Here is his description of the genesis of the California limitation provision in section 4(a) (Rep. 165):

> "Absent seven-state ratification of the Compact, the Upper Basin required protection against appro-

[3]The Walsh-Johnson colloquy is set in context with explanatory materials in appendix D, pp. 127-31.

priations in the Lower Basin in excess of the Compact apportionment. The Upper Basin feared that Arizona might not ratify, in which event California, unless limited, would be able to appropriate from the mainstream substantially all of the Lower Basin apportionment, leaving Arizona free to make further appropriations from the mainstream outside the Compact ceilings. The limitation on California left a sufficient margin for exploitation by Arizona so as to secure the Upper Basin against undue encroachment by the non-ratifying state.

"Similarly, Arizona and Nevada were concerned that *California's rapid development would enable that state to appropriate most of the mainstream water available in the Lower Basin.* The California limitation afforded these states protection against this eventuality. . . ." (Emphasis added.)

Why would the upper basin and Arizona have feared California's appropriations if interstate priority principles were either (a) totally abrogated or (b) limited to waters put to use prior to 1929? Obviously, waters which had been put to use prior to the time the dam was built did not depend upon the creation of storage; rights to those waters, whatever their quantity, were nevertheless insufficiently large, of themselves, to preempt most of the lower basin allocations, thus forcing Arizona to encroach upon the upper basin's apportionment. The limitation must therefore have been premised on the assumption that the Project Act would not restrict the interstate applicability of priority principles absent interstate agreement to the contrary.

Failing seven-state agreement, the resulting compromise was approval of the Compact upon six-state rati-

fication and enactment by California of the limitation specified in section 4(a). That the compromise left priority principles unimpaired in Arizona and limited only quantitatively in California was the view supplied to the Congress by Senator Hayden in 1930 in opposing the initial appropriations for Hoover Dam (*supra* pp. 74-77); it was the decision of this Court in 1931 in *Arizona v. California,* 283 U.S. 423.[4]

D. The Secretary Has Not Purported To Abrogate Interstate Priority in Article III(a) Water

If the Project Act authorized a "contractual allocation scheme" with interstate parity in "Article III(a) water," an indispensable element of that scheme is the 1944 Arizona contract. Ariz. Ex. 32, Tr. 248. Here is what that contract says about priorities (Rep. app. 403, 405):

Article 7(l): "Present [1944] perfected rights to the beneficial use of waters of the Colorado River system are unimpaired by this contract."

Article 10: "Neither Article 7, nor any other provision of this contract, shall impair the right of Arizona and other states and the users of water therein to maintain, prosecute or defend any action respecting, and is without prejudice to, any of the respective contentions of said states and water users as to . . . (5) what limitations on use, rights of use, and relative priorities exist as to the waters of the Colorado River system . . . ."

This express language leaves beyond argument an absence of secretarial intent to create the scheme which

[4]See Calif. Op. Br. 139, and this brief at 65-66 *supra.*

the Master constructs from the Secretary's contracts. It negates any implication that "silence" substituted interstate proration for interstate priorities; article 10(5) is not silent. Furthermore, it does not reserve the question of whether interstate priorities or interstate parity shall govern; it obviously reserves contentions as to all relative priorities.

E. No Congressional or Secretarial Silence Supports Any Inference That Priorities in "Article III(a) Water" Have Been Supplanted by Proration

No operative provision in the Project Act or in the contracts expressly provides for proration of shortages in "Article III(a) water."[1] Project Act sections 12 and 14 (incorporating by reference section 8 of the Reclamation Act) and Project Act section 18 command the application of priority principles to such shortages both interstate and intrastate (*supra* pp. 65-66).

However, even if the statute and the contracts were completely silent, the same conclusion would follow. Priority in "Article III(a) water" is compelled because priority is the law throughout the West except where priority has been clearly and expressly abrogated. The necessity which has shaped that law would compel the adoption of priority here, even if this case required the judicial construction of a rule for allocation of shortages.

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[1]Clause (4) of the proposed tri-state compact in the second paragraph of § 4(a) of the Project Act set forth a different proration formula (and one more favorable to California) than the Master's proration formula. It dealt solely with the impact of the Mexican burden. However, that tri-state compact was never ratified by any state; hence, none of its provisions became operative. See discussion *infra* pp. 82-83.

Neither statute, Compact, nor contract prescribes, expressly or by implication, interstate parity in "Article III(a) water."

Alleged silence is the only common denominator of the arguments of the other parties that proration was substituted for priority by implication. However, no party endorsing proration is able to agree with any other party either about whose silence is relevant or about what other factors, if any, are coupled with silence to bring about that result. None of their arguments can be sustained.

1. *Arizona's contention that section 4(a) supports the Master's proration formula is unsound*

Arizona seems to rely solely upon section 4(a) of the Project Act to support interstate parity, on the following reasoning:[2] Congress in section 4(a) did not consider the problem of shortages expressly. However, proration is "implicit in the basic purpose [of section 4(a)] to make an equitable division of water." Therefore, "Congress must be presumed to have intended that a lesser quantity than 7,500,000 acre-feet should be divided among the states in the same proportions as those which it specified for the division of the 7,500,000 acre-feet," that is, 28/75 (37%) to Arizona, 44/75 (59%) to California, and 3/75 (4%) to Nevada. Ariz. Ans. Br. 95-96.

First, Arizona's major premise—that section 4(a) is silent concerning shortages in "Article III(a) water"

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[2]In her new argument to support *intrastate* proration, Arizona relies upon "the same considerations which led the Master to conclude that the Project Act envisions a ratable sharing of water between the states." Ariz. Ans. Br. 165.

—fails. Clause (4) of the proposed tri-state compact in the second paragraph of section 4(a) expressly provides that shortages to supply any Mexican Treaty burden, if the surplus proves insufficient, should be met equally by Arizona and California from the main stream.[3] That section 4(a) proration formula (which requires California to bear 50% of any shortage) is not espoused by the Master, Arizona (although her argument logically should require that result), or by any other party, but it is more favorable to California than the Master's formula (which requires California to bear 44/75 (about 59%) of any shortage).

Second, Arizona disregards secretarial intent. The Secretary was not required precisely to follow the authorized allocation set forth in section 4(a) (Rep. 162-63; Calif. Ans. Br. 126-27) and he plainly did not do so. Rep. 222-24. If secretarial contracts make some kind of allocation, the secretarial intention is germane. Secretarial contracts and "commitments" expressly prorate "excess or surplus waters" only. The Secretary has

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[3]Clause (4) provides in part "That . . . if, as provided in paragraph (c) of Article III of the Colorado River compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River, one-half of any deficiency which must be supplied to Mexico by the lower basin."

Clause (4) also confirms that the lower basin's share of the Mexican Treaty deficiency is calculated by reference to "paragraph (c) of Article III of the Colorado River compact." We take it that this reference to the Compact is not "inappropriate" (see Rep. 173). The systemwide scope of Article III(c) of the Compact is explained in Calif. Ans. Br. 22-24. The lower basin's share of the Mexican Treaty burden cannot be calculated under the Colorado River Compact and clause (4) of the tri-state compact solely by reference to consumptive use of "mainstream" waters.

rejected the proration provision of clause (4); his contracts contain no provisions specifying proration of "Article III(a) waters." The inescapable inference is that the Secretary thus intended to preserve priority and not to substitute proration among contractees sharing "Article III(a) water." See Calif. Op. Br. 216-17, 222-25.

2. *The United States contention that administrative practice supports the Master's proration formula is unsound*

Although the interstate priority issue is one of two vital questions now presented in this suit, the United States in its major brief on the merits (U.S. Ans. Br. 1) devotes to that issue only this one short paragraph (*id.* at 52-53):

> "The decree orders a pro rata reduction of these quantities[4] if insufficient water is available to meet the full allotments. Although it might have been argued that the Secretary of the Interior is authorized by the Project Act to determine how deficiencies should be met, just as he is authorized to make the allotments in the first place, the pro rata reduction of allotments in the case of deficiencies has been the practice generally followed by the Secretary of the Interior for 59 years in his administration of reclamation projects. It is reasonable to construe these contracts in the light of this history."

[4](Footnote ours.) *I.e.*, of "the apportionment from the first 7,500,000 acre-feet available in the mainstream of the Colorado River of 2,800,000 acre-feet for use in Arizona, 4,400,000 acre-feet for use in California, and 300,000 acre-feet for use in Nevada" (U.S. Ans. Br. 52).

The Government does not clearly say whether it relies upon the silence of Congress or of the Secretary, or of both. In any event, the Government's argument is unsound because there is no practice in the administration of reclamation projects to support the Master's interstate proration of "mainstream" waters.

The United States answering brief never identifies nor attempts to prove the administrative practice on which it relies. No such administrative practice has been pleaded, proved, argued, or briefed. The Government provides not one citation of authority, not one reference to the record or to facts which may be judicially noticed, and not one cross reference to some other writing.

Time has not permitted an investigation of this newly asserted but unexplained practice "generally followed by the Secretary of the Interior for 59 years in his administration of reclamation projects." We doubt that much relevant administrative practice can be found: First, the several water users diverting from Lake Mead and the main Colorado River below are not in any sense one project.[5] Those users are very different. See Rep. 32-39, 50-71, 73-75. Some, like the Yuma Project with divisions in both Arizona and California (Rep. 50-51, 60-61), are federal reclamation projects, and some, like the Indian projects (Rep. 85-88), are federal reservations (but not reclamation projects). Some are not federal projects at all but are water districts created under state law (like Palo Verde Irrigation District and the Metropolitan Water District in California

[5]See United States v. Arizona, 295 U.S. 174, 185-87 (1935); *cf.* United States v. Gerlach Live Stock Co., 339 U.S. 725, 733, 737-39 (1950).

(Rep. 58-60, 61-69)), municipalities (like Henderson or Boulder City, Nevada (Rep. 73, 74-75)), or private businesses (like Basic Management Industries, Nevada (Rep. 74)). Second, we know of no "contract" executed by the Secretary of the Interior under the reclamation laws which resembles in any way the "commitments" to the states of Arizona and Nevada upon which the Master's interstate proration scheme rests. See *supra* pp. 51-52. Third, we know of no reclamation project where different rules regarding shortages apply interstate than apply intrastate. See *supra* pp. 34-35 & note 3.

However, the decisions of this Court have dealt with two instances involving secretarial administrative practice outside the Colorado River basin,[6] each of which reinforces the applicability of priority principles to uses of "mainstream" water from Lake Mead and below.

