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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1961

No. 8 Original

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants,*

UNITED STATES OF AMERICA, *Intervener,*
STATE OF NEVADA, *Intervener,*
STATE OF NEW MEXICO, *Impleaded,*
STATE OF UTAH, *Impleaded.*

ANSWERING BRIEF FOR THE STATE OF NEVADA,

Intervener

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ANSWERING BRIEF FOR THE STATE OF NEVADA, Intervener

PATTERN OF THE BRIEF

In aid of a useful arrangement of material, Nevada in this Brief will, in answering the Opening Briefs, first outline her position in opposition to them. Then she will consider the Briefs of the other parties separately, stating first its answer to California (pp. 29–48, *infra*). The answer to California's lengthy Brief

will consist principally of a discussion of the general issues rather than any attempt to make a detailed point by point reply. It will answer those portions of the Brief of the United States to which it wishes to reply (pp. 49–61, *infra*) ; and lastly, its comments on Arizona's Brief (pp. 61–65, *infra*). Since Utah and New Mexico have filed no Briefs, no comment is made on the Master's decision with respect to the rights of those States.[1]

SUMMARY OF ARGUMENT

I

It is clear from the Opening Briefs filed herein that Intervener Nevada's principal controversy is with California. For California seeks to reduce Nevada's contract rights to the beneficial consumptive use of 300,000 acre feet of the waters of the Colorado River stored in Lake Mead to a mere 120,500 acre feet. This controversy will, of course, be resolved by the basic issues in the case.

Nevada has a subsidiary controversy with the United States who contests the Master's findings that that portion of Article 5(a) of Nevada's amended contract requiring the deduction of her tributary uses from her contract supply is invalid. The United States further objects to the Master's finding that Nevada's basic contracts are sufficient and that it is not necessary to have additional contracts with each individual water user. Finally, there is a difference of views between Nevada and Arizona who contends that Article 7(g) of her contract, wherein she agreed that Nevada could have 4 percent of any excess or surplus water, is invalid.

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[1]The omission herein of an answer to any specific argument or point in any one of the Briefs does not necessarily indicate the agreement of Nevada to the position taken by the other parties. Some arguments are unanswered as a result of judgment concerning their relative importance and relevancy and a desire to eliminate controversy on as many issues as possible.

II

Nevada is entitled to the beneficial consumptive use of 300,000 acre feet of water stored in Lake Mead under any theory that may be adopted by this Court in deciding this case. Whether Section 4(a) of the Boulder Canyon Project Act (hereinafter, Project Act) relates only to mainstream water, as the Master found, or water of the entire system, does not affect the validity of Nevada's allocation of 300,000 acre feet of Lake Mead stored water. It affects only the accounting necessary to determine the quantity of excess or surplus water, if any.

Nevada's contract rights are valid whether Section 4(a) of the Project Act constitutes a statutory contractual allocation, or whether the contracts were made under the general Reclamation Law. The amount contracted to Nevada corresponds to the amount discussed as her allocation in the Congressional debates preceding passage of the Project Act. It is an amount which reflects a proper exercise of the discretion vested in the Secretary of the Interior.[2] Likewise, Nevada's contracts are valid if that section is a mandatory formula, as Arizona contends. Particularly, both the amount of water awarded Nevada in her contracts, and the validity of the contracts, must be upheld in the event that the Court determines this case upon the basis of an equitable apportionment of the waters of the Colorado River among the three sovereign States in the Lower Basin.

Nevada is unique in that it has no other source of water than Lake Mead. There is no ground water to be developed, or any salt or brackish water that can be converted. The Colorado River water is literally the life blood of the area and is the controlling factor as to the population that can live there. On the other hand, California has alternate sources of water, both by

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[2]Hereinafter "Secretary" shall mean the Secretary of the Interior.

the newly authorized diversions from the water-surplus area of Northern California and from the salt water conversion program now actively under development.

III

There is a complete answer to much of California's argument when it is realized that since the Colorado River is a navigable river, the Secretary, by reason of the Project Act and the construction of the Hoover Dam, had a right to, and did take full and complete control of all of the water of the Colorado River at that point, free of any prior claims. California's uses on the Yuma Project (partly an Indian Reservation project) and in the Palo Verde Valley, which existed prior to this time, undoubtedly thus lost their priority. But this is academic because the Master has defined the present perfected rights which existed as the date the Project Act became effective (June 25, 1929), so as to include these rights, and has provided for their protection in short water years. There is no evidence of any conceivable water shortage which would diminish these rights under the Recommended Decree.

The rights of the Imperial Irrigation District, which had been using water which flowed northward out of Mexico, after having been diverted through that nation, was likewise of a type which could not claim priority over the right of the Secretary of the Interior to store water at Lake Mead. In addition, by reason of the specific provisions of the Project Act which, among other things, provided for the construction by the United States of a new diversion point for an All-American Canal leading to this District, and for contracts providing Lake Mead stored water for use thereon, the Imperial Irrigation District right became and is solely a right to Lake Mead stored water, under the terms and conditions of its contract. The right of the Metropolitan

Water District, which was only a paper filing at the effective date of the Project Act, depends entirely on a contract with the United States dated April 24, 1930, and subsequent contracts. All of these California uses or rights were changed from whatever status they may have had as normal flow rights prior to the construction of Hoover Dam, and thereafter became merely contract rights for stored water on a parity with similar rights of Arizona and Nevada and the water users in those States. This is precisely in accord with the provisions of Article VIII of the Colorado River Compact (hereinafter, Compact).

IV

There is no validity in California's repetitious argument that she still retains, after the construction of Hoover Dam and Lake Mead, water rights founded upon which she terms "equitable apportionment and priority of appropriation."

The doctrine of appropriation (first in time is first in right) is the foundation of Western water law as to intra-state rights, and grew out of the customs and usages of those who first settled the arid West. It is the very antithesis of any kind of apportionment, equitable or otherwise. On the other hand, the doctrine of equitable apportionment grew out of what might be termed "interstate-international" law, as developed by this Court in determining controversies between sovereign States. The coupling of the two in one descriptive phrase is a misnomer, and leads only to confusion. Priority of appropriations is not controlling in an interstate equitable apportionment suit. It is only one of many factors to be considered. This is particularly true where, as here, the apportionment must be of stored water, the rights to which are represented by contracts with the Secretary of the Interior.

V

"Present perfected rights" as used in the Compact, the pertinent statutes, and the contracts, has a definite and precise meaning. Originating in the Compact, it is clear that it was intended to refer to something other than appropriations, which might exist under State law as only paper filings or partially used appropriations. It seems the most logical to interpret such rights as those which had been perfected and were in use at the date of the execution of the Compact (November 24, 1922). But, in any event, this phrase could not include any rights other than those actually perfected as of the effective date of the Project Act, as the Master determined.

VI

A finding as to the dependable supply of the Colorado River, sufficiently accurate for an allocation in perpetuity is impossible of attainment. There is no need for making it in this action. The Recommended Decree fully protects the rights of all the parties. It is not needed as a foundation for a justiciable controversy for the controversy is one concerning the waters stored in Lake Mead and the validity and effect of the contracts disposing of it. This controversy, in existence for years, is entirely independent of any question of dependable supply.

VII

There is nothing in the Brief of the United States which seriously challenges the soundness and correctness of the Master's decision holding that the provisions of Article 7(d) of the Arizona contract and Article 5(a) of the amended Nevada contract, which charges tributary uses in these States against the contract amounts to be delivered from storage in Lake Mead, are in violation of the Project Act and unenforceable.

There are reasons other than those relied upon by the Master why his decision is proper and sound. The legislative history of Section 4(a) of the Project Act demonstrates clearly that Congress intended that Nevada should have an undiminished 300,000 acre feet of beneficial consumptive use from the mainstream. There is nothing in it even remotely suggesting that this amount should be reduced by tributary uses in Nevada above Lake Mead.

There is nothing in the Project Act that authorized, directed or permitted the Secretary to limit Nevada's allocation of water from Lake Mead by deducting therefrom tributary uses in Nevada. Nor could any act of any Nevada official in signing such a contract be deemed to be a waiver or release of any rights which that State, as a sovereign, possessed.

If the Court should concur in Arizona's view that the second paragraph of Section 4(a) of the Project Act established a formula for the allocation of mainstream water among the three Lower Basin States which the Secretary, in making water delivery contracts, is required precisely to follow, then these provisions in both the Arizona contract and the Nevada contract, which obviously deviate from the formula, are void.

The Nevada contract is entirely consistent and in accord with Section 5 of the Project Act. Nevada is a "person" as used in that section, and therefore entitled to have the use of the water contracted for.

The Nevada contract was drafted in the light of circumstances peculiar to Nevada. Existing and future uses of Lake Mead water will be for industrial and municipal use. It would be ridiculous to require individual and duplicate contracts for each industrial and municipal user of Lake Mead water. It is logical and sensible that the water delivery contracts be with the State of Nevada, acting through its Colorado River Commission of Nevada, an entity created by law specifically for this purpose.

VIII

Nevada is in general agreement with the position taken by Arizona since it supports the Master's Report and Recommended Decree in all essential respects.

We concur generally with Arizona's argument that the Project Act provides for the storage of mainstream water only and for its allocation among the three Lower Basin States. Whether this Court concludes that the Master was correct or whether Arizona is correct, in their respective interpretations of the Compact with respect to mainstream water, the results, so far as Nevada's rights are concerned, would be the same. Nevada would still be entitled, under its contracts, to an undiminished 300,000 acre feet of water from Lake Mead.

One point of difference between Arizona and Nevada concerns the validity of Article 7(f) of the Arizona contract which provides for the recognition by Arizona of the right of Nevada to contract with the United States for the use of 4 percent of any excess or surplus water which she claims to be invalid. The Master held this provision to be valid and Nevada concurs.

In the unlikely event that this Court should find Article 7(f) of the Arizona contract void, then Nevada submits that that part of the Recommended Decree permitting Nevada to contract with the United States for 4 percent of the excess or surplus should be retained irrespective of any provisions of the Arizona contract. Nevada's right to an equitable share of the excess or surplus is not dependent upon any recognition or consent by Arizona in its contract, or otherwise.

Nevada concurs in Part II of Arizona's Brief in opposition to the views expressed by the Master with respect to the unrestricted right of the United States to reserve water for all Federal establishments.

ARGUMENT

I

NEVADA'S ALIGNMENT AS AGAINST OTHER PARTIES

Nevada, an intervener, submits that it is now more apparent than ever that the final decree to be entered herein should uphold the validity of her contracts with the United States[3] as awarding her the right to the full beneficial consumptive use of 300,000 acre feet[4] of Colorado River water from Lake Mead, or below, as and when needed. Also, that she is entitled to this amount of water under whatever interpretation there may be made of the language of Section 4(a) of the Boulder Canyon Project Act.[5] Or, more broadly speaking, under whatever theory may be followed in apportioning Colorado River water among the States of the Lower Basin.

It is clear that the real controversy in this action, so far as Nevada is concerned, is between her and California. There is a subsidiary controversy between Nevada and the United States, so far as the latter urges diminution of Nevada's full 300,000 acre feet claim by deduction of Nevada upstream tributary uses; and contends that each Nevada user must have an individual contract with the Secretary.

The direct conflict between California and Nevada is this: As against Nevada's claim to a full 300,000 acre feet of beneficial consumptive use from Lake Mead, California asserts that

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[3]Appendices 6 and 7, Report, pp. 409–422.

[4]Throughout this Brief, when referring to Nevada's rights to 300,000 acre feet, it is always intended that this figure be read as a beneficial consumptive use of that amount, whether those specific words are used or not. And "consumptive use" is used as meaning diversions from the stream less return flow, as defined by the Master in his Recommended Decree (Paragraph I, (A), Report, p. 345).

[5]45 Stat. 457, 43 U.S.C. 617.

Nevada is entitled only to the amount needed for the ultimate development of mainstream projects authorized or constructed to date in the total amount of 120,500 acre feet.[6] In this connection she concedes that Nevada is additionally entitled to her uses on the tributaries which flow into Lake Mead (the Muddy and Virgin Rivers) in the amount of 51,000 acre feet of beneficial consumptive use. Elsewhere, California argues, however, that in the event Nevada's contract rights are upheld, that this Court should overrule the Master's decision invalidating that provision in Section 5(a) of that contract, which provides that Nevada's mainstream uses shall be diminished to the extent of her upstream tributary uses. In other words, California aligns herself with the United States on this phase of the case.

The differences between Nevada and the United States divides itself into two parts. Nevada urges the correctness of the Master's recommendation declaring the invalidity of the provision in Article 5(a) of the contract between Nevada and the United States which provides that her use of mainstream water should be reduced by deducting therefrom the amounts of her upstream tributary uses. And the United States denies that the Colorado River Commission of Nevada, a statutorily created entity[7] created for the express purpose of contracting for, receiving, paying for and controlling the distribution of all Colorado River water to which Nevada is entitled, can alone contract for Nevada's water supply. It urges that, in addition, separate contracts must be made between the Secretary and each individual user in Nevada, although concededly, the Nevada contracts do not so specifically provide, as contrasted with the Arizona contract[8] which does so provide.

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[6]California's Brief, pp. 18, 22.

[7]Appendix II, Nevada's Opening Brief, pp. 106–109.

[8]Appendix 5, Report, pp. 399–407.

The controversy between Nevada and the United States admittedly involves only an interpretation of the applicable statutes, and a correlative determination of the power of the Secretary in the pertinent respects.

On the other hand, the resolution of the controversy between Nevada and California involves the whole question as to the fundamental correctness of the Master's Report. The basic concepts upon which the Master, among other things, found that Nevada was entitled to the benefit of her two contracts with the United States, giving her the right to apply up to 300,000 acre feet of Colorado River water to beneficial consumptive use, are challenged by California with a myriad of points of attack. In Nevada's opinion, to attempt to answer California's voluminous Brief, paragraph by paragraph, or even topic by topic, would be pointless and result only in endless repetition—in fact, such repetition is the outstanding characteristic of the California Brief. On the other hand, the resolution of a few fundamental questions can perhaps better indicate the incorrectness of the California position.

Since Arizona supports the Master's Report and Recommended Decree in all essential respects, Nevada is in general agreement with Arizona, except that she does take issue with Arizona as to the validity of Article 7(g) of the Arizona contract, which recognizes the right of Nevada to contract with the United States for 4 percent of any excess or surplus. Nevada asserts the validity of this paragraph.

Nevada does not take issue with either Utah or New Mexico on any aspect of the Master's Decision and Recommended Decree relating to those States.

II

NEVADA ENTITLED TO AN UNDIMINISHED 300,000 ACRE FEET OF STORAGE UNDER ANY THEORY

From the point of view of the State of Nevada, the Decree herein should award her the right to the beneficial consumptive use of 300,000 acre feet of water stored in Lake Mead under any theory that might be adopted by this Court in deciding this case. This is true whether it be determined that Section 4(a) of the Project Act related only to mainstream water, as the Master found, or to system water, as contended by California.

This is true whether Section 4(a) of the Project Act is construed as authorizing and directing the Secretary, under Section 5, to make allocations of mainstream water among the three Lower Basin States by means of water delivery contracts, as the Special Master decided, or whether Section 4(a) is construed as establishing a mandatory formula for the allocation of mainstream water among the three Lower Basin States which the water delivery contracts made by the Secretary are required to conform, as contended by Arizona. Likewise, this would be true if contracts for the delivery of storage water were made by the Secretary under the general Reclamation Law[9] irrespective of the Project Act. Particularly, if any or all theories of statutory or secretarial allocations are discarded and the case be determined on the basis of equitable apportionment among the three Lower Basin States, a confirmation of the 300,000 acre feet right of Nevada is emphatically correct and proper.

A. The Controversy as to Whether Section 4(a) Relates to Mainstream Water Only.

Of course, one of the crucial decisions of the Master was his determination that by the language used in Section 4(a) of the

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[9]Act of Congress, approved June 17, 1902 (32 Stat. 388, 43 U.S.C. 391) and acts amendatory or supplementary thereto.

Project Act, the Congress intended that 7,500,000 acre feet of mainstream water should be annually allocated so that California should receive 4,400,000 acre feet (the maximum permitted under the specific limitation imposed upon her by the Project Act; a limitation which California accepted by its own legislative Act),[10] Arizona 2,800,000 acre feet and Nevada 300,000 acre feet; referring in all instances to beneficial consumptive use. As set out in his Report (pp. 151–185) the reasons for arriving at this conclusion are logical and convincing and no good purpose would be served by repeating or elaborating upon them in this Brief. California, disagreeing violently with this conclusion, devotes a large part of her Opening Brief to argument upon this phase of the case. (California's Brief, pp. 69–138.) In the last analysis, her argument amounts to repeating innumerable times and in a bewildering variety of approaches, the theme that "Compact means Compact." And that, accordingly, it must follow that since the waters apportioned by Article III(a) of the Colorado River Compact[11] were those of the entire Colorado River System, the 7,500,000 acre feet referred to in Section 4(a) to which California's limitation applies would be system water and not mainstream water.

So far as the claim of Nevada to the beneficial consumptive use of 300,000 acre feet of Lake Mead water is concerned, the determination of this particular question is immaterial. Under the Master's Recommended Decree, this amount of beneficial consumptive use is awarded to Nevada out of mainstream water. If California is correct, and Section 4(a) should be interpreted as applying to system water instead of mainstream water, the situation, so far as this right of Nevada is concerned, is

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[10]California Limitation Act, Act of March 4, 1929; Ch. 16, 48 Session; Statutes and Amendments to the Codes, 1929, pp. 38–39.

[11]Appendix 2, Report, pp. 371–376.

unchanged. Her contracts call for this amount of stored water. Lake Mead will be the source of the supply. The interpretation of this Section as to whether it applies to the mainstream or the tributaries goes only to the accounting phase; and that accounting would not affect Nevada's 300,000 acre foot allocation.

The only phase of the interstate allocation affected by the determination as to whether Section 4(a) relates to mainstream water only, or system water, is in the determination of the excess or surplus. Nevada is interested in that phase of the case to the extent that when proper contracts with the United States have been executed, she will be entitled to 4 percent of the surplus to be deducted from Arizona's one-half share. As mentioned in Nevada's Opening Brief (p. 40), it is her opinion that there is ground to believe the Master erred in classifying the one million acre feet of water apportioned by Article III(b) of the Compact as excess or surplus. We once more comment that if the Master's decision on this point should be reversed and it be held that Section 4(a) be deemed to refer to 7,500,000 acre feet of system water, then it automatically follows that the million acre feet apportioned by Article III(b) to the Lower Basin would not be surplus or excess. California would not be entitled to take one-half of that million acre feet over and above her 4,400,000 acre foot limitation. In short, the total combination of the Master's determination that while the 7,500,000 acre feet allocated is mainstream water only, but that Article III(b) is excess to which California is entitled to one-half, is a decision extremely favorable to California.

B. Nevada's Rights Under a Statutory Contractual Allocation.

It is the position of all the active parties to this action, other than the State of California, that the Master is correct in his Report and Recommended Decree in determining that properly interpreted Section 4(a) of the Project Act created a statutory

contractual allocation scheme; that is, by the Project Act Congress authorized and directed the Secretary, under Section 5, to make allocations of mainstream water among the three Lower Basin States by water delivery contracts. Under this theory of the case, Nevada is entitled to an undiminished 300,000 acre feet of beneficial consumptive use from the waters stored in Lake Mead.

This is a lesser amount than will be needed by Nevada by the year 2000, according to her evidence herein (Appendix I, Opening Brief, pp. 63–105). However, under all the circumstances, Nevada has not excepted to the Master's Report and is willing to accept a decree awarding her this amount of Lake Mead water as being proper.

Here we find the provisions of the Project Act expressly providing that there shall be contracts with reference to the water stored in Lake Mead and that no one is entitled to water without such a contract. These provisions carry with them the necessary ingredient of authority in the Secretary to determine the amount of water for which he will contract as to each user. It is inherent in the Project Act itself, and clear from the legislative history, that secretarial contracts would be used in determining the amounts of water to be ultimately diverted in each State.

It offends nothing in the Project Act for this Court to now find valid the contracts which the Secretary has made, including the two awarding Nevada the beneficial consumptive use of 300,000 acre feet.[12] The amount contracted for is precisely the amount that

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[12]Wherever in this Brief Nevada asserts its right to the beneficial consumptive use of 300,000 acre feet under its contracts, it is intended to express the single exception that the provision in Article 5(a) of that contract charging tributary uses against the 300,000 acre feet is not valid, whether expressly stated at that time or not. For brevity's sake, an attempt has been made to eliminate the constant repetition of this exception, but it is always there in this presentation.

was discussed as being Nevada's requirement through the whole legislative debate in Congress. It is the amount prescribed as a proper allocation to Nevada in the preapproved Tri-State Compact referred to in the second paragraph of Section 4(a) of the Project Act. In fact, it is the precise amount which the Master found as Nevada's share if the Act is treated as a statutory allocation.

The contract amount is a fair and equitable amount if Nevada's future needs are taken into account as shown by Nevada's evidence herein. The proof shows that by the year 2000 Nevada's needs, even if her growth continues at no greater than the present rate, will exceed this amount before the end of the century. It is a fair amount, having in mind the fact that Colorado River water, and specifically waters stored in Lake Mead, are the sole possible sources of supply for the Southern Nevada area.

Taking all of the above into account, the Secretary acted within the boundaries of his authority and within the complete limits of his discretion in contracting with Nevada for the beneficial consumptive use of 300,000 acre feet. In fact, this amount is in the nature of a borderline amount, and any attempt to limit Nevada to a lesser amount could well be described as an abuse of discretion. Certainly nothing in the Nevada contracts (except only part of Section 5(a)) can in any way be characterized as a violation of the Secretary's discretionary power if the case is viewed in that light. Having full right to the waters stored in the reservoir, the Nevada contracts made by the Secretary are valid and binding and should be given full force and effect.

Paranthetically, we might here mention in passing that several remarks or intimations in the California Opening Brief indicate its contention that contracts, such as those of Nevada, are similar to water right appropriations, and the accompanying implications that unless the use thereof is completed with what is defined as

due diligence, the right covered therein might be lost. This we directly challenge.

Obviously, it is the duty of the State to provide for its future growth and its future citizens equally as it must provide for those presently in existence. The development of large scale projects such as will be required to complete the full use of Nevada's water rights must and should extend over a period of many years. The Project Act itself stated that the contract should be for permanent service. There is nothing in the Project Act or in the basic law indicating that Nevada's contracts are defeasible, or that the right to use the amount of water provided can be lost if not promptly exercised. The contracts themselves, and the Recommended Decree, protect against any waste of water by allowing interim use thereof prior to the time required by the contracting State.

Arizona, while agreeing that the Project Act authorizes and directs the Secretary to allocate mainstream water by water delivery contracts among the three Lower Basin States, goes further and contends that the second paragraph of Section 4(a) established a formula for the allocation of the waters of the mainstream among the three Lower Basin States to which the water delivery contracts made by the Secretary are required precisely to conform. If this Court should agree, then clearly Nevada would be entitled to an undiminished 300,000 acre feet of beneficial consumptive use from stored water in Lake Mead.

C. Nevada's Rights Under Contracts Made Under the General Reclamation Law.

Another alternative theory upon which Nevada's right to an undiminished 300,000 acre feet of storage from Lake Mead could be sustained, is the Secretary's authority to make contracts under the general Reclamation Law. The Secretary, under the

general Reclamation Law,[13] had the basic right and obligation to make water delivery contracts for the delivery of stored water which, in effect, would constitute an allocation among the three Lower Basin States, irrespective of the Project Act.

Such a conclusion is entirely consistent with the historical operation of the Bureau of Reclamation in the myriad projects which it has constructed throughout the arid West. Both by practice and by statute it has been the undeviating policy of the Secretary to allocate and provide for the delivery of water stored in Federally constructed reservoirs by contracts.[14] In the case of projects built under the Reclamation Law, the Secretary acquires the necessary water right for impounding water in storage reservoirs for the benefit of the ultimate users, but the rights to the stored waters *as between the Secretary and the contracting parties are fixed by contract.*

Thus, the Master's decision that the water delivery contracts constituted a contractual allocation of mainstream waters to Arizona and Nevada in the quantities specified in their respective contracts can be sustained both under the Project Act and the general Reclamation Law.

D. Nevada's Rights Under an Equitable Apportionment by the Court.

Nevada, as *parens patriae*, at the very inception of her intervention in this case premised her right to the beneficial consumptive uses of the waters of the Colorado River flowing within her

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[13]Specifically, e.g., Section 46 of the Omnibus Adjustment Act of 1926, 44 Stat. 649, as amended, 43 U.S.C. Sec. 423e; Reclamation Project Act of 1939, Secs. 9(d) and 9(e), 53 Stat. 1187, 43 U.S.C. 85, as amended, 43 U.S.C. 485L(d).

[14]*Nebraska* v. *Wyoming*, 325 U.S. 589, 640 (1945).

boundaries upon the doctrine of equitable apportionment thereof among sovereign States of the Union as heretofore developed, sanctioned and applied by this Court.[15]

Nevada's position in this respect was outlined in its Opening Statement to the Master (Tr. 16152–16193) and thereafter fully submitted to him in Nevada's Briefs.[16] It may well be that this Court may decide the issues upon the equitable apportionment doctrine, particularly in view of the sovereign status of the parties; if so, every element of equity justifies an apportionment to Nevada at least as large as her contract amount.

California urges that the theory of an equitable apportionment is the proper theory for the disposition of this case. But she then distorts her argument into contending for a pure priority adjudication, even going to the extreme of saying that the word "equitable" as used in the statement is a mere word of art and does not bring into play the fundamental principles of equity as that term is customarily used. (California's Brief, pp. 52–64.)