In *Nebraska v. Wyoming,* 325 U.S. 589, 633 (1945), the Court, in a somewhat comparable situation, recognized the interstate priority of the North Platte Project

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[6]Note at least two instances of secretarial administrative practice with respect to the "mainstream" of the Colorado River:

General Regulations for the Storage of Water in Boulder Canyon Reservoir and the Delivery Thereof in Arizona, issued Feb. 7, 1933 (Ariz. Ex. 28, Tr. 244): Art. 10(c) of the proposed annexed contract provides in part that "this [proposed] contract is without prejudice to relative claims of priorities as between the State of Arizona and other contractors with the United States, and shall not otherwise impair any contract heretofore authorized by said regulations" pursuant to which the California contracts were executed.

Gila Project Finding of Feasibility, approved by the President on June 21, 1937 (Ariz. Ex. 60, Tr. 269): "In all sales of water rights it will be necessary to prescribe that the water supply of the [Gila] project is subject to the Colorado River compact, and to the Boulder Canyon Project Act and to the sales of water under the compact and said act" and to any treaty with Mexico.

See also Calif. Op. Br. 162-65, 227-28.

in Wyoming and Nebraska over the Kendrick Project (formerly known as the Casper-Alcova Project) in Wyoming. Both are federal reclamation projects on the North Platte River. That priority was required by an express provision in the 1935 contract between the United States and the Casper-Alcova Irrigation District serving the Kendrick Project.[7] This administrative practice is significant because the authorization for the Kendrick Project is apparently silent on how deficiencies should be borne as against other reclamation projects.[8] Subsequently, in 1937, Congress provided that the Kendrick Project should be junior to future projects in Colorado,[9] apparently in recognition that without such legislation future Colorado projects would be subordinate.

In *Ickes v. Fox,* 300 U.S. 82 (1937), this Court rejected an effort by the Secretary of the Interior to

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[7]325 U.S. at 633 n.18:

"The contract provides:

"'It is expressly agreed that the development of the Casper-Alcova Project and the irrigation of lands under it is in no way to impair the water rights for the Federal North Platte Reclamation Project in Wyoming and Nebraska, and the said North Platte Project, and Warren Act contractors under it are to receive a water supply of the same quantity as would have been received if the Casper-Alcova Project had not been constructed and operated.'"

[8]See U.S. BUREAU OF RECLAMATION, DEP'T OF THE INTERIOR, BUREAU OF RECLAMATION PROJECT FEASIBILITIES AND AUTHORIZATIONS 499 (1957).

[9]See Interior Department Appropriation Act for 1938, ch. 570, 50 Stat. 595 (Aug. 9, 1937): "[N]either the construction, maintenance, nor operation of said [Kendrick] project shall ever interfere with the present vested rights or *the fullest use hereafter* for all beneficial purposes of the waters of said [North Platte] stream or any of its tributaries within the drainage basin thereof in Jackson County, in the State of Colorado, and *the Secretary* of *the Interior is hereby authorized and directed to reserve the power by contract to enforce such provisions at all times . . . .*" (Emphasis added.)

reduce water deliveries to landowners in the Sunnyside Division of the Yakima Project in the State of Washington in violation of the landowners' vested appropriative rights under state law based on actual beneficial use. The Secretary had attempted to charge those landowners additional rental for all water delivered in excess of three acre-feet per acre per annum in order to meet a deficiency in the cost of construction of Cle Elum dam and reservoir serving Kittitas Reclamation District and other lands which are other divisions of the Yakima Project in Washington. See lower court's opinion, *Ickes v. Fox*, 85 F.2d 294, 296, 297 (D.C. Cir. 1936). In a later installment of the same litigation, the Court of Appeals for the District of Columbia restated the basis of the Supreme Court's decision:[10]

> "Reading the Reclamation Act in the light of the decision in Ickes v. Fox, we find the situation in this case to be as follows: The water-rights of appellants are not determined by contract but by beneficial use. The Secretary of the Interior in operating the project is in the position of a carrier of water to all entrymen in the Reclamation project. He is not obligated to furnish any more water than is available. Under the Reclamation Act he is not authorized to furnish any water at all except for beneficial use. He must distribute the available water according to the priorities among the different users which are established by the law of the State of Washington. He has no concern in disputes between the various entrymen which concern their respective priorities, other than as a stakeholder."

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[10]Fox v. Ickes, 137 F.2d 30, 33 (D.C. Cir. 1943), *cert. denied*, 320 U.S. 792 (1943).

3. *Nevada's contention that equitable apportionment principles, administrative practice, and custom and usage support the Master's proration formula is unsound*

Nevada appears to rely upon the sum of congressional and secretarial silence[1] in conjunction with what she conceives to be equitable apportionment principles, administrative practice, and custom and usage to support the Master's proration formula. In each instance, her reliance is misplaced. Somewhat inconsistently, Nevada asks for a "floor," in reality a super-priority, below which her uses can never be reduced (Nev. Op. Br. 58).

Nevada's contention that equitable apportionment principles support the Master's proration formula[2] is unsupportable. Where the Master applies equitable apportionment principles, *e.g.*, on the upper Gila, he applies priorities, not proration, subject to the protection of existing economies (Rep. 324-28, 331). It is beyond question that the basic elements of any equitable interstate apportionment are priority of appropriation and protection of existing projects (Rep. 326-28; Calif. Op. Br. 64-65; Calif. Ans. Br. 136-40; *supra* p. 35 note 4). Both are the antithesis of proration.

Nevada's contention that administrative practice sup-

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[1]Nev. Ans. Br. 28: "Neither the Project Act nor any of the contracts provide for proration in years of short water supply."

[2]*Id.* at 29: "The provisions [in the recommended decree] for proration in short water years . . . is a concrete expression of this rule of parity between States. It is a very effective and proper method of exercising the power of equitable apportionment by judicial decree."

ports the Master's proration formula[3] is in error for the same reasons given above concerning the United States similar contention (*supra* pp. 84-88).

Nevada argues that there is some uniform custom and usage for prorating stored water which supports the Master's proration formula.[4] Nevada is wrong. No such custom or usage has been pleaded, proved, argued, or briefed. In support, Nevada provides not one citation of authority, not one reference to the record or to facts which may be judicially noticed, and not one cross reference to any other writing.

The laws of Arizona and Nevada, in 1929 (when the Project Act became effective), in 1944 (when the purported Arizona and Nevada "contracts" were executed), and now, do not establish any uniform general practice of prorating shortages.

The Arizona law

A 1921 Arizona statute, consistent with the emphasis given to principles of priority in an early leading case,[5] subjected the distribution of water by irri-

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[3]*Id.* at 38-39: "All of these rights [in California] being for water stored by the Secretary would be, under the generally accepted pattern of Western water law and under the practice of the general Reclamation Law, of equal priority with other storage contracts executed by the Secretary for uses in either of the States of Arizona or Nevada."

[4]Nev. Ans. Br. 32: "In every instance, it has been the universal custom that contracts for storage water for any given reservoir are of equal priority, and in times of shortage the owners of storage space share pro-rata."

Id. at 40: "We mention again the universal rule that contracts for storage water out of any given reservoir stand on a parity."

See also *id.* at 38-39, quoted *supra* note 3.

[5]Gould v. Maricopa Canal Co., 8 Ariz. 429, 76 Pac. 598 (1904), *appeals dismissed,* 195 U.S. 639 (1904), in which the court declared that all landowners under a canal who had irrigated therefrom "became appropriators, and possessed of rights of appropriation in the order of their priority." 8 Ariz. at 447, 76 Pac. at 601.

gation districts to the "law of priorities."[6] In case of shortage, the "laws of priorities" controlled over proration.[7] This was the law of Arizona in 1929 when the Project Act became effective.

Between 1929 and 1944, Arizona adhered to those principles of priority, as evidenced not only by decisions of her supreme court,[8] but also by the retention of that 1921 legislation.[9]

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[6]ARIZ. LAWS 1921, ch. 149, § 6, at 331: "Subject to the law of priorities all water of the district available for distribution shall be apportioned to the lands thereof pro rata . . . ." The remainder of the section, not material here, related to withholding of water deliveries for nonpayment of charges. The statute remained unamended through 1928. ARIZ. REV. CODE OF 1928, § 3344 (Struckmeyer).

[7]ARIZ. LAWS 1921, ch. 149, § 24, at 350: "In case the water available in any district shall be insufficient at any time to supply all lands of the district susceptible of irrigation therefrom and otherwise entitled to water, it shall then be the duty of the board of directors to provide for the distribution of all available water upon certain or alternate days to different localities as the board in its judgment may deem to be for the best interests of all parties concerned, and so that such available water shall be distributed in *as nearly equal proportions as possible* to all such lands of the district *subject to the laws of priorities.*" (Emphasis added.) See also ARIZ. REV. CODE OF 1928, § 3395 (Struckmeyer).

[8]Olsen v. Union Canal & Irr. Co., 58 Ariz. 306, 119 P.2d 569 (1941), held that canal companies are under a duty to carry the water of appropriators "in the order of the priority of the land served, and upon equal terms. This also has been the law of Arizona for nearly forty years, affirmed by both this court and the legislature of the state." *Id.* at 317, 119 P.2d at 573. The *Olsen* holding was summarized in Whiting v. Lyman Water Co., 59 Ariz. 121, 124 P.2d 316 (1942), as meaning "that the right to the delivery of water by the owners of a canal and reservoir system depends *entirely upon the right of appropriation* held by the water user, and is not in any manner dependent upon his owning stock in such a corporation." *Id.* at 124, 124 P.2d at 317. (Emphasis added.)

[9]The first clause of § 6, *supra* note 6, reappears in ARIZ. LAWS 1931-1932, 1st Spec. Sess., ch. 8, § 1, at 20 with "priorities" changed to "priority." It remained unamended through 1939. ARIZ. CODE 1939, § 75-222.

For § 24 of the 1921 act, *supra* note 7, see ARIZ. CODE 1939, § 75-424.

The present law of Arizona appears to be substantially the same as in 1944.[10] The burden of shortages is borne in inverse order of priorities unless there is some express provision to the contrary.[1] A recent Arizona statute appropriating funds to study the Central Arizona Project under contract with the Bureau of Reclamation subordinates that project's rights to those of all existing contractees and users of main stream water in Arizona:[2]

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[10]The first clause of the section relating to distribution generally is the same as in § 75-222 of the 1939 code, *supra* note 9. ARIZ. REV. STATS. ANN. § 45-1588(A) (West 1956).

Section 24 of the 1921 act, *supra* notes 7 and 9, relating to distribution in case of insufficient supply, has been condensed somewhat; but the changes are in form rather than substance, and the last clause, from "distributed in as nearly equal proportions as possible" to the end, has not been changed. ARIZ. REV. STATS. ANN. § 45-1589 (West 1956).

[1]*E.g.*, in Adams v. Salt River Valley Water Users' Ass'n, 53 Ariz. 374, 89 P.2d 1060 (1939), the charter of the association provided in article V, § 6, for delivery of "that proportionate part of all stored and developed water," *id.* at 381, 89 P.2d at 1063, evidently referring to storage expected to be made available by Roosevelt Dam. See Calif. Op. Br. 120. Since article 1 of the 1904 contract between the Government and the association (Calif. Ex. 3, Tr. 1816, at 3-4) provided that rights of shareholders to the use of water should be determined under "said act" (referring to the Reclamation Act of 1902) and "the rules and principles set out in said articles of incorporation," the basis was established for proration of the stored water, and this would seem to explain why the Kent decree of 1910 (Ariz. Ex. 101, Tr. 380), quoted in part in the *Adams* case *supra*, 53 Ariz. at 380, 381, 89 P.2d at 1063, so provided.

Cf. State v. Laramie Rivers Co., 59 Wyo. 9, 43, 136 P.2d 487, 498 (1943): "An appropriation by the water user from a canal, then, is just as essential for the purpose of acquiring a water right as it is for an appropriator from a stream. Even the doctrine of *priority obtains in such case, as in others . . . unless, perchance, modified by provisions for pro-rating. . . .*" (Emphasis added.)

[2]ARIZ. LAWS 1961, ch. 39, § 2, at 108. Text of the act is at 133-35 *infra.*

"[T]he contract with the bureau of reclamation shall provide that the investigations and studies shall be restricted to only that quantity of water which may be available for use in Arizona, after the satisfaction of all existing water delivery contracts between the secretary of the interior and users in Arizona for the delivery of main stream water, and that nothing shall be done thereunder which will impair existing rights in Arizona for the diversion and use of Colorado River water."

The city of Yuma's federal water contract, signed after the close of the trial in this case, does not provide for proration; to the contrary, it subordinates Yuma's rights to stored waters to all diversions at Imperial Dam for agricultural uses in Arizona.[3]

The Nevada law

Allocation of shortages according to inverse order of priorities appears to be the only practice consistent with *Prosole v. Steamboat Canal Co.,* 37 Nev. 154, 140 Pac. 720, 144 Pac. 744 (1914), in which defendant company was enjoined from reducing deliveries to plaintiffs below the 50 inches of water which the company had delivered for about 19 years. The court held that plaintiffs were appropriators in the same sense as if they had diverted directly from a public stream, and that the canal company was under an implied contractual obligation to continue deliveries at the previous rate, physical availability permitting, so long as there was no interference with rights of appropriators under the same system who were prior in time. *Id.* at 165,

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[3]Calif. Ex. 7611 for iden. (Tr. 22,760), art. 6(a)(1), p. 4 of second pagination.

140 Pac. at 724.[4] The *Prosole* case has been treated as settling the law of Nevada that the right to the use of water is appurtenant to the land irrigated.[5]

No Nevada statute has been discovered relating to the division of shortages in stored water.[6]

F. The Master's Proration Formula Would Provide an Illogical and Impractical Hybrid System of Water Rights in the Lower Basin

The hybrid system of water rights recommended by the Special Master and supported to differing extents by the United States, Arizona, and Nevada reaches results which cannot be defended either logically or practically.

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[4]The court summed up its decision in this significant language (37 Nev. at 166, 140 Pac. at 724):

> "It is the duty of the diverting corporation in cases of this kind, where a consumer has once established a right to the use of water by acquiring the same and applying it to a beneficial purpose, to continue to furnish him water *in preference to latter* [later] *applicants,* provided he has never waived his rights nor forfeited the same. The company has the right, and *it is its duty, to discriminate* between appropriators of water from their irrigation system, *giving the preference to those appropriators who are oldest in point of time.*" (Emphasis added.)

[5]See, *e.g.,* RFC v. Schmitt, 20 F. Supp. 816, 819 (D. Nev. 1937), *rev'd on other grounds sub nom.* Pacific States Sav. & Loan Corp. v. Schmitt, 103 F.2d 1002 (9th Cir. 1939), in which the *Prosole* case is said to recognize the "intimate relationship between land and water beneficially applied upon it, whether the water is directly appropriated or obtained through the intermediary of a canal company . . . ." *Id.* at 1004. RFC v. Schmitt involved lands which were dependent on stored water (20 F. Supp. at 818), but no issue of proration versus priority was considered.

[6]*Cf.* Interior Department Appropriation Act for 1926, ch. 462, 43 Stat. 1168 (March 3, 1925), providing that existing uses in the Newlands Project, Nevada, should be prior to the rights of a proposed new division of that project: *"Provided further,* That the existing water rights of the present water users of the Newlands project shall have priority over the water rights of the proposed Spanish Springs division . . . ."

We have already seen the unfair results of the dual system of interstate water rights proposed by the Special Master wherein priorities still apply to competing rights of "mainstream" users against "tributary" users above Lake Mead in other states (and presumably against those in the same state) but proration controls competing interstate rights of "mainstream" users *inter sese*. See Calif. Op. Br. 228-31. We have also seen the impossible situation created by the application of such a dual system intrastate, as advocated by the United States (Calif. Ans. Br. 39-46).[1]

A further example is presented by the Master's conclusion that priorities must be observed intrastate, but not interstate except for "present perfected rights." The consequence of such blunted priority is strikingly illustrated by the plight of wildlife refuges. These refuges are astride the main stream of the Colorado River where it forms the Arizona-California boundary. They have a priority date, on both sides of the river, of 1941. See Decree art II(C)(2)(g) and (h), Rep. 352-53. On the Arizona side of the river, those refuges have an abundant water supply under almost any conceivable condition; the 1941 priority date is superior to the priorities of a number of existing projects in

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[1]Suppose, under the Government's theory, a senior contract user in Arizona below Lake Mead sues a junior appropriator in Arizona above Lake Mead. Among the unresolved and unresolvable problems of the Arizona contractee are these: (a) In what court should he seek redress? (b) Is the United States an indispensable party? (c) If the United States is indispensable, has it waived its sovereign immunity? (d) How can the contractee, if otherwise successful, establish that the Secretary would release any water from Lake Mead for his use? (e) If the contractee prevails, how can he obtain more than 28/75 of whatever water he is held entitled to?

Arizona and to any future Central Arizona Project. In California, however, there is no reasonable expectancy of any water supply for those refuges; the 1941 priority date is junior to all rights in California. The Master's decision requires not only the states, but the ducks, to fix the boundary line with precision. Enforcement of the Master's decree requires an advance in technology which will enable those charged with its enforcement to dry up the California one half of a duck marsh.

G. The Relevant Interstate Priorities for Existing Main Stream Projects Can Readily Be Determined and Incorporated in Any Decree

The priorities for existing projects in Arizona, California, and Nevada diverting from the main Colorado River can be easily determined, without unduly delaying or complicating the resolution of this controversy. The Court, at this time, may decide only to establish that such rights (with California's priorities limited to 4.4 million acre-feet annually by the limitation) are senior to any rights for new projects.

There are fewer than 30 such existing projects using waters from the main river, in all states.[2] The priorities for eight of these, the federal reservations, are already adjudicated in the recommended decree (Decree art. II(C)(2), Rep. 350-53). The other existing projects are also identified by the Master. Rep. 50-71, 73-75; see also Calif. Op. Br. app., tables 1-3.

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[2]Excluding miscellaneous small uses in Arizona and California outside organized districts or federal projects and reservations. See Tr. 11,977-12,002 (Rowe); Calif. Op. Br. app., tables 1, 2.

There are a number of alternative procedures available to the Court to make the requisite determinations of whatever interstate priorities are recognized by this Court:

(1) The Court may utilize the machinery proposed by the Special Master for determination of "present perfected rights," to determine the magnitude and priorities of rights of existing projects. See Decree arts. II(B)(5) and (6) (Rep. 348-49) and VI (Rep. 359).

(2) The Court may refer the matter to a Special Master to make those determinations from the record with authority to supplement the record as may be necessary or desirable and to report his findings of fact, conclusions of law, and recommendations to the Court.

(3) The Court may make those determinations from the record. See Calif. Op. Br. app., tables 1-3.

Finally, it should be noted that priority principles can readily be made a part of any "contractual allocation scheme," even if the Master's recommended decision were not reversed in any other respect. This is demonstrated by the Master's scheme itself in which "priority of 'present perfected rights' regardless of state lines" controls the allocation of water "in the extremely improbable event that releases [from Lake Mead] do not satisfy the rights perfected in any of the states [of Arizona, California, and Nevada] as of the effective date of the Act" (Rep. 312). We simply propose that a broader but no more difficult priority system be incorporated into any decree for the protection of projects existing at the date of the decision.

IV. IF THE CONCLUSIONS REACHED BY THE SPECIAL MASTER AND URGED BY THE OTHER PARTIES ARE CORRECT, THIS CONTROVERSY IS NOT JUSTICIABLE

Statement of the Issue

Arizona initiated this suit to quiet an alleged title to 3.8 million acre-feet per annum (subject to the rights of New Mexico and Utah) from the 8.5 million acre-feet available to the lower basin from the Colorado River system under the Colorado River Compact.[1] Arizona alleged that more than 1.7 million acre-feet of the claimed 3.8 million acre-feet from main stream and tributaries was unused by Arizona and required for the proposed Central Arizona Project and other proposed projects, unidentified.[2] Arizona alleged that California was using Arizona's water.[3]

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[1]Arizona's first prayer was that "1. Its title to the annual beneficial consumptive use of 3,800,000 acre-feet of the water apportioned to the Lower Basin by the Colorado River Compact be forever confirmed and quieted, subject only to the rights of the States of Utah and New Mexico and to the availability of such water under the Colorado River Compact." Ariz. Bill of Complaint, p. 30, tendered August 13, 1952.

[2]"Arizona is not now presently using all of the aforesaid 3,800,000 acre-feet of water to which it is entitled annually. In excess of 1,700,000 acre-feet out of the said 3,800,000 acre-feet is not being presently used and consumed in Arizona, and is available for such use and consumption under the Arizona Projects hereinafter mentioned." *Id.* at 21.