A reading of the cases in which water has been apportioned among States by this Court indicates an almost diametrically opposite conclusion. It has been made clear in *Nebraska* v. *Wyoming*, 325 U.S. 580, 618, that all of the pertinent facts and circumstances affecting an apportionment must be taken into account. In that particular case, the Court made it clear that it was apportioning only natural flow water, and in that limited field followed substantially the priorities of appropriations in the respective States.

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[15]*Kansas* v. *Colorado*, 206 U.S. 46 (1907), 185 U.S. 146 (1902); *Connecticut* v. *Massachusetts*, 282 U.S. 660 (1931); *New Jersey* v. *New York*, 283 U.S. 336 (1931); *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938); *Nebraska* v. *Wyoming*, 325 U.S. 580 (1945).

[16]Vol. II, Opening Brief, pp. 32–54, Answering Brief, pp. 15–27, Reply Brief, pp. 12–15.

But here, at the very outset, we find an entirely different circumstance. A judicial apportionment in this action must involve the apportionment of stored water. In fact, the principal water to be apportioned is that water stored behind Hoover Dam in Lake Mead and controlled and diverted by the other dams downstream. All of these are structures constructed by the United States and under the management and control of Federal officials. The Project Act authorizing the reservoir which is the source of the stored water which must be apportioned specifically provided that this storage water was to be disposed of by contract and not used by anyone unless the user had a contract. The same Act imposed specific limitations as to the quantities of this stored water which California might use.

Pursuant to this, contracts have been made (a) with the individual California users, (b) with the State of Arizona for a gross amount of 2,800,000 acre feet and with individual users in Arizona for their particular portions of this gross amount, and (c) with the State of Nevada for its 300,000 acre feet.

If the Court should make an equitable apportionment of the waters of the Colorado River, how can it ignore these contracts for stored water? It would seem that they are, of necessity, the basic yardsticks which the Court should use to determine the rights of the respective States as *parens patriae*. California, under any theory, cannot be awarded more than that to which she is entitled under her Limitation Act. The water which she must be awarded is her contract entitlement, subject to that limitation. She cannot be awarded water rights of any greater magnitude nor any other character.

Likewise, in the case of Arizona, if the Court is apportioning the waters of the Colorado River it must assume that Arizona is entitled to use out of Lake Mead the amount of water covered by her contracts with the Secretary. We cannot conceive that it

is the function of the Court in a judicial apportionment suit to either declare a contract such as this invalid, or to frustrate in any way its operation.

The same is true with respect to Nevada and its contracts totaling 300,000 acre feet of beneficial consumptive use out of Lake Mead. Since the Colorado River flows in a very deep and narrow canyon as it leaves Hoover Dam, the possibility of using, by direct diversion from the stream itself, any water in Nevada, other than a very small amount in the Fort Mohave area, is very remote.

The geography of the area and the basic economics dictate that Nevada must take substantially all of its water by pumping from Lake Mead. Even so, it is necessary to lift the water a thousand feet or more. Already, Nevada has constructed at great expense an initial pumping system, and is planning and studying for future development.[17] In apportioning the waters of the stream, the basic fact is that Nevada's water right can be only Lake Mead storage water.

It would seem that in making such a judicial equitable apportionment, the Court could not reduce Nevada's rights under her contracts with the Secretary unless they were found to be unfair or inequitable. There is nothing in this record even remotely hinting that such is the fact. As mentioned in her Opening Brief (p. 32), Nevada is unique among the States of the Lower Colorado River Basin in that there is no other possible source of water for the future development of Southern Nevada than the water from

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[17]Since Nevada filed its Opening Brief, the Bureau of Reclamation has been authorized, and there has been made available to it, a $75,000 appropriation for F.Y. 1962 for a project study to commence July 1, 1961, to pump Lake Mead water to Eldorado Valley, Boulder City and Las Vegas Valley, including Nellis Air Force Base. The study will take three years to complete.

the mainstream of the Colorado. In testing the fairness of her contract rights, the needs of the State should be definitely taken into account. We will not repeat here the detailed discussions of these specific needs. They were set out in the Opening Brief, and particularly Appendix I, pp. 63–105.

For example, if Nevada were prevented from using the water which she is presently diverting from Lake Mead, the effect would be so disastrous as to even result in the forced migration of a part of the present population of the Clark County area. It is only with the knowledge that she will be entitled, from time to time, to increase her withdrawals up to her full contract amount that there can be any hope for an increased population in the area. To fix Nevada's water rights as proposed by California would be to create an absolute strangle hold on the future growth and development of Southern Nevada. Without water from Lake Mead, additional population cannot survive. It is not a question of comparative cost, nor is it in any way theoretical. It is simply the fact that to grow and expand Nevada must be entitled to take this additional contracted water from Lake Mead—its only possible source. No opportunity exists for developing underground water, for there is no more. No opportunity exists for converting salt or brackish water, as there is no such water available.

Certainly these vital factors must be taken into account in making an apportionment to Nevada which will permit a reasonable future growth. 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."

In testing California's demand that she so stop the growth and development of the State of Nevada by taking the water for use in California, we believe that the Court must take into account, along with many other factors, the question of whether or not

California has alternative sources of supply. California claims she is entitled to and must reduce the contract entitlements of Arizona and Nevada so she can take large quantities of water out of the Colorado River Basin into the great urban areas lying along the Pacific Coast. However, at the same time that she is urging this extreme doctrine in this case, at least two events are taking place which indicate there are other sources of water for this California region.

First, there is the great drive (almost a "crash" program) presently under way for the development of an economical process for the conversion of salt water for municipal use. In Nevada's Opening Brief (p. 34) reference is made to existing legislation to promote this program. Since then, legislation is pending, with full administration approval, to expand this program. A brief description of the pending legislation appears in Appendix I, pp. 68–70, *infra*.

The other imminent source of water for the region for which California cries disaster in its Brief is the so-called California Water Plan. There is a great surplus of water in Northern California. It is physically feasible to transport a large amount of this to the very regions in the south which are demanding Colorado River water. The people of California have voted $1,750,000,000 of bonds to finance this project, in accordance with the authorization contained in the "California Water Resources Bond Act," passed by the California Legislature in 1959. Brief reference is made to this legislation in Nevada's Opening Brief (p. 32). There is attached hereto as Appendix II, pp. 71–80, *infra*, a more detailed description of the scope of this legislation and of the facilities authorized to make water available to Southern California.

Along with the other California users the Metropolitan Water District is presently taking all needed water from the Colorado River. Everyone concedes that it will be many years, if ever,

before the Upper Basin develops its use up to the amount permitted by the Compact. Also, because of their size and cost, the projects by which Arizona and Nevada will use their allocations will require a number of years for completion. Because of this delay in uses by other States there will be ample time for the construction of the California Water Plan Project and of any necessary conversion plants, if the remote possibility ever develops that the uses allocated to the other States by the Master's Recommended Decree threaten to injure California. The Master explains why he believes this to be a remote possibility (Report, p. 102). The situations just discussed indicate other reasons why the contingency is extremely remote that there would ever be any disaster to California, or even limitation on her growth, for lack of water.

These are some of the factors this Court should consider in determining whether it would judicially authorize the taking from Nevada and the giving to California of the water covered in Nevada's contracts with the Secretary. Compared with California's total needs, the 180,000 acre feet which California seeks to seize from Nevada is relatively small. But to Nevada, this water is vital; to be deprived of it would indeed be a monumental catastrophe.

Among the provisions of the Recommended Decree are those providing that whenever there is not sufficient water available in any given year to supply the State allocations in full, the water shall be delivered on a pro-rata scale. This is accompanied by the further provision that those rights which could be classified as present perfected rights as of June 25, 1929, be first served, in their order or priority, even to the extent of ignoring State lines. It would seem that in this portion of the Recommended Decree the Master is making a judicial equitable apportionment of the water. Neither the Project Act nor any of the contracts provide for such proration in years of short water supply.

This is a fair and proper exercise of the judicial power. The incorporation of this provision in the Recommended Decree does not in any way infringe on any of the rights which California possessed after the completion of the reservoir. The provision giving protection to present perfected rights would give full protection to the Yuma, Palo Verde and Imperial rights of California. The effect of the proration, if any, upon California would fall upon her later rights, such as that of Metropolitan Water District. This District's Colorado River rights were obtained, and all of their facilities were constructed, with full knowledge of the provisions of the Project Act and the legislative history connected with its passage. Certainly, as sovereign States, Arizona, California and Nevada all stand on a parity, each with the other. The provisions for proration in short water years (especially since the older California uses are protected as present perfected rights) 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.

III

COMMENTS ON CALIFORNIA'S BRIEF

A. Water Rights in Lake Mead.

Basic to the determination of this case is the ascertainment of the precise character, quality and quantity of the water right possessed by the Secretary, acting for the United States, to store water in Lake Mead. And the determination as to what, if any, rights in the river are superior to the right of the Secretary, acting for the United States, in connection with this reservoir. Strangely, the many voluminous briefs filed with the Master, and with this Court, have to date been rather silent on this point.

Obviously, to fill the reservoir the Secretary must have some sort of a water right. Once the gates in the dam were closed and

the storage of water began, then the water naturally flowing in the river at that point came under the control and management of the United States, acting through the Secretary. It changed its character. It became, instead of naturally flowing water, purely simply storage water.

This is not unusual, but on the other hand, a rather common occurrence in all of the arid Western States. We do not believe that it can be denied that in all States applying the appropriation doctrine any one constructing a reservoir must have a legal right to stop the flow of the river, impound it in his reservoir, and convert it into stored water. Of course, only water not already appropriated is ordinarily available for appropriation by the entity constructing the reservoir. By Section 8 of the Reclamation Act of 1902,[18] the Secretary was required to acquire water rights under State law for any projects to be constructed by him, and to recognize existing rights under State law in connection with projects constructed under the Reclamation Law. It has been the universal rule of the Secretary to do so in all projects in the United States *except* in the case of Hoover Dam and Lake Mead. *United States* v. *Gerlach Livestock Co.*, 339 U.S. 725, 740, 759–760 (1950).

Here, the Project Act authorized the construction by the Secretary of a reservoir of a capacity of not less than 20 million acre feet of water—equal to more than the usual annual flow of the Colorado River at that point. Such a reservoir could only be filled by preempting the flow of the Colorado River. That is exactly what has happened since the completion of Hoover Dam.

The Colorado River is admittedly a navigable stream. The Master pointed out (Report, p. 163) that the Congress stated in both Sections 1 and 6 of the Project Act that the improvement of navigation was enumerated as the first purpose of the dam and

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[18]32 Stat. 390, 43 U.S.C. 372, 383.

reservoir. Under the numerous and clearly applicable decisions of this Court under this set of circumstances the Secretary had the legal right to take into his possession sufficient flow of the river to create the planned storage. *Arizona* v. *California*, 283 U.S. 423 (1931); *United States* v. *Twin City Power Co.*, 350 U.S. 222 (1955); *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53 (1912); *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 890 (1899); *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 426 (1940). And had the right to control the allocation and use of the water so impounded. *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 295 (1958); *United States* v. *Gerlach Livestock Co.*, 339 U.S. 725 (1950).

The history of the last 30 years has indicated that even though the Secretary has taken control of all water reaching Lake Mead, still he has not been able to accumulate adequate storage for all needs.

Again, reverting to the usual reservoir project constructed under general Reclamation Law, the stored water made available by the dams and reservoirs have been in every instance allotted to the water users, either directly or through their representatives (such as irrigation districts or water users' associations) by contract. This is made clear by the Court in *Nebraska* v. *Wyoming*, 325 U.S. 589, 640, where this Court stated:

> "All of the storage water is disposed of under contracts with project users and Warren Act Canals. It appears that under that system of administration of storage water no state and no water users within a state are entitled to the use of storage facilities or storage water unless they contract for the use."

These contracts provide the amounts of water to be delivered, the terms and conditions of delivery, payments, and other necessary details. In other words, once stored, the water has changed its character from normal flow, flowing in a stream available for

use by priorities, into a different character of water, namely, stored water available for use and delivery only by contracts with the United States, acting through the Secretary. In every instance, it has been the universal custom that the 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.

There is nothing in the Project Act to indicate that Congress planned any other or different program with respect to the storage to be provided on the Colorado River. On the contrary, there is much to indicate that the Congress planned to follow exactly the historical pattern. It was provided in the first section that among the purposes of the reservoir was that of ". . . providing for storage and future delivery of the stored waters thereof . . ." In Section 5, the Secretary was authorized ". . . to contract for the storage of water in said reservoir and for the delivery thereof . . .;" that the "contracts representing water for irrigation and domestic uses shall be for permanent service . . ." And finally, as has been emphasized by the Master in his Report:

> "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."

Section 14 also provides:

> "This Act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided."

Assessing this whole situation in the light of the historical pattern of the creation of reservoir water rights and the paramount and superior rights of the Federal Government under the navigation servitude on navigable streams, and the pertinent language in the Project Act, there can be no escape from the fact that: (1) The Secretary acquired a prior and superior right to all the waters

of the Colorado River for storage in Lake Mead, (2) that as a matter of law, this right was superior to the claim of any other rights on the river, even those preexisting,[19] and (3) that the water stored in the reservoir was thereafter available only to those having contracts with the Secretary therefor and subject to the terms and conditions of those contracts. The rights of California which she claims have been invaded or destroyed by the Master's Recommended Decree are contract rights for stored water and nothing more. As such, they are subject to all of the conditions and limitations of contracts made in accordance with the Project Act.