[3]"Defendants and each of them have threatened for many years to use and consume, and are now actually using and consuming, quantities of Colorado River water in excess of 4,400,000 acre-feet annually. . . . Defendants have no firm right to divert and take annual quantities of Colorado River water in excess of 4,400,000 acre-feet, and their use of such quantities of

California welcomed the opportunity for a resolution by this Court of that controversy.[4]

The controversy which the parties thus brought before this Court in 1952 and 1953 did not involve a present shortage of water. It involved an acknowledged shortage of the dependable supply, permanently available to the lower basin states under the Colorado River Compact.[5]

The Master accurately describes the reasons why a resolution of the controversy is necessary. First, new projects cannot be built if their water supply is subject to major uncertainty (Rep. 130-32). Second, existing projects on which whole communities have come to depend cannot serve their functions if their future is uncertain (Rep. 133-35). The Master is demonstrably correct in the principles he thus states. He is demonstrably wrong in their application.

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water in derogation of the rights of Arizona should be enjoined and forever restrained." *Id.* at 29.

Arizona's second prayer was that "The title of the State of California to the annual beneficial consumptive use of the waters of the Colorado River System apportioned to the Lower Basin by the Colorado River Compact be fixed at and forever limited to 4,400,000 acre-feet and be made subject to the availability of such water under the Colorado River Compact." *Id.* at 30.

[4]Return of Defendants to Rule To Show Cause and Brief in Support of Return, filed December 8, 1952.

[5]The Secretary of the Interior in 1948 reported to Congress with respect to the Central Arizona Project: "If the contentions of the State of Arizona are correct, there is an ample water supply for this project. If the contentions of California are correct, there will be no *dependable water supply* available from the Colorado River for this diversion. *While the necessary water supply is physically available at the present time in the Colorado River,* the importance of the questions raised by the divergent views and claims of the States is apparent. . . . It [the controversy] can be resolved only by agreement among the States, by court action, or by an agency having jurisdiction." (Emphasis added.) Ariz. Ex. 70 (Tr. 308), at 141 in Arizona's bound exhibits; quoted at Rep. 30-31.

A. The Proposed Decree Does Not Apply to a Proposed Central Arizona Project Diverting Above Lake Mead

There is only a contingent possibility that the decree would apply to the water which Arizona would divert for the Central Arizona Project—the water supply for which was the object of Arizona's lawsuit. Arizona's evidence and the record before four Congresses disclose that Arizona has never decided whether she wants a Central Arizona Project diverting from Marble Canyon, from Bridge Canyon, or from Parker Dam. See Calif. Op. Br. 7. The first two points named are on the main Colorado River above Lake Mead, to which the decree does not apply. The Thirteenth Annual Report of the Arizona Interstate Stream Commission to the Governor of Arizona (1960) discloses that circulation of the Special Master's draft report prompted cooperative surveys by the stream commission and the United States Geological Survey of the Marble Canyon diversion route. See Calif. Op. Br. 125.

If a Central Arizona Project is authorized diverting from the Colorado River above Lake Mead, the decree recommended by the Master, which allocates only "mainstream" water in Lake Mead and below, is worse than useless. The Master's Report clouds the problems which the decree fails to solve. The Report first asserts that if Congress authorizes a Central Arizona Project to divert above Lake Mead, "at that time Congress can determine whether or not Arizona's diversions above Lake Mead shall be chargeable to her under the present

contractual apportionment." Rep. 228. Obviously, this Court cannot base a decree upon a prediction of what, if anything, Congress will do in the future. Then, in a footnote to this quoted statement, the Report says that "the doctrine of equitable apportionment *may* affect diversions in this reach of the River [above Lake Mead]. See pages 316-318, *infra.*" Rep. 228 n.86. (Emphasis added.) The reference *infra* is to the determination in the Report that "the conclusion is *inescapable* that principles of equitable apportionment still control rights of mainstream states [diverting from Lake Mead and below] in waters of the tributaries of the Colorado River in the Lower Basin [including the main stream above Lake Mead]." Rep. 317. (Emphasis added.) The Master adds, however, that "the mainstream rights to tributary inflow ought not now be adjudicated." Rep. 319.[6]

B. On the Master's Water Supply Premises, the Proposed Decree Resolves No Real Case or Controversy Even if a Proposed Project Diverts From the "Mainstream"—Lake Mead and Below

1. Physical availability: water supply

In the prior interstate water cases dependable water supply has been determined. Rep. 100. The necessity

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[6]" 'Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence.' New York v. New Jersey, 256 U.S. 296, 309; North Dakota v. Minnesota, 263 U.S. 365, 374; Connecticut v. Massachusetts, 282 U.S. 660, 669; Missouri v. Illinois, 200 U.S. 496, 521." Washington v. Oregon, 297 U.S. 517, 522 (1936), quoted at Rep. 319-20.

for the Court to do so, despite greater difficulties than this case presents, has not been questioned. The determination is necessary in the first instance to determine the jurisdictional issue. The original jurisdiction is invoked only if it is shown that there is a basic necessity for a decision. That necessity does not exist unless the claims in fact exceed the supply.[7] Furthermore, as we shall see (*infra* pp. 105-27), that same water supply determination is necessary to test the effect of any proposed decree.

The Master says (Rep. 115): "Existing California uses[8] are in no danger of curtailment unless and until many vast new projects, some of which are not even contemplated at this time, are approved by Congress and constructed."[9] If this is so, the controversy with Arizona is illusory.

The necessity for a water supply determination is shown by the fact that the sharpest controversy is over

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[7]Arizona challenges application of the "claims-exceed-the-supply" test of justiciability, asserting that this is a case in the nature of interpleader, over which the Court has exercised jurisdiction in the past. Arizona's citation of Texas v. Florida, 306 U.S. 398 (1939), Ariz. Ans. Br. 100, exposes the error in her argument. Original jurisdiction in that case rested on the fact that the death tax claims against a decedent's estate by the federal government and the states of Texas, Florida, New York, and Massachusetts totaled a sum greater than the net value of the estate. 306 U.S. at 405-12, especially 409 & n.2. The case illustrates the "claims-exceed-the-supply" test.

[8](Footnote ours.) We sought a decree which would allocate California 4.6 million acre-feet from the dependable supply, almost identical in quantity to our then existing uses. See Rep. 128 & n.73.

[9]Contrast: "But, despite a present unsatisfied demand for water in the Lower Basin, it is impossible to develop further uses of the water because of the cloud on its legal availability." Rep. 132-33.

what the effect of the decree is. The United States says: "So long as California gets its 4,400,000 acre-feet, plus one-half of the surplus over 7,500,000 acre-feet, it cannot complain that its rights are not being fully met." U.S. Ans. Br. 51. We complain because the decree permits us far less than 4.4 million acre-feet, and far less than enough to satisfy the known requirements of the California projects which Congress knew and intended were to be served. The fact, as between these contentions, is unascertainable without a water supply determination. Surely, no one can seriously contend that the determination is irrelevant.

2. *Legal availability: the Compact*

This case is not justiciable unless effect is given to the Colorado River Compact's restrictions on the quantity of water available from the main stream[10] (6.5 million acre-feet)[1] to satisfy the claims of Arizona, California, and Nevada. Justiciability of the controversy among Arizona, California, and Nevada depends upon a determination that their claims to the waters of the entire main stream exceed the supply which will be available to satisfy them. On the basis of historical main stream supply, this test has not been met. The total claims of all three states from the main stream do not exceed 9 million acre-feet of consumptive use for their

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[10]We use the expression "main stream" to denote the Colorado River between Lee Ferry and the Mexican boundary, as distinguished from the Master's word of art, "mainstream," which he coins to describe Lake Mead and the main Colorado river below. The "mainstream" waters thus include the inflow from the Bill Williams River.

[1]See p. 11 *supra*.

existing and proposed projects.[2] The flow at Lee Ferry required to supply all these claims, in addition to supplying Mexico its guaranteed 1.5 million acre-feet and all losses between Lee Ferry and the boundary (these losses are about 1 million in excess of offsetting contributions of tributary inflow), is slightly less than 11.5 million acre-feet.[2a] The average annual historic flow at Lee

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[2]"The contracts which the Secretary of the Interior entered into . . . provide for the delivery annually of 8,462,000 acre-feet of water stored at Hoover Dam." U.S. Petition of Intervention, par. XX, p. 18. This does not include any quantitative value for the one half of "excess or surplus" which the Master awards to Arizona from the "mainstream." In the United States view, the contract quantity is less than that stated, by the amount of lower basin depletions above Lake Mead. See U.S. Exception II.

[2a]The loss figures on which we rely are those supported by testimony of California witness Stetson and Arizona witness Erickson. See Calif. Op. Br. A45-A46, plates 7 and 8 and the table preceding plate 7 for comparison of comparable loss figures in other studies in evidence.

Arizona attempts to show that all figures relating to losses and gains should be ignored, by tabulating (1) "greatest loss" plus "least gain" compared to (2) "least loss" plus "greatest gain." Ariz. Ans. Br. 122. Arizona's tabulation is meaningless, but the water supply studies of which it is a hopeless mixture are not meaningless. The impression Arizona seeks to convey is that (1) the most pessimistic expert view results in a net loss (not including Mexican Treaty deliveries) of 1,325,000 acre-feet, while (2) the most optimistic expert view results in a gain of 165,000 acre-feet. Each view, pessimistic or optimistic, is a composite of figures from a number of studies in evidence, plus some figures that cannot be found in the record. These composite figures were not even suggested by any witness. Valid comparisons are found by examining the end results of comparable water supply studies, not in comparing a mixture of components of various water supply studies created by counsel. The Arizona techniques can be illustrated: Reservoir evaporation can be eliminated by the expedient of keeping reservoirs empty, but passing all water through the reservoir as spill under such operation naturally wastes all the water otherwise available for storage. Had there been one such operational study in evidence, Arizona would compound the following mixture: (1) Zero reservoir loss for the optimistic column of the tabulation; (2) astronomical spill for the pessimistic side. The only point proved: The isolated components of separate reservoir operation studies cannot be selected and combined in this way to prove anything at all.

Ferry for any of the 10-, 20-, or 30-year periods reported by the Master was not less than about 11.7 million acre-feet and for the last four decades the historical average has been about 12.7 million acre-feet.[3] Rep. 109.

The supply historically available has thus exceeded the aggregate of the claims for all future use tendered for adjudication here, and if the certainty of further depletion of this supply by expanding upper basin uses were not the unspoken premise of the Master's Report, this case would not be presently justiciable.