B. What Happened to the California Rights When Hoover Dam Was Constructed?

If we assume that as a result of the construction of the Congressionally authorized Hoover Dam, which had among its stated purposes that of the improvement of navigation, the Secretary acquired a right to store water sufficient to fill the reservoir, what happened with respect to the then existing California uses? If we accept this assumption, and if the Secretary required the entire flow of the river to fill the storage space he had created, then he had a right to take all the flow, regardless of any then existing prior uses.

The uses in California for which she claims priority, and whose priority is asserted to be destroyed by the provisions of the Recommended Decree should be separately analyzed for clarity in thinking.

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[19]While Section 6 of the Project Act provides for the satisfaction of "present perfected rights" these rights are to be satisfied out of *storage* created by Hoover Dam and not from the *natural flow*. There is nothing in any of the California water delivery contracts which recognizes and preserves any *natural flow* rights. After storage was created by the construction of Hoover Dam normal flow rights as such ceased to exist.

California's oldest uses are those of the Palo Verde Valley totaling 120,560 acre feet[20] and of the Yuma Project, Bard District, amounting to 17,000 acre feet.[21] These uses of the natural flow of the river were always good in that the flow never dropped too low to supply them. They are given the first priorities in California's Seven-Party Agreement. They are in no danger of being diminished by any conceivable application of the Master's Recommended Decree. Not even California contends that these rights could be adversely affected. So that, in that respect, these particular California rights will not be affected one way or the other by the present proceedings.

The Yuma Project, a Federally constructed project, was a project under the control and supervision of the Secretary. There were existing individual water contracts whereby the Secretary had agreed to deliver water to the users on the so-called non-reservation portion of the project. The reservation division, being Indian lands, would be entitled to be supplied by the Secretary with the priority established under the so-called Winters' Doctrine (*Winters* v. *United States*, 207 U.S. 564 (1908)).

The right of the Palo Verde Irrigation District would probably not have any ground upon which to claim a priority over the right of the Secretary to store water in Lake Mead. However, an exact classification or definition of this right does not seem necessary in the disposition of this case because the Secretary has entered into a contract with this District for the full amount of its claim[22] and this contract includes, as do all of the

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[20]Calif. Exs. 352 and 356; Appendix III, Nevada's Opening Brief, p. 110.

[21]Calif. Exs. 375 and 376, Appendix III, Nevada's Opening Brief, p. 110.

[22]Appendix 8, Report, p. 423.

California water delivery contracts, the intra-state priorities provided by the Seven-Party Agreement entered among the California claimants. By this agreement, Palo Verde Irrigation District is given the first claim to waters available to the State of California. There is not an iota of evidence in the record to indicate that either the right of the Palo Verde Irrigation District or that of the Yuma Project would ever be in any way diminished. In other words, there is no evidence of any stream flow so low but that these two uses would be fully supplied under any conceivable situation that might arise as a result of the Master's Recommended Decree.

There next comes the claim of the Imperial Irrigation District. There had been a use on this project of up to 2,807,000 acre feet by June 25, 1929.[23] By the Seven-Party Agreement, this project has a third priority among California claimants, and is a part of a total of 3,850,000 acre feet allotted collectively for irrigation uses as a first intra-state priority to the Palo Verde Irrigation District, the Bureau of Reclamation's Yuma Project and the Imperial Irrigation District. There is no more reason to believe that this project could have any priority as against the Secretary acting under the navigation power of the United States than in the case of the Palo Verde Irrigation District.

Many pages of the record herein describe the troubles and the vicissitudes which had long affected this water use. Several different diversion points had been tried, one after the other, to accomplish diversions. The Colorado River had, in one flood period, changed its course so that it flowed through the diversion canal and into the Salton Sea. This continued for several years,

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[23]Calif. Exs. 270 and 273; Appendix III, Nevada's Opening Brief, p. 110.

and it was only after the expenditure of great sums of money that the river was turned back into its original channel. The threat of a repetition of this event hung over the Imperial Valley at all times.

In other years of low water there was insufficient flow in the river to fully supply the needs of the valley, particularly in the summer months. Great damage resulted from water shortage.

The waters of the Colorado River at this point were heavily laden with silt which caused tremendous difficulties at the diversion works and, at times, hindered or prevented the diversions.

So that, all factors considered, this use, prior to the construction of Hoover Dam, was a highly precarious one. If California could convert this to a contract right to take storage water out of a large reservoir, which reservoir would likewise control the flood and silting conditions, she had everything to gain and nothing to lose.

But even more important is the fact that the Project Act itself completely altered the situation with respect to the Imperial Irrigation District. As an integral part of the authorized project, the Secretary was authorized to construct a main canal located entirely within the United States connecting the Laguna Dam (a structure owned by the United States), or such other suitable diversion dam as the Secretary might select, for the Imperial and Coachella Valleys in California. It is further provided in Section 4(b) that before money was appropriated for, or construction work done upon the facilities for conveying water to the Imperial Valley there must be a contract insuring repayment of all costs in the manner provided in the Reclamation Law. Along with the construction of Hoover Dam, the Secretary constructed a new diversion dam (Imperial Dam) on the Colorado River, and the main canal and appurtenant structures leading therefrom

to the Imperial and Coachella Valleys. Subsequently, a contract was entered into[24] between the Secretary and Imperial Irrigation District for the delivery of water stored in Lake Mead through such works and for the repayment of the cost of construction of such works. Storage water has been supplied to the Imperial Irrigation District and Coachella Valley County Water District and delivered through such Federally constructed works constantly since their completion.

It would seem that as a result of the applicable legal principles, the construction of these works by the United States and the existing contracts, that the water rights of the Imperial Irrigation District are, and have been ever since the construction of the Hoover Dam, vastly different than they were prior to the passage of the Project Act. Of necessity, their water right, if one they had, also changed from a claim on the normal flow of the river to a supply from storage created and operated by the United States. It had become a supply provided for and regulated by a contract with the Secretary. The point of diversion from the river had been changed. Parenthetically it might be noted that there is no evidence indicating the State authorized a change in point of diversion as provided in State law, as would have been the required procedure if Imperial Valley were relying on old normal flow rights. The delivery is now through the All-American Canal instead of the District receiving back from Mexico the unused residue of the amounts previously diverted into and transported through Mexico. Because of these factors the Imperial Irrigation District presently has a vastly different type and character of water right and, in fact, a much more valuable one.

As a result of what might be generally described as these great

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[24]Special Master's Ex. No. 4, Hoover Dam Documents, p. A595.

Federal subsidies, the Imperial Irrigation District was freed from the ever-present threats of destruction by flood and silting, from the danger of large Mexican diversions, or interference over which it could have no control, while the water was flowing through Mexico, and from the danger of late summer shortages of supply in low water years. More than any other entity, the Imperial Irrigation District profited as a result of the Federal expenditures in the construction of the great storage and regulating reservoir at Lake Mead, the Imperial Dam and the All-American Canal. The water rights resulting from this tremendous expenditure being evidenced by contract, the Imperial Irrigation District is not now in a legal position to object to a finding that its rights are contract rights and are a part of a statutory and contractual allocation. The doctrine stated in *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 295, is clearly applicable here.

A conclusion that the rights of the California users mentioned above, being all who were actually diverting and using water at the time the Project Act became effective, are now contract rights, is entirely in conformity with the provisions of Article VIII of the Compact wherein it was provided that, after storage equivalent to 5 million acre feet or more had been provided from the Colorado River in the Lower Basin, the claims by appropriators or users of water in the Lower Basin should attach to the stored water. The whole pattern of the Project Act providing for the storage of water by the Secretary and the delivery of the same pursuant to contracts is in accord with an interpretation of Article VIII of the Compact as meaning that thereafter the rights in the lower Colorado River would be evidenced by contracts for stored water, and not otherwise.

All of these rights being rights 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. It is true that the California users had agreed among themselves as to an intra-state priority. But there has been no agreement by the States of Arizona or Nevada, or the users therein, as to any priority on the part of California.

The fact that the Master recommended the protection of present perfected rights as prior rights seems to Nevada to go even further in protecting the California rights than he was entitled to go. It would seem that the only protection given to present perfected rights was that given by the Compact, and the Compact applies only as between the Upper and Lower Basins. But in any event, with the protection given by the Recommended Decree to present perfected rights as between the States of the Lower Basin, the California users are given the maximum of protection. The Master's provision for a pro-rata division of the water in short years does not trespass upon any legal rights that any of the California users might have.

The foregoing discussion applies particularly to the rights which might be claimed to have been present perfected rights as defined in the Compact. The right of the Metropolitan Water District is given a later priority than those heretofore mentioned by the Seven-Party Agreement. It is the right which, according to California's Brief herein (pp. 266–277), would suffer the greatest in years of water shortage under the Master's Recommended Decree. But certainly it is not a right which is entitled to claim any priority interstate as against contract rights created by the Secretary with Arizona or Nevada. The Metropolitan Water District water right could not conceivably have been a present perfected right at the time either of the execution of the Compact or at the effective date of the Project Act. It was a claimed right of the exact type which the Compact negotiators had been

attempting to prevent from establishing priority. A determination was finally made as to the points of diversion from the Colorado River and of the location of the aqueduct from the river over the mountains to the coastal regions at some date later than June 25, 1929, according to California's Brief (pp. 125–126). The first contract with Metropolitan Water District was dated April 24, 1930.[25]

In any event, the Metropolitan's right is purely a contract right depending upon the contract between it and the Secretary. The diversion is made from Parker Dam, a structure constructed by and controlled by the Secretary. The water supply is out of the stored water of Lake Mead and not elsewhere. The supply has all of the characteristics of true stored water in that Metropolitan Water District is given the right to accumulate unused water for later use. There is nothing in the Project Act, or in the pattern of water law, or the long continuing practices of the Bureau of Reclamation, that would give the Metropolitan Water District contract any priority over other secretarial contracts with users in the States of Arizona or Nevada. We mention again the universal rule that contracts for storage water out of any given reservoir stand on a parity.

It would certainly be absurd to state that the Metropolitan Water District, which is relegated to a low priority intra-state among the California users, should have some sort of high priority as against Arizona and Nevada users. But, that is exactly the position taken by California in her violent protestation against the Master's decision as he found (a) that the Metropolitan right did not fit within the definition of present perfected rights, and (b) that there should be proration of shortages in low water years.

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[25]Special Master's Ex. No. 4, Hoover Dam Documents, p. A499.

C. California's Repetitious Combination of Equitable Apportionment and Priority of Appropriation Invalid.

Another fundamental vice in the California argument is indicated by the strange and artificial phrase, endlessly repeated, that the foundation of her water rights is "equitable apportionment and priority of appropriation." Such a combination doctrine is utterly unknown in Western water law. Dividing the phrase into its two component parts, it is apparent that it is inconsistent on its face. The doctrine of appropriation as it grew up in the Western States, or the proposition that, as to water rights, the first in time is the first in right is, of course, so well defined and generally accepted as to be practically the "a, b, c," of Western water law. As mentioned by this Court,[26] and the Courts of practically every Western State, the doctrine of appropriation developed from the customs and usage of those who settled the arid west, first the miners and then the irrigators.

None of those people who thus, by their actions and customs, created the law of priority of appropriation ever heard, or even thought, of any doctrine of "equitable apportionment." In fact, the fundamental theory of the doctrine of priority of appropriation is the very antithesis of equitable apportionment. Under the appropriation doctrine, each user acquired the right to use and did use, when needed, all of the water necessary to fill his particular water right. He didn't share or apportion his water with anyone—equitably or otherwise. Of course this doctrine grew up on specific streams and in its adoption by the several States was only thought of as applying intra-state and in determining priorities of rights on specific streams or specific stream systems.

The principle of equitable apportionment, on the other hand,

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[26] *Wyoming* v. *Colorado*, 259 U.S. 419, 459 (1922).

is purely a creation of the so-called interstate-international law evolved in determining disputes between the sovereign States.[27] It did not arise from any custom or usages of miners or irrigators, or any other users. Nor does it in any way depend upon any first in time, first in right priorities for its existence or even its application.

True, this Court, in determining certain controversies over the division of the natural flow of interstate streams between states, each of whom have applied the appropriation doctrine intra-state, has considered these priorities in making an equitable apportionment. But each time this Court has been very careful to state that these priorities created under State law are given effect across State lines only as one element of equitable apportionment, and has made it very clear that they are not always controlling, and, as a matter of fact, in the actual decisions, they have not always been accepted as completely controlling. A portion of the many and diverse factors to be taken into consideration in an equitable apportionment suit are enumerated in *Nebraska* v. *Wyoming*, 325 U.S. 580, 618, along with the statement that the list is not complete or exhaustive. This Court said:

> "That does not mean that there must be a literal application of the priority rule. We stated in *Colorado* v. *Kansas*, *supra*, that in determining whether one State is 'using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one State or the other must be weighed as of the date when the controversy is mooted.' 320 U.S. p. 394. That case did not involve a controversy between two appropriation States. But if an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible. For example, the economy of a region

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[27] *Kansas* v. *Colorado*, 185 U.S. 125, 146–147 (1902).