C. Tested by the Realities of Water Supply, the Proposed Decree Destroys California's Existing Projects

A water supply determination is necessary not only to establish the jurisdiction of this Court but also to test the effect of any proposed decree. That effect is now the focus of this controversy. We say that the proposed decree would be ruinous to California projects. These are its manifest results:

(1) With a full lower basin Compact supply—8.5 million acre-feet of consumptive use from the Colorado River *system*—the decree would limit California to about 3.8 million acre-feet of consumptive use within the

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[3]Calif. Op. Br. 232 n.1. Records at Lee Ferry began just prior to the water year 1921-1922. Ariz. Ex. 98 (Tr. 363), at 520.

"Historic flow" is the actual flow, recorded or estimated, for any specified past period of time at a specific point on a river.

Compact "ceiling."[4] That 3.8 million acre-feet is not enough to satisfy the California rights which are prior to Metropolitan Water District. If a Central Arizona Project or other project is built to divert water from above Lake Mead, California's figure may be even smaller than 3.8 million acre-feet.

(2) With the 6 million acre-foot dependable supply from the main stream actually available for consumptive use in Arizona, California, and Nevada (requiring a flow of about 2.5 million acre-feet greater at Lee Ferry to supply Mexico and all losses),[4a] California would receive about 3.5 million acre-feet. Again, the 3.5 figure, based on the water supply evidence introduced before the Master's truncated "mainstream" beginning at Lake Mead had been invented, may be smaller if a major project is built to divert above Lake Mead.

Either result manifestly defeats the intent and purpose of Congress with respect to the specific projects whose requirements were known and intended to be satisfied under the Boulder Canyon Project Act. The result is demonstrably contrary to the purposes of every Secretary of the Interior who has administered the Project Act.

The focus of the controversy is not whether the result which we have described can be squared with the statute, as of course it cannot, but whether such a result will truly take place. The Master and our opponents deny

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[4]44/75 of 6.5 million acre-feet, the quantity which may be appropriated from the main river under the 8.5 million acre-foot ceiling after accounting for 2 million acre-feet of uses on the tributaries under that ceiling. See p. 11 *supra*.

[4a]See p. 104 note 2a *supra*.

that it will for a variety of reasons which require brief but separate examination:

(1) The upper basin will not use all water apportioned to it under the Colorado River Compact, or anything approaching that quantity.

(2) An increase in upper basin use that would seriously impair the water supply for California's existing projects is so remote that the possibility now merits no serious consideration.

(3) It is possible that technology may solve all water problems of California before the decree restricts California uses.

(4) California is now wasting water, and hence her present uses are in excess of her legitimate requirements.

None can be sustained.

1. *The assertion that the upper basin will not use its apportionment*

The United States says (U.S. Ans. Br. 53):

> "The very foundation of California's argument is that the Upper Basin States will in the near future utilize the entire 7,500,000 acre-feet allotted to them by the Compact. . . . But even the California argument does not predict this result before 1990 (California Opening Br., p. 261) . . . ."

This is completely wrong. The "foundation of California's argument" is that the Compact ceiling on lower basin appropriations will be enforced in favor of expanding upper basin uses. It must be enforced if there is to be any substantial expansion above presently authorized

projects in the upper basin. If it is enforced, the lower basin's consumptive use *from the main stream* will be limited to 6.5 million acre-feet, long before upper basin uses are anywhere near 7.5 million. The Colorado River Storage Project Act of 1956 declares the purpose of Congress to make it possible for the upper basin states to utilize their full Compact apportionment. See Calif. Op. Br. 252-53.

California does not contend, has never contended, and is aware of no other party's contention that "the Upper Basin States will in the near future utilize the entire 7,500,000 acre-feet allotted to them by the Compact." Indeed, California's evidence leads to the conclusion that the upper basin may never physically be able to do so if it respects the upper division delivery obligation under III(d) of the Colorado River Compact.[5]

At page 261 of our opening brief, which the United States cites, we said, referring to our water supply motion:

"We offered to establish that the upper basin

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[5]Upper basin annual depletion of 7.5 million acre-feet per annum at Lee Ferry requires 52 million acre-feet of effective storage in the upper basin (Calif. Exs. 2206, 2206A, Tr. 11,737) or about 75 million acre-feet of total storage capacity. Tr. 11,736 (Stetson). This is double the total presently existing and authorized upper basin reservoir capacity of 37.6 million acre-feet. Calif. Ex. 2203A (Tr. 11,720). It is doubtful that upper basin reservoir sites for 75 million acre-feet of storage can be found (Tr. 11,736 (Stetson)), and, if this storage were constructed, the added reservoir evaporation would offset the added conservation. Calif. Ex. 5610 (Tr. 22,469).

If reservoir losses are not a component of beneficial consumptive use, 7.5 million acre-feet of upper basin depletion at Lee Ferry is the equivalent of about 6 million acre-feet of beneficial consumptive use, contrasted with the 7.5 million acre-foot Article III(a) apportionment.

depletion would expand at such a rate that Metropolitan would lose its entire supply not later than 1990. The Master denies our motion for opportunity to do so (Rep. 112 n.41)."

We referred to permanent upper basin depletion at Lee Ferry of 6.19 million acre-feet per annum, which we believe is foreseeable by 1990 (Calif. Op. Br. A59). This, subtracted from the *maximum* undepleted or virgin flow average for any period ending with the present, would leave a residue at Lee Ferry too small to yield any water at all to Metropolitan under the Master's decree.[6]

2. *The assertion that upper basin use is remote*

As stated by the United States (U.S. Ans. Br. 53):

"The dangers depicted by California must be discounted on the basis of remoteness."

The United States seriously misunderstands our position. Our position is that rapidity of upper basin development was not put in issue by the pleadings, was not tried, and was not treated as relevant until oral argument on the Master's draft report. See Calif. Op. Br. A47-48, A55. If it is relevant, we are entitled to present evidence. We asked the Master for leave to do

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[6]The maximum annual average virgin flow for any period ending with the latest year reported by the Master (Rep. 118) was 15.21 million acre-feet per year. Subtracting upper basin depletion of 6.19 million acre-feet would leave a flow of 9 million at Lee Ferry. Even if perfect regulation of this inflow is assumed, only 6.5 million would be available for beneficial consumptive use in the United States. See pp. 111-12 & note 2 *infra*.

so, and our motion was denied. We have renewed that motion to this Court.[7]

The Bureau of Reclamation's current plan for operation of upper and lower basin reservoirs contemplates firm annual releases of 9.8 million acre-feet from Lake Mead under 1975 conditions and 8.5 million acre-feet under year 2020 conditions of upper basin depletion (plus unusable spill in both instances).[8] After deduction of deliveries which must be made to Mexico and the losses below Hoover Dam, the Master's formula would permit California about 4.4 million acre-feet in 1975 and less than 3.7 million acre-feet 45 years later. (Calculations are in table 6 in the appendix of our opening brief.) We believe, and offered to prove, that the Bureau errs in predicting too slow an increase in use in the upper basin.

Arizona protests that the Bureau study is a power study, and therefore is not relevant to a determination of the water supply available for consumptive use (Ariz. Ans. Br. 130). Arizona overlooks that the objective of a power study is to determine the maximum quantity of water which can be made available in equal annual amounts. The objective and procedure of a study to determine the dependable annual supply available for consumptive use is identical.

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[7]Calif. Op. Br. A39.

[8]U.S. BUREAU OF RECLAMATION, REGIONAL OFFICE, REGION 4, DEP'T OF THE INTERIOR, FINANCIAL AND POWER RATE ANALYSIS, COLORADO RIVER STORAGE PROJECT AND PARTICIPATING PROJECTS (September 1960). Copies have been made available to the Court, with our opening brief. Relevant portions of the data are tabulated in tables 4 and 5 in the appendix to California's opening brief.

Arizona also says that if water is required for consumptive use in the lower basin, the upper basin reservoirs will not be filled, and hence the water required for filling them will be available to the lower basin in addition to the releases that the Bureau plans.[1] We hope that Arizona's contention (in which the United States thus far has not joined) will prove to be true. However, any study of water supply available to the lower basin should be made on the assumption, until the contrary is established, that the Colorado River Storage Project reservoirs now under construction will be filled, and will serve the purpose which Congress intended for them in the 1956 Colorado River Storage Project Act.

The Bureau study rather conclusively establishes two things: (1) that water supply can and must be determined; (2) that there can be no reasonable contention that the destruction of California projects rendered inevitable by the decree is a distant possibility.

If there is to be even 7.5 million acre-feet of consumptive use available from the main stream in the lower basin (far less than the Master's comfortable prophecy, Rep. 115) there must be at least 10 million

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[1]Ariz. Ans. Br. 131-32.
Compare Arizona's assumption that for a long period of time California may rely upon the use of large quantities of unused upper basin water (Ariz. Ans. Br. 125, 128-29) *with* Arizona's contention that California should not be permitted to consume unused Arizona water (apparently even though that water might otherwise waste into the Gulf of California) (Ariz. Op. Br. 106-08).

acre-feet of flow "let down" at Lee Ferry. That quantity is necessary to supply consumptive uses (7.5 million acre-feet), the Mexican Treaty obligation (1.5 million acre-feet), and to allow for the inevitable losses in excess of tributary inflow between Lee Ferry and the Mexican boundary (at least 1 million acre-feet).[2] A Lee Ferry flow of 10 million acre-feet annually is a full one third more than the average annual delivery guaranteed by the upper division to the lower division under the terms of Article III(d) of the Colorado River Compact. It is 1 million acre-feet in excess of the sum of the Article III(d) obligation and the entire Mexican burden imposed upon both basins.

There is not enough water in the river to sustain 10 million acre-feet of flow at Lee Ferry (thus 7.5 million acre-feet of consumptive use in the main stream below) unless (1) upper basin development is virtually halted (a prospect which Congress has unmistakably said shall not occur[3]), or (2) stream flow shall unaccountably increase far beyond the long-term average of any period ending with the present.

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[2]Losses plus treaty deliveries to Mexico would be somewhat larger than 2.5 million acre-feet from a 10 million acre-foot flow at Lee Ferry. The Stetson and Erickson loss figures on which we rely to show that net losses plus Mexican deliveries are about 2.5 million acre-feet (Calif. Op. Br. app. A46) are associated with Lee Ferry flows smaller than 10 million acre-feet. Calif. Ex. 2216A (Tr. 11,825); Ariz. Ex. 366 (Tr. 18,097). See p. 104 note 2a *supra*.

[3]Colorado River Storage Project Act, 70 Stat. 105 (1956), 43 U.S.C. §§ 620-620*o* (1958).