> may have been established on the basis of junior appropriations. So far as possible those established uses should be protected through strict application of the priority rule might jeopardize them. Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made."

The oft-repeated statement throughout the California Brief that they have "rights under equitable apportionment and the appropriation doctrine" are complete misnomers, are of no value and tend only to mislead. If the California water users acquired any priorities intra-state, they acquired them as appropriators, and not otherwise. To what extent they may be increased, diminished, or altered, by the application of the doctrine of equitable apportionment will result, if at all, for the first time from the determination of this action.

Accordingly, clarity of thinking requires rejection of the phrase "equitable apportionment" in assessing the amount and character of the California rights at the time of the passage of the Project Act, and the extent and character of those rights as they now exist, after the construction of Hoover Dam and all of the other structures by which the United States has taken physical control of all of the waters of the main Colorado River from Lake Mead to the Mexican Boundary.

D. "Present Perfected Rights," a Unique Descriptive Phrase, is Strongly Applied in California's Favor.

Those who drafted the Compact used a very precise and unusual definition of the rights which were to be unimpaired thereby. In Article VIII, first sentence, it is stated:

> "Present perfected right to the beneficial use of waters of the Colorado River System are unimpaired by this compact."

This is a definition unique in water law. It is not one that has been customarily used in referring to water rights of any kind or variety. It must be assumed that in using this unique language, the authors of the Compact had a definite and precise purpose in mind. Elsewhere (even, in fact, in the succeeding sentence) reference is made to the rights of "appropriators" or "users." So that where the reference was to present perfected rights, a very clear and distinct description, we think that the meaning must be that which was ascribed to it by the Master in his Report (pp. 307–308). In other words, it did not cover claims which were only, in effect, paper rights. That is, where initial steps had been taken under State law to make appropriations, but which were so new that the works had not been completed and no water had been applied to beneficial consumptive use. Nor did it cover unused portions of large claimed rights, a part only of which actually had been applied to a beneficial consumptive use, such as was the case of the Imperial Valley claim.

So far as the Compact is concerned, there was not being guaranteed to California any greater water use than the total of three then existing uses. It can, of course, be argued as to whether California users had *any* rights in the waters of this navigable stream as against the United States as mentioned, *supra*, p. 33. It can also be argued, as was done strenuously by Arizona in the early phases of this case, as to the real extent and validity of the Imperial Valley rights under the physical conditions then

existing. That is, where the actual diversions of the Colorado River were taken into Mexico, a considerable amount of the water was used in that foreign nation, and then a part returned northerly across the border into the Imperial Valley.

But in any event, ignoring any and all questions as to their validity, the total of these rights, i.e., 2,944,560 acre feet is the *most* that California could claim as a then existing priority.

It should be noted that there is no indication that the amount of these then existing rights would be affected by the Master's Recommended Decree. In other words, the allegedly "prior" rights which California insists will be destroyed are rights other than those actually in being at the time of the execution of the Compact.

In the interim, between the execution of the Compact in 1922 and its effective date, June 25, 1929, first steps were taken toward making an appropriation of water for use by the Metropolitan Water District, consisting purely of primary surveys and of an initial paper appropriation under California law. At the time that the Project Act was passed, neither the right of the Metropolitan Water District, nor any other subsequent claims for California uses, were anything more than paper filings. No construction work was started on the Metropolitan Water District right until after the effective date of the Project Act. In fact, California argues in its Brief (pp. 125–126) that as late as 1930 consideration was still being given to a proposal to divert the Metropolitan Water District from a point on Lake Mead above Hoover Dam. The actual diversion point eventually chosen was at Parker Dam, many miles downstream from the Hoover Dam. In other words, the California argument concedes that, until a time subsequent to the effective date of the Project Act, the point of diversion and plan of conveyance for the Metropolitan Water District was still an uncertainty.

It has always been the position of the State of Nevada that the present perfected rights protected by the Compact were those in existence at the date of its execution. Obviously, these could be the only rights of which the negotiators of the Compact would have knowledge. It seems absurd to believe that they would be attempting to guarantee rights which might have later inception. The very purpose of the Compact was to protect the more slowly developing States against "grabs" of water by the rapidly developing States.

If the rights which are protected by the Compact and the Project Act are those "present perfected" as of the date of its execution on November 24, 1922, California had no other rights than those for Palo Verde, the Yuma Project and the then existing uses in the Imperial Irrigation District. The Master was of the opinion that the Compact could speak only of its effective date and that, since this was June 25, 1929, when President Hoover issued his proclamation, the present perfected rights are those existing on that date. As against California's claim, it would seem that this variation between 1922 and 1929 is not important. As above mentioned, no California rights had been created in that interim period except by initial paper filings. There were no additional or new actual uses which could come within the definition of present perfected rights. The claims of the Metropolitan Water District were still very definitely inchoate and unperfected.

Of course, this situation is the background which compelled California to argue (California's Brief, pp. 38, 57–58) concerning the doctrine of relation under which, in the Western States, it has been provided, either by statute or custom, that after a water right was initiated, its priority date relates back to the date of such initiation if the work of completing it has been diligently pursued to completion and application of the water to beneficial use. But that rule is wholly irrelevant here, where the specific description of present perfected rights was used in lieu of the

description of "appropriations" or "appropriators." The words are clear, precise and unambiguous and when that is accepted, much of the ambiguity and confusion ascribed to the Master's Report by California completely disappears.

E. A Finding as to Dependable Water Supply is Not Necessary and, in Fact, Cannot be Made.

California devotes a large portion of her Opening Brief (Part Five, pp. 232–277) to an argument which might be briefly summarized as a contention that unless there is a determination of the dependable water supply of the Colorado River there is no justiciable controversy. Nevada urges that this entire argument is fallacious from a number of points of view. As pointed out foregoing, the real *res* of this action is the body of stored water in Lake Mead. This water resulting from the construction by the United States of a great dam under the management and control of the Secretary has been contracted to various entities as has been described in detail.

For decades a controversy has raged, particularly between Arizona and California, as to the meaning, effect and validity of these contracts; and particularly as to their place in the distribution of Colorado River water among the three States of the Lower Basin. This is the justiciable controversy long recognized by all.

It does not in any way depend upon a finding as to the dependable supply. The controversy is there, regardless of the extent of the supply. And, as the Master pointed out, this expanding great Southwest area cannot progress unless the rights of the parties are determined.

As to the possibility of making a finding such as that requested by California, it would seem that obstacles are insurmountable. Nevada, confronted with the fact that both Arizona and California had introduced much evidence on water supply, endeavored

with the assistance of expert engineers to present some findings on this facet of the case in her Briefs before the Master.[28] The only conclusion that she could then reach was that a finding could be made prorating among the States six million acre feet so that California would get 4,400,000 acre feet of that water, and then in turn prorating the balance. The Master has arrived at a different but a quite similar conclusion.

His determination that the contract rights of the State are valid, that in times of shortage the supply will be prorated and that present perfected rights will be protected even across State lines is a very fair and reasonable solution of the problem. There are many reasons why a determination of the dependable supply cannot be made. No one can determine the future Upper Basin uses. The exact method of computing the contributions of the various States to the Mexican Treaty deliveries cannot be determined in absence of the Upper Basin States. The water supply record is for a very short period, having in mind the problem, and much of it undependable. The situation is entirely different from that confronting engineers desiring to make a water supply study for a proposed project. For there calculated risks can be taken. But any finding here which would endeavor to determine a water supply in perpetuity would be an impossible task. Any and all studies are just as good as the assumptions upon which they are based. And a determination of the proper assumptions to make for such a study, and their validity, would involve the Court in an endless task. We submit that the Master was correct in not attempting any such finding and that such a finding is entirely unnecessary.

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[28]Proposed Finding of Fact and Conclusions of Law, Vol. I, pp. 63–79, Brief, Vol. II, pp. 129–162, Answering Brief, pp. 70–81.

IV

COMMENTS ON UNITED STATES' BRIEF

In Exceptions I and II (United States Brief, Points I and II, pp. 7–21), the United States takes the position that the Secretary is authorized to make deductions for upstream tributary uses in Arizona and Nevada from the amounts to which these States are entitled to have delivered from storage in Lake Mead under their water service contracts with the United States.

More specifically, the United States takes the position that the Master's determination is erroneous in holding that the provisions of Article 7(d) of the Arizona contract[29] and the provision in Article 5(a) of the amended Nevada contract,[30] which charges tributary use in these states against the contract amounts to be delivered from storage in Lake Mead, are in violation of the Project Act and unenforceable.

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[29]Article 7(d) provides: The obligation to deliver water at or below Boulder Dam shall be diminished to the extent that consumptive uses now or hereafter existing in Arizona above Lake Mead diminish the flow into Lake Mead, and such obligation shall be subject to such reduction on account of evaporation, reservoir and river losses, as may be required to render this contract in conformity with said compact and said act.

[30]Article 5(a) provides: Subject to the availability thereof for use in Nevada under the provisions of the Colorado River Compact and the Boulder Canyon Project Act, the United States shall, from storage in Lake Mead, deliver to the State each year at a point or points to be selected by the State and approved by the Secretary, so much water, including all other waters diverted for use within the State of Nevada from the Colorado River system, as may be necessary to supply the State a total quantity not to exceed Three Hundred Thousand (300,000) acre-feet each calendar year. Said water may be used only within the State of Nevada, exclusively for irrigation, household, stock, municipal, mining, milling, industrial and other like purposes, but shall not be used for the generation of electric power.

The Master states three principal reasons why Article 7(d) of the Arizona contract and that provision in Article 5(a) of the amended Nevada contract charging tributary uses are in violation of the Project Act and are unenforceable (Report, p. 237):

(1) Since Section 5 of the Project Act[31] requires contracts for permanent service, the contract provisions referred to above would be in violation of this Section.

To illustrate, the Master uses as an example: Assume that annual delivery from Lake Mead aggregated the full contract allotment of 300,000 acre feet. If, thereafter, a consumptive use from the Virgin River System reduced the inflow into Lake Mead by 50,000 acre feet, the Secretary's obligation under the Nevada contract would be reduced by this amount. This would result in cancellation of deliveries to the junior-most Nevada users who had been receiving the last 50,000 acre feet under the contract. For these junior Nevada users, as the Master correctly points out, the contract cannot be regarded as one for permanent service and therefore it is violative of Section 5 of the Project Act.

The Master also points out (Report, pp. 239–240) that these provisions charging Arizona and Nevada for tributary uses above Lake Mead would "generate new causes of uncertainty . . ."; that the provisions charging Arizona and Nevada for depletions above Lake Mead "created this very uncertainty of supply that

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[31]The pertinent portions of Section 5 are: 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, * * *. 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.

Hoover Dam and the Section 5 command were explicitly designed to avoid."

The Master finally points out (p. 240) that since Section 5 admittedly deals only with the mainstream, it must have intended to require permanent service in regard to mainstream deliveries regardless of consumption on the tributaries.

The United States argues that there is no inconsistency between these provisions and the "permanent service" requirement of Section 5 of the Project Act (p. 15, United States' Brief). The United States argues, using the Master's example, that if the use of the contract right for 300,000 acre feet preceded in time the upstream appropriations "there would not be permitted any diversion upstream that would interfere with the senior contract use, and thus there would be no occasion for any reduction of delivery under the contracts and no impairment of their permanence. The flaw in the United States' answer is that it completely overlooks the fact that the Secretary admittedly has no control over consumptive uses on the Virgin River or any other tributaries in Nevada, and has no control whatsoever on whether uses on the Virgin River System under State law shall be permitted or not permitted.

(2) The Master also points out (Report, p. 240) that these contract provisions also violate Section 18 of the Project Act[32] which provides in effect that State law shall govern water rights and priorities intra-state.

Using the same example regarding use on the Virgin River

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[32]Section 18 provides: 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.

under the law of prior appropriations, the project would be junior to all users of the 300,000 acre feet. But the contract provisions, if enforced, would reverse this order of priority. The users of the last 50,000 acre feet of mainstream water under the Nevada contract would be deprived of water, while the Virgin River users would continue, despite the fact that the tributary users under State law were junior to the mainstream users. This, obviously, would be a flagrant violation of Section 18. The Master correctly points out that the Secretary has attempted, by the provisions in these contracts, to intervene within the States of Nevada and Arizona to dictate who shall receive water and in what order of priority. Moreover, in this attempt, as he points out, the Secretary has adopted a rule of priority exactly the reverse of the State rules; the contract provisions would displace senior downstream users for the benefit of junior upstream users.

The answer the United States makes (p. 18, United States' Brief) is to repeat that junior upstream diversions would not be permitted if 300,000 acre feet of Lake Mead was being used; a matter, we repeat, over which the Secretary has absolutely no control.

(3) In addition to violating Sections 5 and 18 of the Project Act, the Master cites a third reason why these contract provisions are invalid and unenforceable. Articles 7(d) and 5(a) are inconsistent with the Section 4(a) limitation on California's use of mainstream water, and would result in an allocation out of harmony with the California limitation, and, indeed, would defeat the basic purpose of the delivery contracts themselves (p. 241). How this would operate is explained fully in the Master's Report (pp. 241–247), and will not be repeated here. This is demonstrated clearly by another example used by the Master. He said (p. 242):

"The resulting incomplete allocation may be demonstrated

by the following example: Assume that the Secretary decided to release in a particular year enough mainstream water to permit consumption of 7.7 million acre-feet in the three states. Assume, also, that Arizona's diversions from the Little Colorado River depleted the flow into Lake Mead by .1 million acre-feet. Under the interstate apportionment established by the Section 4(a) limitation on California and the delivery contracts with Arizona and Nevada, of the first 7.5 million acre-feet of mainstream consumption, Arizona would be allocated 2.8 million acre-feet, California 4.4, and Nevada .3. Of the .2 million acre-feet constituting surplus, Arizona and California would be each allocated one-half. Thus to California would be apportioned a total consumption of 4.5 million acre-feet for the year in question. She could not consume more than this amount because of the Section 4(a) limitation, which is based on mainstream considerations only. To Nevada would be apportioned a total consumption of .3 million acre-feet, and she could not utilize more than this since that constitutes her full contractual allotment. To Arizona would be apportioned a total consumption of 2.9 million acre-feet. But if Article 7(d) of her contract were applied in this situation, the Secretary's delivery obligation of 2.9 million acre-feet would be reduced by the amount of the depletion of the flow into Lake Mead, and Arizona could consume only a total of 2.8 million acre-feet from the mainstream. Thus, although 7.7 million acre-feet were released for consumption within the three states for the year, only 7.6 million acre-feet could be utilized under the statutory and contractual limitations. 100,000 acre-feet of water released for consumption could not be used."

The United States makes no reply; it merely states that it does not agree with this conclusion. It suggests that the 100,000 acre feet of Little Colorado River depletion is a part of the total mainstream supply for allocation. The frailty of the suggestion of the United States is that it would do violence to the interpretation of Section 4(a) adopted by the Master, the interpretation

to which the United States itself agrees. The Master's interpretation of Section 4(a) limits California to 4.4 million acre feet, plus one-half the surplus from the *mainstream*. The Master's interpretation establishes a mainstream, not a system-wise method of accounting. The suggestion of the United States would import tributaries or system water into the Section 4(a) limitation. Articles 7(d) and 5(a) would defeat this mainstream allocation otherwise completely provided for in the contracts by introducing system considerations in a mainstream apportionment. These provisions are not in harmony with a mainstream apportionment and, as the Master points out, would leave some mainstream water undisposed of.

Essentially, the answer comes down to this: Was the Master correct in holding that Congress intended by Section 4(a) of the Project to confine mainstream water to water stored in Lake Mead and flowing in the mainstream below Hoover Dam, and that California is limited to 4,400,000 acre feet of the first 7,500,000 acre feet of mainstream water. If the Master was correct, it inevitably follows that he was correct in excluding tributary uses above Lake Mead.

Nevada respectfully submits that there is nothing in the Brief of the United States which seriously challenges the soundness and correctness of the Master's decision.

In addition, there are reasons other than those relied upon by the Master why his decision that Article 7(d) of the Arizona contract and the provision in Article 5(a) of the Nevada contract charging tributary uses are unenforceable, is proper and sound.

The legislative history of Section 4(a) of the Project Act demonstrated clearly that Congress intended that Nevada should have 300,000 acre feet of consumptive use of the mainstream. There is nothing in the legislative history even remotely suggesting that this amount should be reduced by tributary uses in Nevada above Lake Mead.

The legislative history of Section 4, which is reviewed by the Master in establishing that Congress intended that the first 7,500,000 acre feet to be allocated to the three Lower Basin States was mainstream water (Report, pp. 173–185), makes it abundantly clear also that the 300,000 acre feet to be allocated to Nevada from the mainstream was not to be diminished by any tributary uses in Nevada. In reviewing the legislative history, the Master said (Report, p. 174):

> "Certainly Congress intended that the water, to a portion of which California was limited by Section 4(a), would be mainstream water only. The very language of the Section—it refers to the Colorado River and not to the System—points in this direction. But more important, the second paragraph of Section 4(a) demonstrates that Congress considered the limitation on California to be part of an overall allocation of the entire quantity of water dealt with in that Section among three states only: of the first 7.5 million acre-feet—4.4 to California, 2.8 to Arizona, and .3 to Nevada; the balance to California and Arizona equally. This intention is clearly stated in the legislative history."

Senator Pittman of Nevada made it perfectly clear that Section 4(a) of the Project Act was designed by Congress to apply only to the mainstream, and that Nevada's share of that water from the mainstream was 300,000 acre feet.

> "The Senate has already determined upon the division of water between those States. How? It has been determined how much water California may use, and the rest of it is subject to use by Nevada and Arizona. Nevada has already admitted that it can use only . . . 300,000 acre-feet. That leaves the rest of it to Arizona. As the bill now stands it is just as much divided as if they had mentioned Arizona and Nevada and the amounts they are to get . . ."[33]

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[33]70 Cong. Rec. 468 (1928), Ariz. Legis. Hist. p. 80.

This statement by Senator Pittman obviously reflected the understanding of Congress that of the first 7,500,000 acre feet of water in the mainstream, California would be entitled to 4,400,000, Arizona 2,800,000, and Nevada 300,000. Senator Pittman confirmed this when he concluded that:

> "Arizona today has practically allocated to it 2,800,000 acre feet of water in the main Colorado River."[34]

This is confirmed also by the recommendations of the Governors' Conference in 1927. Its proposed settlement was considered at length by the Senate in the debate on the fourth Swing-Johnson bill.

The Governors of the seven Colorado River States met in 1927 in an attempt to bring about the seven-state ratification of the Colorado River Compact. The Governors of the Upper Division recommended by a resolution adopted by them at that conference that out of the average annual delivery of water to be provided by those States at Lee Ferry under the Compact, there would be apportioned to Nevada 300,000 acre feet, to Arizona 3,000,000 and to California 4,200,000 acre feet. They further recommended that each Lower Basin State should have exclusive use of all water of the Colorado River tributaries within its boundaries above the place where that water emptied into the mainstream.[35] The division finally patterned upon by the Congress was that recommended by the Governors' Conference, except that California was raised to 4,400,000 acre feet and Arizona was reduced to 2,800,000 acre feet.

With respect to the Governors' Conference recommendation, as to tributary uses, Senator Hayden commented (80 Cong. Rec. 171):

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[34]70 Cong. Rec. 469 (1928), Ariz. Legis. Hist. p. 82.

[35]70 Cong. Rec. 172, Ariz. Legis. Hist. 33–34. 69 Cong. Rec. 10259, Ariz. Legis. Hist. 14.

"The governors at Denver went on further and stated, in addition:

2. To Arizona, in addition to water apportioned in subdivision (b), 1,000,000 acre-feet of water to be supplied from the tributaries of the Colorado River flowing in said State, and to be diverted from said tributaries before the same empty into the main stream. Said 1,000,000 acre-feet shall not be subject to diminution by reason of any treaty with the States of Mexico, except in such proportion as the said 1,000,000 acre-feet shall bear to the entire apportionment in (1) and (2) of 8,500,000 acre-feet.

3. As to all water of the tributaries of the Colorado River emptying into the river below Lees Ferry not apportioned in paragraph (2) each of the states of the lower basin shall have the exclusive beneficial consumptive use of such tributaries within its boundaries before the same empty into the main stream, provided, the apportionment of the waters of such tributaries situated in more than one State shall be left to adjudication or apportionment between said States in such manner as may be determined upon by the States affected thereby.

That last provision referred particularly to the Virgin River, which was partly in Utah, partly in Arizona, and partly in Nevada, the only important tributary that is a stream of interstate character."

The foregoing is further affirmative evidence that tributaries uses in Nevada above Lake Mead are not to be deducted from the 300,000 acre feet allocated to Nevada from the mainstream.

We repeat, a careful study of the legislative history of Section 4(a) does not disclose even the most remote suggestion that Nevada's share of 300,000 acre feet from the mainstream should be reduced by tributary uses in Nevada.

Another reason was advanced in Nevada's Briefs before the Master (Reply Brief, pp. 10–11 and also in Nevada's Opening Brief herein, p. 48), why the provision in Article 5(a) of the

amended Nevada contract charging tributary uses is invalid and unenforceable. There is nothing in the Project Act that authorized, directed or permitted the Secretary to limit Nevada's allocation of water from Lake Mead by deducting therefrom tributary uses in Nevada. Nor could any act of any Nevada official in signing such a contract be deemed to be a waiver or release of any rights which that State, as a sovereign, possessed. It is fundamental that State officials do not have any power to surrender, abrogate, release or dispose of any of the rights of a sovereign State. Such acts would be *ultra vires*. Accordingly, from all aspects, the provision in Article 5(a) of the Nevada contract purporting to reduce Nevada's allocation of 300,000 acre feet from Lake Mead would be *ultra vires*, void and unenforceable.

One further point should be mentioned. Arizona, while agreeing with the United States that the Project Act constitutionally delegates to the Secretary the power to allocate mainstream water among the Lower Basin States, took the position before the Master that the second paragraph of Section 4(a) established a formula for the allocation of the water of the mainstream among the three Lower Basin States which the Secretary is required precisely to follow, and that those provisions in the water delivery contracts both in Arizona and Nevada, which deviated from the formula are void. Arizona's contention in this respect was rejected by the Master (Report, pp. 162–163).

Arizona excepted from the Master's ruling in this respect (Arizona Exception No. 7) and devotes Part III of its Brief (pp. 83–104) in support of its position. By Article 4(a), Arizona argues, Congress made an over-all allocation of the entire quantity of the mainstream of the Colorado River dealt with therein by establishing a formula under which the first 7,500,000 acre feet of that water should be divided in an amount not to exceed

4,400,000 to California, 2,800,000 to Arizona, and 300,000 acre feet to Nevada, and the surplus above 7,500,000 acre feet to California and Arizona equally, to which the water delivery contracts made by the Secretary are required to conform.

In the event this Court should concur in Arizona's view, this would provide an additional reason why that provision in Article 5(a) of the Nevada amended contract charging tributary uses is void and unenforceable.

The formula of Section 4(a) of the Project Act entitles Nevada to the delivery from Lake Mead for use in Nevada of 300,000 acre feet per annum. Under Article 5(a), however, there is to be subtracted from the 300,000 acre feet "all other water diverted for use within the State of Nevada from the Colorado River System." Obviously this does not conform to the Section 4(a) formula, and hence, if Arizona is correct, is beyond the authority of the Secretary and is unenforceable.

In Point IV, the United States excepts to the statement of the Master at page 210 of his Report that:

> "It should be noted that the Nevada contract, unlike the Arizona contract, does not require additional subcontracts between each water user and the Secretary of the Interior. On the contrary, the State of Nevada is free to determine who shall use the water, subject only to the Secretary's approval of the points of diversion."

and requests this Court to reject this statement.

This, likewise, was the subject of an exception by Nevada. Nevada requested that Paragraph II(B)(7) of the Recommended Decree be amended so that the phrase "mainstream water should be delivered to users in * * * Nevada only if contracts have been made by the Secretary of the Interior pursuant to Section 5 of the Boulder Canyon Project Act for the delivery of all

such waters; * * *", conforms to the conclusion which the Master makes with respect to this contract on page 210 of his Report.

We believe that Nevada's argument in support of its exception in Nevada's Opening Brief (pp. 52–55) is a complete answer to the United States and will not be repeated here.

It may be added additionally that the major position of the United States, in excepting to the Master's statement on page 210, is that it is inconsistent with Article 5(a) of the Nevada contract providing that the United States shall annually deliver from storage in Lake Mead:

> "So much water, *including all other waters diverted for use within the State of Nevada from the Colorado River System*, as may be necessary to supply the State a total quantity not to exceed Three Hundred Thousand (300,000) acre feet each calendar year."

The United States says, at page 50:

> "The underscored language excludes from the agreement to deliver 'to the State' all other diversions for use within the State. Such exclusion preserves the Secretary's authority to contract with users in Nevada and precludes the possibility of an attempted waiver of the Section 5 requirement for contracts with all users."

If the Master is correct in holding that the underscored part of Article 5(a) is contrary to Section 5 of the Project Act and is unenforceable, and we submit that he clearly is correct (*supra*, pp. 50–59), then, of course, the argument of the United States is completely groundless.