The demonstration is simple. The average virgin (undepleted) flow at Lee Ferry for the 35-year period from 1922 through 1956 during which flow has actually been gaged[4] was 14 million acre-feet annually (Rep. 118).[5] If there is to be 10 million acre-feet of flow averaged annually, the depletions above Lee Ferry must not exceed 4 million acre-feet. *Present* depletions of the "virgin" flow above Lee Ferry are about 2.55 million acre-feet annually.[6] The upper basin can thus deplete no more than 1.45 million acre-feet in addition to existing depletions within that 4 million acre-foot margin.

Upper basin projects are now authorized by Congress which, when combined with existing uses, will deplete the flow at Lee Ferry by 3.9 million acre-feet.[7] This means that the upper basin has only 100,000 acre-feet to go in future authorizations before the 4 million acre-foot margin totally disappears. The Secretary of the Interior and congressional committees have reported favorably on new upper basin projects, nearly any one of

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[4]Figures prior to 1922 are calculated from estimated historical flow.

[5]The period from water year 1922 to water year 1956 is the most reliable record available at Lee Ferry. See Tr. 11,820 (Stetson). These years also include the critical drouth period. Calif. Ex. 2202-A, (Tr. 11,713A), at 2. *Cf.* Rep. 109: "It might be that over a short period of less than ten years Hoover Dam could be operated flexibly enough to translate the total flow into an average yearly release. But it is most unlikely that this can be done over a longer period."

[6]See table, p. 115 & note 9 *infra.*

[7]See note 8 *infra.*

which, if authorized and constructed, would far exceed that 100,000 acre-foot margin.[8] The following tabula-

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[8]*Hearings on H.R. 2206, H.R. 2207, H.R. 2208, and H.R. 2209 Before the Subcommittee on Irrigation and Reclamation of the House Committe on Interior and Insular Affairs,* 87th Cong., 1st Sess. 83(1961), in testimony of William I. Palmer, Asst. Commissioner of Reclamation:

Item	Average annual depletion at Lee Ferry in 1,000's of acre-feet
Existing and authorized prior to 1949:	2,550
Authorized by Public Law 485 [Colorado River Storage Project Act of April 11, 1956, 70 Stat. 105, 43 U.S.C. §§ 620-620*o* (1958)]:	
Evaporation by storage units	691
Participating projects	404
Section 11 (Blue River settlement)	190
Other authorizations:	
Collbran project, Colorado	7
Utah Construction Co., New Mexico	39
Private developments, Wyoming	17
Subtotal, existing and authorized	3,898
Proposed in S. 107:	
Navajo Indian irrigation	252
San Juan-Chama initial phase	110
Subtotal with S. 107	4,260
Animas-La Plata project	130
Subtotal	4,390
Other proposals before the Congress:	
Fryingpan-Arkansas project, Colorado	75
Savery-Pot Hook, Colorado-Wyoming	38
Subtotal, existing, authorized, and proposed	4,503
Mentioned in sec. 2, Public Law 485 [Colorado River Storage Project Act]:	
Preliminary data on 21 projects (excluding San Juan-Chama, Navajo, Animas-La Plata, and Savery-Pot Hook)	800
Total	5,303

tion demonstrates the calculation of the margin for future upper basin development:

DEPLETION AVAILABLE TO UPPER BASIN IF LOWER BASIN IS TO HAVE 7.5 MILLION ACRE-FEET OF CONSUMPTIVE USE FROM ENTIRE MAIN STREAM

		Millions of acre-feet
1.	Average annual "virgin" flow at Lee Ferry, 1922-1956 (Rep. 118)	14.0
2.	Required flow at Lee Ferry to satisfy lower basin consumptive use of 7.5 million acre-feet from main stream	10.0
3.	Margin available for all upper basin depletions (1 minus 2)	4.0[9]
4.	Depletions by all existing and authorized upper basin projects	3.9[10]
5.	Margin remaining for future upper basin projects available without invading 7.5 million acre-feet of consumptive use from lower basin main stream (3 minus 4)	0.1

Moreover, the disappearance of that 100,000 acre-foot cushion will not await future authorizations for future upper basin projects. There is now 35 million acre-feet of new reservoir storage under construction in the upper basin.[11] Filling of these new reservoirs will begin with the closing of Glen Canyon Dam, scheduled

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[9]Depletions by existing upper basin projects total 2.55 million acre-feet. Calif. Ex. 5536 for iden. (Tr. 21,354) (extract from a 1958 Bureau of Reclamation study of the Colorado River Storage Project, published as S. Doc. No. 101, 85th Cong., 2d Sess.) at 13.

This leaves a margin of only 1.45 million acre-feet (4.0 minus 2.55) for depletion by future upper basin projects, including about 1.35 million acre-feet which are now authorized (*supra* note 8).

The United States argues (U.S. Ans. Br. 53) that S. Doc. No. 101 forecasts the time at which the upper basin will use its *full* Compact apportionment. S. Doc. No. 101 does not do so.

[10]See *supra* note 8, subtotal, existing and authorized, 3,898,000 acre-feet per annum.

[11]See Calif. Ex. 2203A, Tr. 11,720.

for 1962.[1] Filling criteria have not yet been finally determined, but it is obvious that water to fill the new storage reservoirs will deplete the flow at Lee Ferry very substantially. For example, if reservoirs were filled at a regular annual rate over a period as long as 1962 to 1990, the average supply withheld from Lee Ferry would be 1.2 million acre-feet yearly.[2]

It is manifest that a reduction of California's supply under the recommended decree to 3.8 million acre-feet or less is neither remote nor avoidable unless the purposes of the Colorado River Compact, the congressional purpose of the Colorado River Storage Project Act of 1956, and the expectations of every upper basin state are frustrated.

The day the decree is entered, every state and every project in the lower basin will begin a study to determine the consequences of that decree.[2a] We again sug-

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[1]Tr. 21,351-52 (Riter).

[2]If there is any doubt about this, evidence should be taken to establish the facts. See Calif. Op. Br. A39-A62.

[2a]Nevada does a complete about-face on the issue of water supply. She went to great lengths in her findings of fact and conclusions of law to show that water supply should be determined and that it should be based on the period 1930 through 1956. Nev. Findings XXVIII-XLVI and Conclusions 29, 30, pp. 63-75. Nevada asserted that "In determining the amount of water available for allocation among the Lower Basin States, the proper amount to be assumed as passing Lee Ferry is the minimum amount required to be permitted to pass that point by the States of the Upper Division, under Article III(d) of the Compact, namely, an average of 7,500,000 acre-feet." Nev. Finding XXX, p. 63.

In her answering brief before the Special Master (June 1, 1959), Nevada asserted: "If any concrete, definite, and worthwhile result is to be obtained from the vast expenditure of money and effort that has gone into this hearing, it would seem that there should be some determinations made with respect to the

gest that the consequences in terms of water supply should be known to the Court before the decree is entered.[8]

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water supply upon which the Court is to act in its decree herein." Nev. Ans. Br. 70 (June 1, 1959).

Now just two years later in her answering brief of August 7, 1961, Nevada says that a finding as to the dependable water supply is not necessary and, in fact, cannot be made. Nev. Ans. Br. 47-48.

[3]Arizona's criticisms of our water supply studies (Ariz. Ans. Br. 112-27) are completely unfounded. They demonstrate a distortion, or lack of comprehension, of the water supply evidence.

Typical is Arizona's assertion that our water supply studies require "the *assumption* that suitable reservoir sites are available in the Upper Basin; that Congress will provide the effective storage capacity hypothesized by California's experts . . . ." Ariz. Ans. Br. 114. (Emphasis added.) See also *id.* at 119.

These are facts—not assumptions. Calif. Exs. 2203 and 2203A (Tr. 11,720) show and document that the Stetson water supply study is based upon presently existing or authorized reservoirs in the upper basin. Obviously those reservoirs are located at sites which are in use or have been fully investigated.

Three of the four major authorized upper basin reservoirs will soon begin filling, and the fourth will soon begin construction: Reservoir filling is planned to begin in Navajo Reservoir in the fall of this year, in Lake Powell (the reservoir behind Glen Canyon Dam) in the fall of 1962, and in Flaming Gorge Reservoir in the spring of 1963. On the Curecanti unit, highway relocation is now underway, and a prime construction contract will be awarded in early spring 1962. See Remarks of Frank M. Clinton, Regional Director, Region 4, Bureau of Reclamation, Before the Upper Colorado River Commission, on May 11, 1961, at Denver, Colorado, inserted in the appendix of the *Congressional Record,* June 14, 1961, as part of the extension of remarks of Hon. Wayne N. Aspinall, Colorado, pp. A4357-58. Lake Powell behind Glen Canyon Dam will provide about two thirds of the total existing and authorized upper basin storage. Calif. Ex. 2203A, *supra.*

Similarly, Arizona erroneously asserts that California water supply studies ignore "the fact that existing reservoir capacities will be reduced by future accumulations of silt." Ariz. Ans. Br. 118. In fact, California witness Stetson testified that silt accumulation was taken into account in the operational study of Lake Mead (Tr. 11,748) and is reflected in Calif. Ex. 2208A (Tr. 11,747). To the extent that "future accumulations of silt" decrease reservoir capacity, this decreases the safe annual yield which can be controlled by storage.

The recommended decree is an invitation to Congress to authorize simultaneous development in both the upper and lower basins upon the same small margin of unused water. The decree would set the basins on a collision course the outcome of which is disaster, not only to California, but to the entire Colorado River basin.

The interpretation of the "law of the river" may be sufficiently elastic, legally, to permit simultaneous development. The water supply is not. The assumption of the Master, endorsed by the United States,[4] Arizona, and Nevada, of abundant water to sustain all existing projects until "many vast new projects" are approved by Congress and constructed (Rep. 115) is demonstrably

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[4]We find the United States argued position (U.S. Ans. Br. 19) impossible to reconcile with the position taken by the Department of the Interior and the Bureau of Reclamation in recent hearings on the Fryingpan-Arkansas Project. In May 1961, Assistant Commissioner of Reclamation William I. Palmer presented a Bureau study depicting conditions in the year 2020 in which the *total* annual scheduled releases from Lake Mead are 8.5 million acre-feet (plus unusable spills separated by long intervals of years). *Hearings on H.R. 2206, H.R. 2207, H.R. 2208, and H.R. 2209 Before the Subcommittee on Irrigation and Reclamation of the House Committee on Interior and Insular Affairs,* 87th Cong., 1st Sess., ser. 4, at 86-87, col. 18 (1961). Under such conditions, the total water available for consumptive use in California, Arizona, and Nevada would be 6.225 million acre-feet annually. See Calif. Op. Br. table 6.

Contrast the argument of the attorneys for the United States: "California's assertions that the decree will result in disaster for the Metropolitan Water District are based on the assumption that the Upper Basin States will utilize their entire allotment [7.5 million acre-feet?] in the near future. The right of the Upper Basin to all the water apportioned by the compact is not to be questioned but, as a practical matter, it is at best uncertain when Upper Basin developments will reach this point. It would be undesirable to abandon needed development in Arizona and Nevada in order to protect against possible future shortgages which by reason of scientific discoveries or other factors may never occur." U.S. Ans. Br. 19. (Bracketed material ours.)

wrong. The water supply of the Colorado River basin will permit some further development in each basin. It will not permit "vast new projects" in both.

3. *The assertion that technology will solve water problems*

We hope, of course, that the optimism asserted will be shown to be justified. No one in this case, however, has testified that there is any such prospect.[5] Overdevelopment predicated on the possibility of rescue by a technology not in being is a risk which we believe it would be irresponsible to undertake.[6] In any event, the risk should be assumed by those who find it attractive. Needless to say, the Project Act was not written on the theory that science would one day find a way to permit Californians to drink and irrigate with the waters of the ocean.

4. *The assertion that California is wasting water*

This has been thoroughly disproved in the evidence. It rests on the undisputed fact that large quantities of Colorado River water flow into the Salton Sea, a sea nearly as saline as the ocean. This discharge must carry out of the irrigated lands into Salton Sea at least as much salt as is deposited by irrigation or the lands will ultimately be rendered useless. The waters of the

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[5]Nor has anyone suggested a way to salvage a half billion dollars of public investment by the people of California in the facilities which the decree will render useless. Calf. Op. Br. A27, A29, A33-34.

[6]The U.S. Geological Survey has estimated that about 40 million acre-feet of annual precipitation falls on the drainage basins of the Gila River and its tributaries, but only 3 million of this is recovered in runoff. Calif. Ex. 16 (Tr. 2718), at 24. The 37 million acre-feet of lost precipitation is likely to be available to Arizona as soon as the Pacific Ocean is available to California.

Colorado River at Imperial Dam contain materially over 1 ton of salt per acre-foot of water and salt content is increasing.[7] As more than 3.5 million acre-feet are diverted into the Imperial and Coachella valleys,[7a] nearly 4 million tons of salt enter and must be discharged from the irrigated area. This equivalent to 1000 trains of 80 carloads of 50 tons each is removed hydraulically instead of mechanically. If not so removed, this salt would render the soil useless.

Water discharged to maintain "salt balance" is not waste, in any pejorative sense, any more than sewage is waste. It is, indeed, agricultural sewage.

Arizona's answering brief speaks of California's "inefficient water uses and gross waste"—"a shameful waste of a precious commodity." Ariz. Ans. Br. 135. California's claim of 5.5 acre-feet per acre which must be diverted for the All-American Canal project "even after making use of reasonable conservation practices, is wholly unrealistic and grossly inflated." *Id.* at 133 n.185, 134. Eight numbered paragraphs in Arizona's footnote purport to provide specifics and documentation of this charge.

We shall not reply here in detail to these assertions: we have already done so. Arizona made the same assertions in her answering brief to the Special Master, and we replied in detail in appendix A to the Cali-

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[7]Calif. Finding 4C:106(1) & n.5, at IV-21 through 22, citing testimony and exhibits in evidence by outstanding experts on the chemistry of soils and of irrigation water.

[7a]Calif. Finding 4C:105(2), at IV-20.

fornia Rebuttal Brief filed with him on June 30, 1959.[8]

However, we think that the following brief comments alone answer Arizona's contentions:

Arizona presented evidence relating to alleged waste of water by California projects in her initial case presented in 1956. Arizona presented more evidence on the same subject in rebuttal in 1958. Our evidence met both attacks fully.

The Master directed that the parties submit findings of fact and conclusions of law supporting not only their own cases (Arizona had made this a part of hers) but meeting those of her adversaries.[1] We responded to that direction. Arizona presented neither findings, conclusions, nor a brief which touched this subject. In her answering brief, Arizona made the assertions now made before the Court, based on evidence which had been fully refuted. Arizona objected to California's request for opportunity to file a rebuttal brief,[2] but the Master overruled the Arizona objection.

Our evidence with respect to Imperial Irrigation District established three things, none of which any Arizona evidence contradicted:

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[8]These are the allegations specifically made in separately numbered paragraphs in Ariz. Ans. Br. 133 n.185:

1. Effective precipitation. Answered Calif. Rebuttal Brief submitted to the Master, June 30, 1959, p. A-13.
2. Salt content. Answered, *id.* at A-15.
3. Leaching requirement. Answered, *id.* at A-17.
4. Imperviousness of soil. Answered, *id.* at A-18.
5. Seepage losses. Answered, *id.* at A-21.
6. Pump recovery. Answered, *id.* at A-26.
7. Regulation loss. Answered, *id.* at A-28.
8. Domestic requirement. Answered, *id.* at A-30.

[1]Tr. 21,691.

[2]Letter of Arizona counsel of June 5, 1959. Nevada and New Mexico also sought leave to file rebuttal briefs.

(1) The irrigation efficiency of Imperial Irrigation District places Imperial toward the top of the list of Bureau of Reclamation Projects in the United States. This was the testimony of J. R. Riter, Chief Development Engineer of the Bureau of Reclamation. (Tr. 21,313.)

(2) The efficiency of Imperial is superior to that of the Arizona projects which divert at Imperial Dam on the Arizona side of the river.[3]

(3) The efficiency which Arizona would require of Imperial Irrigation District after elimination of "waste" is greater than that planned for the Central Arizona Project which Arizona sought to have Congress authorize.[4]

If the Court has any doubt on this score, we would suggest a decree which specifies minimum standards of efficiency applicable on both sides of the river. We are in favor of conservation. We will go as far as Arizona wishes in furthering conservation, so long as the standards are identical for similarly situated projects on both banks of the river.

D. In the Absence of Any Attempt To Determine the Consequences of the Decision Before It Is Made the Court Should Not Exercise Jurisdiction

The most fundamental difference which exists among the parties relates to the consequences of what the Master recommends the Court decide. We have iterated and reiterated that to California the consequences must

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[3]Calif. Ex. 5106 (Tr. 20,768). This shows, for example, that Imperial diverts 7.11 acre-feet per acre per year. The Gila Project in Arizona diverts 10.32 acre-feet per acre per year.

[4]Calif. Ex. 3047 (Tr. 19,860).

be described by the word "disaster." Our adversaries insist we are wrong.

There can be no reasonable argument that to reduce California's rights to 3.5 million acre-feet (our expectancy on the basis of the water supply evidence) or 3.8 million acre-feet (our expectancy if there is a full Compact supply available to the lower basin) means disaster.[5] California was beneficially using about 4.6 million acre-feet of water at the close of the trial, and is beneficially using nearly 5 million acre-feet today.

Our adversaries answer arguments we have not made. The United States writes that "California would go too far in mortgaging the present to protect the remote future, perhaps because it is Arizona's present that will be sacrificed as security for California's future." U.S. Ans. Br. 54. Arizona charges us with including in our "existing needs" and "present requirements" water to irrigate 175,000 acres of new land never before irrigated. Ariz. Ans. Br. 133. Arizona says:

> "[T]he California protestation that unless she receives 5,378,000 acre-feet of Colorado River water each and every year she will be visited with disaster is without substance." Ariz. Ans. Br. 139.

Irrigation of 175,000 acres of new land in California is not in prospect. There is no issue in the case whose resolution would conceivably give California 5,378,000 acre-feet of water each and every year.

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[5]California's 3.5 and 3.8 million acre-feet referred to in text may be further reduced if a Central Arizona Project or other project is built to divert water from the main stream above Lake Mead.

It is California's *present,* not California's future, which we defend. We defend it against projects for the future in the other states only because those future projects would be given, by the Master's decree, water rights which would impair our present projects.

The facts are tabulated on page 128 of the Master's Report where he lists present consumptive use by each California project. At the close of trial, California agricultural projects used 3.994 million acre-feet of water. Of that quantity, about 200,000 acre-feet was junior in right to (1) the Indian reservation rights in California which the decree would establish, and (2) Metropolitan's entire right of 1.212 million acre-feet. This 200,000 acre-feet now used will be unavailable to those agricultural projects on a permanent basis. There can be no question of expansion in California under anyone's view. The issue is, how much contraction?

The attack on Metropolitan Water District is equally unfounded. Arizona asserts that Metropolitan's entitlement, if confined to domestic use, is adequate to satisfy a population of the district expanded by 80 per cent (Ariz. Ans. Br. 133); that Metropolitan can look to alternate sources of water: the Feather River Project or the Pacific Ocean (*id.* at 137-39).

Neither assertion is justification for wiping out Metropolitan's entire supply. The unavoidable fact, as has been demonstrated, is that under the proposed decree there would be no water available for diversion from the Colorado by the great Colorado River Aqueduct.[6] No issue as to alternate sources of water for any California area was pleaded. Evidence with re-

[6]Calif. Op. Br. 266-67.

spect thereto was rejected as irrelevant.[7] If the issue were tried, the evidence would show that there is no plan in being or in prospect which could replace Metropolitan's Colorado River supply. The testimony shows without contradiction that the full quantity of contract water will be in use in the district by 1970.[8]

Neither Metropolitan's water nor that of any other project affected by the decree is limited to domestic use. Metropolitan's contract specifies "beneficial consumptive use" on the coastal plain of southern California.[9] Both irrigation and prevention of salt water intrusion which would otherwise destroy large ground water basins are beneficial uses. No one has thought that California water users are paying to pump Colorado River water over the mountains into southern California when it is not required.

The question before the Court is whether Metropolitan's contract for "permanent service" (subject, of course, to the vagaries of nature and the California Limitation Act) shall be respected, and not be subjected to destruction by projects not yet in existence.

Before or after a decree in this case is entered, its effect on present projects and the prospects of future projects must be appraised. We urge that this be done before, rather than afterward. The purpose is not to persuade the Court to rewrite the law of the river to avoid a harsh result, but to persuade the Court that the Master's proposed rewriting of that law frustrates its intent and purpose.

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[7]Calif. Ans. Br. 140-42.
[8]Tr. 9829-31, 9834 (Morris).
[9]Ariz. Ex. 39, Tr. 252, art. 6.