The Nevada contract is entirely consistent with Section 5 of the Project Act. It is senseless to require additional subcontracts between each water user and the Secretary. This contract was drafted in the light of circumstances peculiar to Nevada. Existing

and future uses of Lake Mead water will be for industrial and municipal uses (Appendix I, Nevada's Opening Brief). It would be ridiculous to require individual and duplicate contracts with industrial and municipal users of Lake Mead water. There are not now and never will be any large irrigation projects such as there are in Arizona and California. It is logical and sensible that the water delivery contracts be with the State of Nevada, acting through its Colorado River Commission of Nevada. This Commission was created primarily for this purpose and is consistent with Section 5 of the Project Act. Specifically, NRS 538.160 authorizes the execution of a contract such as that involved in this action. Section NRS 538.170 authorizes the Commission to receive the water covered by the contract for the State of Nevada and to make necessary appropriations therefor, and NRS 538.180 authorizes the Commission to make all necessary leases, subleases, or contracts of sale of the water obtained through the contract with the United States (Appendix II, Nevada's Opening Brief).

The United States appears to be concerned about the use of Lake Mead water on Federal projects. In the event any Federal projects are authorized, which is extremely unlikely, it would be a simple matter indeed for the State of Nevada, acting through its Colorado River Commission of Nevada, to relinquish to the United States sufficient water for the Federal project or to contract directly with the irrigation district or company operating the project.

V

COMMENTS ON ARIZONA'S BRIEF

Arizona's Brief is divided into two parts. Part I deals with the "Controversy Among Arizona, California and Nevada with Respect to Mainstream Water," and Part II deals with the "Claims of the United States to Water." Inasmuch as Part I

supports the Master's Report and Recommended Decree in all the essential details, we are in general agreement with the position taken by Arizona, except as hereinafter noted.

We concur in Arizona's argument in Point I of Part II (pp. 32–57) that Congress, in enacting the Project Act, exercised its plenary power over navigable waters and allocated among Arizona, California and Nevada all available water in Lake Mead and in the mainstream of the Colorado River downstream from Lake Mead. If this is true, the principle of equitable apportionment and priority of apportionment is not applicable to the division of mainstream water among those States.

We concur generally with the Arizona argument in Point II of Part I (pp. 57–82) that the Project Act provides for the storage of mainstream water only and for its allocation among Arizona, California and Nevada. Arizona, however, argues that the Compact apportioned only mainstream water. The Master did not concur with Arizona's interpretation of the Compact and construed Article III(a) of the Compact as dealing with both the mainstream and tributaries; that Article III(a) deals with the Colorado River System which is defined in Article II(a) as including the entire mainstream and the tributaries (Report, pp. 142–151, 173). Nevada, in its Brief before the Master, concurred in the Master's view (Nevada's Answering Brief, pp. 28–40).

Nevada, however, makes no issue of the matter at this time. Whether this Court concludes that the Master was correct in construing Section 4(a) of the Project Act and the California Limitation Act as referring only to water stored in Lake Mead and flowing in the mainstream below Hoover Dam, or whether the Court concurs with Arizona's view that the Compact apportioned only mainstream water, the result so far as Nevada's rights are concerned would be the same. Nevada would still be

entitled under its contracts to an undiminished 300,000 acre feet of water from Lake Mead.

In Point III of its argument under Part II (pp. 83–105), Arizona, while agreeing with the Master that the Project Act constitutionally delegated to the Secretary the power to allocate mainstream water among the three Lower Basin States, argues that the second paragraph of Section 4(a) established a mandatory formula for the allocation which the Secretary is required precisely to follow in the water delivery contracts, and that those clauses in her water delivery contract which deviated from the formula are void.

Under this theory, one of the clauses in the Arizona contract which would be void is Article 7(f) which provides for the recognition by Arizona of the right of the United States and the State of Nevada to make a contract for the "use of 1/25 (one twenty-fifth) of any excess or surplus water available in the Lower Basin and unapportioned by the Colorado River Compact, which waters are subject to further equitable apportionment after October 1, 1963, as provided in Article III(f) and Article III(g) of the Colorado River Compact."

Nevada emphatically disagrees with Arizona's contention that Article III(f) is void, and submits that it is valid and enforceable. The Master effectively disposes of Arizona's contention in the following language (p. 163):

> "This argument is premised on the language in Section 5 that 'contracts respecting water for irrigation and domestic uses . . . shall conform to paragraph (a) of section 4 of this act.' The second paragraph, Arizona points out, is included within Section 4(a). But the second paragraph of Section 4(a) is plain in that it merely authorizes a tri-state compact for the division of water; it does not compel it; nor does it condition approval of the Colorado River Compact upon acceptance of the proposed tri-state compact.

> Indeed, the second paragraph was specifically amended on the floor of the Senate to make the suggested division permissive rather than mandatory. The suggested compact which Congress was willing to approve in advance is of no compelling force or effect since no such compact has ever been agreed to. In so far as Section 5 refers to the second paragraph of Section 4(a) it is for the purpose of requiring the Secretary to respect the compact if ratified by the states. See also Section 8(b). Arizona's contention in this respect must therefore be rejected."

Certainly Nevada is entitled to its equitable share of any excess or surplus available in the Lower Basin. This is specifically provided for by Article III(f) of the Compact. It provides:

> "(f) Further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b), and (c) may be made in the manner provided in paragraph (g) at any time after October first, 1963; if and when either Basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b)."

If Arizona's contention is correct, and the excess or surplus is divided 50 percent to Arizona and 50 percent to California, Nevada would be deprived of its equitable share, contrary to the express terms of Article III(f) of the Compact. Nevada submits that Article 7(f) of the Arizona contract is valid and in full force and effect, consistent with the findings of the Master (Report, p. 207).

In the unlikely event that this Court should find Article 7(f) of the Arizona contract is void, then Nevada submits that that part of the Recommended Decree (Paragraph II(B)(2), Report, p. 347) permitting Nevada to contract with the United States for 4 percent of the excess or surplus should be retained irrespective of any provisions of the Arizona contract. Nevada's

right to an equitable share of the excess or surplus is not dependent upon any recognition or consent by Arizona in its contract or otherwise.

Part II of Arizona's Brief is an excellent argument in opposition to the views expressed by the Master with respect to the unrestricted right of the United States to reserve water for all Federal establishments. As Arizona correctly points out, the Master, relying basically on a single decision of this Court (*Winters* v. *U.S.*, 207 U.S. 564), which involved the reservation of water of a non-navigable stream for use on an Indian reservation created by treaty in the Territory of Montana, has concluded that the Federal Government has the unrestricted power to reserve water of both navigable and non-navigable streams for the benefit of all Federal establishments. Arizona points out, also, that the Master fails to recognize the distinction between the legal principles applicable to navigable waters and those which govern non-navigable streams. He fails to give effect to the well-established rule that when a State is admitted to the Union, dominion over its navigable water passes from the United States to the newly created State and that, thereafter, the Federal Government is without power to reserve the water of a navigable stream for use on Federal establishments, since its only authority over such water is that which is vested in it by the Commerce Clause and the treaty-making provisions of the Constitution (Arizona's Brief, pp. 117–118).

Nevada agrees fully with Arizona's presentation on this issue. It is one of far-reaching importance throughout the entire West.

CONCLUSION

Nevada submits that it is entitled to the beneficial consumptive use of 300,000 acre feet of water stored in Lake Mead under any theory which may be adopted by this Court. This is true whether it be determined that Section 4(a) of the Project Act related only to the mainstream, as the Master found, or to system water, as contended by California. Nevada's contract rights are valid whether Section 4(a) constitutes a statutory contractual allocation, as found by the Master, or whether the contracts were made under the general Reclamation Law. Likewise, Nevada's contracts are valid if that section constitutes a mandatory formula, as contended by Arizona. This is true also in the event this Court determines the case upon the basis of an equitable apportionment among the three mainstream Lower Basin States. It would be judicially proper to use the contracts made by the Secretary as a yardstick in arriving at an equitable apportionment.

This is the minimum amount to which Nevada is entitled. The Colorado River is literally the lifeblood of the Southern Nevada area and it is the controlling factor to sustain its expanding population growth. At least, so far as Nevada is concerned, uses for irrigation and navigation are relatively unimportant. Also, Nevada is unique in that it has no other source of water than Lake Mead. The two other mainstream Lower Basin States, particularly California, has alternative sources of water.

Nevada respectfully submits that there is nothing in the Briefs of the United States, Arizona, or California, that seriously challenges Nevada's right to an undiminished 300,000 acre feet of water from Lake Mead.

The allocation to Nevada proposed by the Master is fair and just and should be sustained.

Respectfully submitted,

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Dated August 7, 1961

APPENDIX I

SALINE WATER CONVERSION PROGRAM

At page 34 of Nevada's Opening Brief, there is described existing legislation implementing the saline water conversion program. Since then, S. 2156, "to expand and extend the saline water conversion program being conducted by the Secretary of the Interior" in the Senate, and H.R. 7916, in the House, were introduced on June 27, 1961, with administration approval. It will greatly expand this program.

In transmitting the bill to the President by letter dated June 22, 1961, Secretary of the Interior Udall said (Cong. Rec., June 27, 1961, p. 10540):

> "The results to date of this Department's saline water research and development activities under our basic authorization have in large part developed the technological advances that permit many communities in need of a dependable supply of fresh water to be interested now in the installation of conversion plants, if they could obtain the necessary financial assistance which we are recommending for your consideration. It is our opinion that the continuation of the program which this bill would authorize, should help significantly to make it possible to bring good water supplied to local communities on a basis that is economically feasible. It should also lessen the obstacle to the financing of the investment of substantial sums of money in conversion plants.
>
> ". . . although many technological problems remain to be solved, *results obtained from laboratory investigations give reliable indications that the objective of low cost converted water can be attained.* If we can reach our objectives, converted saline water may become an important source of supplemental water for many areas of the United States." (Emphasis added.)

Title I of the bill covers generally the expanded saline water research and development program. Section 8 of Title I removes expenditure ceilings and extends the time limit. As Secretary Udall points out, "It is impossible to predict in advance the rate of progress that might be achieved, or to predict the cost of solving a technological problem of this magnitude. The time and fiscal limits set by the Congress in 1952 and 1955 have proved to be inadequate. For a program that is probing in an unprecedented manner into the secrets of nature to develop an inexhaustible supply of economically competitive fresh water, it seems wise to allow adequate flexibility in the rate at which such a program shall advance. Congress has recognized, and by this legislation would reaffirm, the importance of this program. With each passing year, the program will be of much greater significance to mankind. It should be authorized to function until it has attained the objectives set forth by the Congress."

Title II repeats the 1958 law regarding demonstration projects but extends the duration of the program from seven years to fifteen years, removes the limitation on the appropriation, and authorizes the construction of an unspecified number of additional demonstration plants, including ones capable of producing not to exceed 50 million gallons of water per day.

Title III would authorize Federal financial assistance for the construction of conversion plants.

Title IV provides for grants to local governmental units or public or private utilities for that part of the investment necessary to reduce the price of water to a competitive price. It further provides for contracts with the borrower for Federal payments between the cost of converted water and a fair price for such water.

Title V directs the cooperation of the Secretary of Defense, the Secretary of State, and the heads of related agencies with the

Department of the Interior in the establishment of land based saline water conversion plants.

President Kennedy, in transmitting the bill to each House of Congress on June 26, 1961, strongly urged its passage. He said:

> "I know of no Federal activity that offers greater promise of making a major contribution to the ultimate economic well being of all mankind than this program." (Cong. Rec., June 27, 1961, p. 10540).

Senator Metcalf stated on the floor of the Senate on July 17, 1961, in commenting upon the pending legislation (Cong. Rec. p. A 5366):

> "We are on the threshold of a break-through in costs that will make saline water economically feasible, both here and abroad."

This expanded program is discussed in considerable detail in the testimony of C. F. MacGowan, Director of the Office of Saline Water, before the Subcommittee on Irrigation and Reclamation of the Interior and Insular Affairs Committee of the House of Representatives on July 17, 1961 (hearings not yet printed), and also in the testimony of Secretary Udall before the same Committee, which appears in the Congressional Record for July 17, 1961, p. A5366.

APPENDIX II

LEGISLATIVE HISTORY AND ANALYSIS OF AUTHORIZATIONS FOR CONSTRUCTION AND FINANCING OF FACILITIES TO PROVIDE WATER FOR SOUTHERN CALIFORNIA

The California Water Resources Development Bond Act (Cal. Stats., Ch. 1762; Water Code of California, Div. 6, Pt. 6, Ch. 8, Secs. 12930–12942), popularly known as the Burns-Porter Act and hereinafter referred to as the Bond Act, was submitted pursuant to Article XVI, Sec. 1 of the California Constitution to, and approved by, a vote of the people on November 8, 1960. This submission was required by Article XVI, Sec. 1 of the California Constitution for the reason that it involved incurring of a debt (bond issuance) in excess of the limitation of $300,000 set forth in the Constitution.

In its principal aspects, the Bond Act is a financing measure intended to make funds available for the construction of water facilities. As hereinafter mentioned, the Bond authorization is in the amount of $1,750,000,000, with a first priority on its use being established to construct designated facilities, among which are those required to make water available to Southern California.

Prior to the enactment of the Bond Act, certain of the facilities which are to be financed by that Act were authorized by Act of the Legislature. These, in effect, were reauthorized and more specifically described by the Bond Act.