These are the compelling facts:

(1) Every member of Congress recognized that the purpose and intent of the Project Act and all its associated documents was to serve California's three projects: Palo Verde, the All-American Canal, the Metropolitan Water District.[10]

The Committee reports on the Swing-Johnson (Project Act) bills contain explicit and detailed statements about the purpose of the Boulder Canyon Project to make possible a water supply for the growing population of the Metropolitan Water District's area.[11]

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[10]Senator Hayden's declaration that the Project Act would provide for California 3.5 million acre-feet for the All-American Canal, .5 million acre-feet for Palo Verde and the Yuma Project, and 1 million acre-feet for the vicinity of Los Angeles out of a supply of 9.5 million acre-feet at the site of Hoover Dam (Calif. Op. Br. 236-37) was never contradicted. Senator Hayden left no doubt that he was against the act, but in 1930, during hearings on appropriations for Hoover Dam he reiterated the statement that the act, then passed, provided over one million acre-feet for the vicinity of Los Angeles. See pp. 74-77 *supra*.

[11]"The formation of a large public district, comprising the cities of Los Angeles, Pasadena, Glendale, Orange County cities, and such other cities as desire to join, is in process of formation for the purpose of building the necessary aqueduct from the river to the coast to supply these cities with domestic water. . . .

"The amount of water required by these cities is 1,500 second-feet [equivalent to about 1,100,000 acre-feet per annum]. This, of course, will not all be necessary at once, but as these cities are growing rapidly, they must look to the future and provide for their vital necessities.

". . . .

"Large storage at Boulder Canyon is ideally fitted to make it possible for these cities to procure a domestic water supply. . . ." H. REP. No. 918, 70th Cong., 1st Sess., to accompany H. R. 5773, pt. 1 (1928), Calif. Ex. No. 444 (Tr. 9,395).

See, to similar effect: S. REP. No. 654, 69th Cong., 1st Sess., to accompany S. 3331, pt. 1 (1926), Calif. Ex. 441 (Tr. 9395); H. REP. No. 1657, 69th Cong., 2d Sess., to accompany H. R. 9826, pt. 1 (1926), Calif. Ex. 442 (Tr. 9395); S. REP. No. 592, 70th Cong., 1st Sess., to accompany S. 728, pt. 1 (1928), Calif. Ex. 443 (Tr. 9395).

(2) The California Legislature, the Congress of the United States, every Secretary of the Interior, and the people of California who depend on these projects have acted on that hypothesis for more than three decades since the Project Act became law.

(3) One of California's three projects cannot survive under the decree recommended, even if new projects are not built to divert from the main stream above Lake Mead. This is not because of drouth, which everyone in California recognizes has diminished the supply. Disaster is in prospect because the Master proposes to write a decree which reverses both the clear language of the Project Act and the California Limitation Act, and an interpretation of those acts accepted and asserted by both Arizona and California in the decades since 1928, both in this Court and in every other forum: (1) the limitation on California incorporates the Colorado River Compact; (2) priority interstate characterizes water rights within the limitation.

Water rights are property rights, and these two positions, correct in the first instance, have become rules of property.[12]

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[12]See Bristor v. Cheatham, 75 Ariz. 227, 231, 255 P.2d 173, 175 (1953):

> "It is generally so well known that we take judicial notice that, with faith in the foregoing declaration and assurance of this court [concerning the ground water law], many and large investments have been made in the development of ground waters. Under these circumstances the court's announcement of the rule becomes a rule of property, and rights acquired thereunder should not be disturbed 'unless the law is such as to leave the court no alternative' [citation]; and when a decision does become a rule of property, the rights acquired thereunder are entitled to protection under the law as declared. . . ."

Accord, City of San Diego v. Cuyamaca Water Co., 209 Cal. 105, 122, 287 Pac. 475, 483-84 (1930).

CONCLUSION

For these reasons the California defendants urge that (1) their exceptions which they have jointly made to the Report of the Special Master be sustained by this Court, and (2) the decree to be entered in this case be in conformity with those exceptions and the views presented in this brief and the California defendants' opening brief and answering brief.

October 2, 1961

Respectfully submitted,

[Signatures follow.]

For the State of California

STANLEY MOSK
Attorney General
State Building
Los Angeles 12, California

NORTHCUTT ELY
Special Assistant
Attorney General
Tower Building
Washington 5, D. C.

CHARLES E. CORKER
Assistant Attorney General
State Building
Los Angeles 12, California

BURTON J. GINDLER
Deputy Attorney General

GILBERT F. NELSON
Assistant Attorney General

JOHN R. ALEXANDER
Deputy Attorney General
909 South Broadway
Los Angeles 15, California

SHIRLEY M. HUFSTEDLER
610 Rowan Building
Los Angeles 13, California

HOWARD I. FRIEDMAN
523 West Sixth Street
Los Angeles 13, California

C. EMERSON DUNCAN II
JEROME C. MUYS
Tower Building
Washington 5, D. C.

For Palo Verde Irrigation District

FRANCIS E. JENNEY
STANLEY C. LAGERLOF
Special Counsel
500 South Virgil Avenue
Los Angeles 5, California

For Imperial Irrigation District

HARRY W. HORTON
Special Counsel

R. L. KNOX, JR.
General Counsel
Law Building
El Centro, California

For Coachella Valley County Water District

EARL REDWINE
Special Counsel
207 Lewis Building
Main Street at 10th
Riverside, California

For The Metropolitan Water District of Southern California

JAMES H. HOWARD
Special Counsel

CHARLES C. COOPER, JR.
General Counsel

H. KENNETH HUTCHINSON
Deputy General Counsel
306 West Third Street
Los Angeles 13, California

FRANK P. DOHERTY
Special Counsel
433 South Spring Street
Los Angeles 13, California

For the City of Los Angeles

ROGER ARNEBERGH
City Attorney
City Hall
Los Angeles 12, California

GILMORE TILLMAN
Chief Assistant City Attorney for Water and Power
207 South Broadway
Los Angeles 12, California

For the City of San Diego

ALAN M. FIRESTONE
City Attorney
Civic Center
San Diego, California

For the County of San Diego

HENRY A. DIETZ
San Diego County Counsel

ROBERT G. BERREY
Deputy County Counsel
Court House
San Diego, California

TEXT OF STATUTES

1. Section 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. §§ 372, 383 (1958):

> That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

2. Section 14 of the Boulder Canyon Project Adjustment Act, 54 Stat. 779 (1940), 43 U.S.C. § 618m (1958):

> Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement. Neither the promulgation of charges, or the basis of charges,

nor anything contained in this Act, or done thereunder, shall in anywise affect, limit, or prejudice any right of any State in or to the waters of the Colorado River system under the Colorado River compact. Sections 13 (b), 13 (c), and 13 (d) of the Project Act and all other provisions of said Project Act not inconsistent with the terms of this Act shall remain in full force and effect.

3. Extracts from the Colorado River Storage Project Act, 70 Stat. 105 (1956), 43 U.S.C. §§ 620-620*o* (1958):

(a) Section 7, 70 Stat. 109, 43 U.S.C. § 620f:

The hydroelectric powerplants and transmission lines authorized by this Act to be constructed, operated, and maintained by the Secretary shall be operated in conjunction with other Federal powerplants, present and potential, so as to produce the greatest practicable amount of power and energy that can be sold at firm power and energy rates, but in the exercise of the authority hereby granted he shall not affect or interfere with the operation of the provisions of the Colorado River Compact, the Upper Colorado River Basin Compact, the Boulder Canyon Project Act, the Boulder Canyon Project Adjustment Act and any contract lawfully entered unto [*sic*] under said Compacts and Acts. Subject to the provisions of the Colorado River Compact, neither the impounding nor the use of water for the generation of power and energy at the plants of the Colorado River storage project shall preclude or impair the appropriation of water for domestic or agricultural purposes pursuant to applicable State law.

(b) Section 14, 70 Stat. 110, 43 U.S.C. § 620m:

> In the operation and maintenance of all facilities, authorized by Federal law and under the jurisdiction and supervision of the Secretary of the Interior, in the basin of the Colorado River, the Secretary of the Interior is directed to comply with the applicable provisions of the Colorado River Compact, the Upper Colorado River Basin Compact, the Boulder Canyon Project Act, the Boulder Canyon Project Adjustment Act, and the Treaty with the United Mexican States, in the storage and release of water from reservoirs in the Colorado River Basin. In the event of the failure of the Secretary of the Interior to so comply, any State of the Colorado River Basin may maintain an action in the Supreme Court of the United States to enforce the provisions of this section, and consent is given to the joinder of the United States as a party in such suit or suits, as a defendant or otherwise.

4. ARIZ. LAWS 1961, Act of March 17, 1961, ch. 39, p. 107:

CHAPTER 39

Senate Bill No. 189

AN ACT

Making Appropriations to Arizona Interstate Stream Commission; Providing for Contract With Reclamation Bureau to Make Investigations and Studies of Bridge Canyon Dam and Works for Diversion and Transportation of Water to Central Arizona Project and Other Areas; Limita-

tion of Such Expenditures; Restrictions; Preventing Impairment of Existing Arizona Colorado River Rights; Providing for Annual Report Disclosing Amounts Expended and Results of Investigations.

Be it enacted by the Legislature of the State of Arizona:

Section 1. APPROPRIATION

The sum of one hundred fifty thousand dollars is appropriated to the Arizona interstate stream commission.

Sec. 2. PURPOSE

The sum appropriated under the provisions of section 1 shall be used under contract with the bureau of reclamation for the purpose of making investigations and studies of a dam at the Bridge Canyon site on the Colorado River and of works necessary for the diversion and transportation of water from the Colorado river to areas in Arizona; provided that not to exceed the sum of one hundred thousand dollars shall be used [108] for the investigation of Bridge Canyon Dam and of works necessary for the diversion of Colorado river water to the Central Arizona Project area; and provided further that the contract with the bureau of reclamation shall provide that the investigations and studies shall be restricted to only that quantity of water which may be available for use in Arizona, after the satisfaction of all existing water delivery contracts between the secretary of interior and users in Arizona for the delivery of main stream water, and that nothing shall be done thereunder which

will impair existing rights in Arizona for the diversion and use of Colorado river water. The commission shall make an annual report to the legislature and the governor on the 15th of January of each year, showing the amounts expended, and the results of their investigations and studies in all categories, coming under the provisions of this act.

Sec. 3. EXEMPTION

The appropriation made by this act is exempt from the provisions of sections 35-173 and 35-190, Arizona Revised Statutes, relating to quarterly allotments and lapsing appropriations.

Sec. 4. EMERGENCY

To preserve the public peace, health and safety, it is necessary that this act become immediately operative. It is therefore declared to be an emergency measure to take effect as provided by law.

Approved by the Governor—March 17, 1961.

Filed in the Office of the Secretary of State—March 17, 1961.