In 1951 the Legislature authorized the Feather River and Sacramento-San Joaquin Delta Diversion Projects (Cal. Stats. 1951, Ch. 1441, amended Cal. Stats. 1956 (Ex. Sess.) Ch. 54, Cal. Stats. 1957, Ch. 1932 and Ch. 2539, Cal. Stats. 1959, Ch. 2043; Water Code of California, Div. 6, Pt. 3, Ch. 2, Sec. 11260).

As originally enacted in 1951, the Project included (a) Oroville Dam on the Feather River, with a capacity of 3,500,000

acre feet to be utilized for conservation, flood control, and power uses, (b) a power plant at the dam, (c) an afterbay dam and power plant, (d) a Delta Cross Channel, and (e) electrical transmission facilities. The Sacramento-San Joaquin Delta Diversion Project, as approved in 1951, included the Santa Clara-Alameda Diversion, the San Joaquin Valley-Southern California Diversion, and the Santa Barbara-Ventura Diversion. These "diversions" were conduits or aqueducts which would carry from the Delta water released from Oroville Dam and Reservoir and flowing in natural channels to the Delta, as well as unregulated water available in the Delta from other streams contributory to the Delta, to the areas of use. The Santa Clara-Alameda Diversion would conduct water to Bay counties south of San Francisco. The San Joaquin-Southern California Diversion would transport water to the central and southern portions of the San Joaquin Valley and across the Tehachapi Mountains to Southern California as far south as San Diego County. The Santa Barbara-Ventura Diversion would serve Santa Barbara and Ventura Counties as well as a portion of San Luis Obispo County. This latter aqueduct would be a branch of the San Joaquin Valley-Southern California facility, taking off from that aqueduct in the southern San Joaquin Valley.

In 1956 the original authorization was amended to make some changes in the project design and add some additional features. The principal modification, particularly as affecting the San Joaquin Valley and Southern California service areas, was the authorization as a part of the State project, the San Luis Reservoir in the vicinity of Los Banos in the San Joaquin Valley. This reservoir would be below the Delta and along the route of the San Joaquin Valley-Southern California aqueduct and would provide off-stream storage for unregulated winter flows available and to be diverted from the Delta.

The 1959 amendment generally approved, and more specifically described, the routing of the above mentioned aqueduct theretofore authorized, to carry water to the San Joaquin Valley and Southern California. All of the facilities described to this point have generally become known and described as the Feather River Project.

On June 3, 1960, Public Law 86–488, 74 Stat. 156, was approved by the President of the United States and authorized for construction, as a Federal project, the Federal San Luis Project in the San Joaquin Valley. This Project envisions use of the same reservoir, San Luis, as well as the same dam-site, contemplated for use in the State program. The Federal legislation provides that, upon agreement being reached with the State of California, the Secretary of the Interior is authorized to include in the San Luis Reservoir and the canal extending southward through the Federal service area, sufficient capacity to accommodate the State's needs with respect to the Feather River Project. (The Federal service area encompasses 500,000 acres of land on the west side of the San Joaquin Valley.) In other words, San Luis Reservoir and a portion of the aqueduct system theretofore authorized for construction by the State could, and undoubtedly will, be a Federally constructed facility to be jointly used by the Federal and State Governments. The State would contribute its share of the cost at the time of construction. Section 1 (a) of the Federal San Luis legislation, *supra*, also provides that should the State elect not to have its share of the joint use facilities constructed when the Federal Government is prepared to proceed with its own construction, provision could be made, upon agreement by the State, for the initial construction of the dam and reservoir to be such as to permit future enlargement when the State desired and was able to proceed.

In 1959 the California Legislature approved the California

Water Plan (Cal. Stats. 1959, Ch. 2053; Water Code of California, Div. 6, Pt. 1.5, Secs. 10004–10007). This plan is a comprehensive plan for the development of all of the water resources of the State of California and includes the Feather River Project. The plan as described is described as "the guide for the orderly and coordinated control, protection, conservation, development, and utilization of the water resources of the State. This declaration does not constitute approval of specific projects or routes for transfer of water for construction by the State or for financial assistance by the State without further legislative action, nor shall this declaration be construed as a prohibition of the development of the water resources of the State by any entity." (Water Code of California, Sec. 10005.)

The last described statute which approved the California State Water Plan expressly states that its provisions do not repeal or modify any of the prior authorizations of projects (Water Code of California, Sec. 10006). Thus, the previous authorizations of the Feather River Project, *supra*, remained in effect and, indeed, were reinforced by that legislation.

In 1959, the California Legislature also created the California Water Fund (Cal. Stats. 1959, Ch. 140, Water Code of California, Div. 6, Pt. 6, Ch. 7, Secs. 12900–12915). This legislation dedicated, but did not appropriate, the funds therein, and all accruals, to the construction of water resource development works (Water Code of California, Secs. 12901(a), 12910, *supra*). Subsequently, the fund was appropriated for use in the construction of the Feather River Project by the Burns-Porter Act (Water Code of California, Sec. 12938, *supra*), as will be later discussed herein. The principal element of the California Water Fund is a portion of the funds which are derived from tidelands oil revenues. Water Code of California, Sec. 12912 (d), *supra*).

Since 1956 funds have been included in the annual budgets and appropriated by the California Legislature from the General Fund as well as the Investment Fund (predecessor to the California Water Fund), for the Feather River Project for preconstruction, construction, right-of-way acquisition, and railroad and highway relocation purposes.[1]

The Burns-Porter Act is the most significant legislation dealing with the construction of works to supply water to Southern California, as well as other areas of the State. As previously noted, it is essentially a financing Act and assures availability of $1,750,000,000 toward that construction. Of the $1,750,000,000, $130,000,000 is dedicated to the making of loans and grants for the construction of local projects which would not involve water for transport to Southern California, thus leaving $1,620,000,000 for construction of the Feather River Project. In discussing the Bond Act, reference will be made only to the Water Code sections. However, those sections are specifically designated in the Act itself. The significant, relevant sections will

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[1]Budget Act of 1956, Cal. Stats. 1956, Ch. 1.

Total for all relevant items	$9,350,000.00
Budget Act of 1957, Cal. Stats. 1957, Ch. 15.	
Total for all relevant items	25,190,000.00
Budget Act of 1958, Cal. Stats. 1959 (2nd Ex. Ord. Sess.), Ch. 1.	
Total for all relevant items	4,023,672.00
Budget Act of 1959, Cal. Stats. 1959, Ch. 1300.	
Total for all relevant items	71,396,709.00
Budget Act of 1960, Cal. Stats. 1960, Ch. 11.	
Total for all relevant items	39,810,243.00
Total for all items listed	$149,770,624.00

be discussed in seriatim as they appear in the Act, with cross references as required.

The object of the Act is set forth in Section 12931 as being to provide funds to assist in the construction of a State Water Resources Development System for the State of California. The System is described in the section as including the "State Water Facilities." No reference is made in the Bond Act to the Feather River Project by name. However, the definition of the State Water Facilities as contained in Sec. 12934(d) of the Bond Act includes all of the facilities which form the Feather River Project in its earlier authorization. In addition, the term includes the additions to the Feather River Project consisting of a North Bay aqueduct to transport water from the Delta to counties along Northern San Francisco Bay and a drainage system for the San Joaquin Valley.

Reference in the Bond Act to the State Water Facilities is interchangeable, for all practical purposes, with the Feather River Project, although by definition (Sec. 12934(d)(4)) the term includes small local projects for which loans and grants may be made by the State. The System envisioned by the Act also includes any additional works which may hereafter be authorized by the Legislature as a part of the State Central Valley Project or the California Water Plan. However, as it will be pointed out later with reference to Section 12938, the Bond funds are dedicated, first to the construction of the State Water Facilities (Feather River Project) and to loans and grants, in the amount of $130,000,000 for small local projects.

Section 12934(d) defines the term "State Water Facilities." Among those facilities are:

(1) Oroville Dam (Water Code Section 12934(d)(1)).

(2) "An aqueduct system which will provide for the transportation of water from a point, or points, at or near the

Sacramento-San Joaquin Delta to termini in the Counties of Marin, Alameda, Santa Clara, Santa Barbara, Los Angeles, and Riverside, and for delivery of water both at such termini and at canal-side points enroute for service in Solano, Napa, Sonoma, Marin, Alameda, Contra Costa, Santa Clara, San Benito, Santa Cruz, Fresno, Tulare, Kings, Kern, Los Angeles, Ventura, San Bernardino, Riverside, Orange, San Diego, San Luis Obispo, Monterey, and Santa Barbara Counties.

"Said aqueduct system shall consist of intake and diversion works, conduits, tunnels, siphons, pipe lines, dams, reservoirs, and pumping facilities, and shall be composed of . . . a reservoir near Los Banos in Merced County . . . a San Joaquin Valley-Southern California aqueduct extending to termini in the vicinity of Newhall, Los Angeles County and Perris, at Riverside County, and have a capacity of not less than 2,500 cubic feet per second at all points North of the northerly boundary of the City of Los Angeles in the Tehachapi Mountains in the vicinity of Quail Lake and a capacity of not less than 10,000 cubic feet per second at all points north of the initial off-stream storage reservoir (San Luis Reservoir); a Coastal aqueduct beginning in the San Joaquin Valley-Southern California aqueduct in the vicinity of Avenal, Kings County, and extending to a terminal at the Santa Maria River." (Water Code, Section 12933(d)(2)).

(3) Facilities for water conservation in and transfer of water across the Sacramento-San Joaquin Delta (Water Code, Section 12934(d)(4)).

Section 12935 authorizes the incurring of a debt in the amount of $1,750,000,000 for water development purposes, principally the State Water Facilities. Section 12936 authorizes the debt as a general obligation of the State of California.

Article XVI, Section 1, of the California Constitution provides

that, if the authorizing legislation for a debt exceeding the constitutional limitation describes the ways and means by which the debt is to be repaid, those ways and means may not be changed by the Act of the Legislature during the existence of the debt. Section 12937 describes the ways and means by which the bonds are to be repaid. It pledged the revenues of the project to the payment of the bonds and to the operation of the operation and maintenance costs of the State water system, as well as reimbursement for funds used from the California Water Fund. The Section also provides that contracts between the State and water users organizations may not be changed by Act of the Legislature during the life of the bonds.

Section 12938 appropriates and makes available, without further action by the Legislature, all the bond funds for the construction of the State Water Facilities which includes the facilities which will be constructed with loans and grants to local agencies for local projects. It dedicates $130,000,000 of the total authorization for such loans and grants.

The Section also provides that all monies in the California Water Fund, except to the extent that the Legislature, in any year, by legislative action diverts money available in the Fund in that year for any other purpose, are now appropriated for use in the construction of the State Water Facilities.

Any money available in the California Water Fund available at the time a construction cost is incurred must be used in lieu of bond funds for the construction of the State Water Facilities. To the extent that California Water Fund monies are available and so used, an equal amount of the Bond funds are released from dedication to the construction of the State Water Facilities and are rededicated to, and appropriated for, the construction of additional works in the watersheds of the Sacramento, Eel, Trinity, Mad, Van Duzen, and Klamath Rivers to augment supplies of

water in the Sacramento-San Joaquin Delta. It should be noted here that this provision assures funds for the construction of works which may be required to make up for deficiencies in the supply to be made available to Southern California from the Feather River Project. One cause for such a deficiency might be the operation of the "County of Origin Statute" (Water Code of California, Sections 10500, 10505), and the "Watershed Protection Statute" (Water Code of California, Section 11460) which purports to give a prior right to the counties and watersheds with respect to all water which originates therein. Thus, if there is a "recapture" on the part of the county or watershed of origin with respect to water which theretofore had been made available by the Feather River Project to Southern California, there would be funds available to initiate, and perhaps complete, construction of additional works necessary to make up for the deficiencies created in Southern California by such recapture.

The remaining sections of the Bond Act are those which deal with the mechanical means by which the bonds are to be issued and sold.

In addition to the funds which have been appropriated and expended in the past with respect to the Feather River Project, the California Department of Water Resources administratively, in this current year, has made $400,000 available to the United States for preconstruction activity with respect to the San Luis Reservoir. This was done in anticipation of the cooperative venture by the State and Federal Governments under the Federal San Luis legislation previously mentioned. When the Federal-State contract, as required by Public Law 86–488, *supra*, Sec. 2, is executed, it is anticipated that the State promptly will advance another $1,500,000 to the United States.

There can, and undoubtedly will, be understandable confusion by the reference in this document and the Bond Act to the terms

"State Water Resources Development System" and "State Water Facilities."

While the Bond Act was initiated and intended to finance principally the Feather River Project, it was necessary and, to some extent, desirable to provide for the financing of additional works in the future. In order to make the funds available for the Feather River Project as well as the other works specifically described in Section 12394(d) of the Bond Act and to give those funds a priority in their use, as well as those in the California Water Fund in connection with the Feather River Project, the term "State Water Facilities" is defined and used in the Act. The "State Water Resources Development System" is intended to be more incompassing and includes the State Water Facilities (Feather River Project) plus additional works which can be financed with surplus project revenues (Section 12937(b)(4)), if any, and with bond funds released from priority for use in the construction of the State Water Facilities as described above by virtue of the use of California Water Fund monies (Section 12938).

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