IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 8 Original

STATE OF ARIZONA, *Complainant*

v.

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

UNITED STATES OF AMERICA, *Intervener*

STATE OF NEVADA, *Intervener*

STATE OF NEW MEXICO, *Impleaded Defendant*

STATE OF UTAH, *Impleaded Defendant*

ANSWERING BRIEF FOR ARIZONA

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California[1] alone, of the four parties who have filed opening briefs,[2] seeks rejection of the Special Master's

[1] Since the California defendants have filed a single consolidated Opening Brief they will be referred to collectively as "California" throughout this brief.

[2] Utah and New Mexico have not filed opening briefs.

Report virtually in its entirety. Nevada accepts it with only "minor" and "perfecting" exceptions (Nev. Op. Br. 9). The United States "in large part . . . supports the Special Master's Report as filed," reserving for an answering brief the right to "deal more directly with the principal issues in the case in which [they] support the report" (U. S. Op. Br. 6). Arizona moves the adoption of the Report and Recommended Decree with such modifications as are requested in her exceptions (Ariz. Op. Br. 2).

This answering brief therefore will be addressed primarily to the Opening Brief filed by California.[3]

THE CALIFORNIA BRIEF

Asserting that her security in an adequate water supply is seriously jeopardized, California responds to the Special Master's Report with asperity and hostility. This emotional approach has impelled California counsel to contend that the Special Master's findings and conclusions are, with but few exceptions, hopelessly wrong and that his recommendations, if adopted, would result in the disposition of this case on a basis which is entirely mistaken. The result is a brief which is permeated by a multitude of misstatements and fallacious positions. It would be impossible in brief compass to catalogue and expose each misstatement and every example of erroneous reasoning. Accordingly, we shall confine this brief to a treatment of only the more irresponsible and flagrant instances.

We are constrained to say at the outset, however, that the various devices employed by California—the selective

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[3] The issues between Arizona and the United States which are treated in the latter's Opening Brief are discussed after our consideration of the California brief (pp. 152-68, *infra*). Since the Opening Brief of the United States does not deal with the claims of the United States for federal establishments, we reserve for our reply brief such response as may be required by the discussion of these matters in the Answering Brief of the United States.

citation of parts of testimony taken out of context and the deletion of other parts; the exaggeration here and the suppression there of portions of documentary exhibits; the misreading and miswriting of the legislative history; the misstatements unsupported and often contradicted by the record; indeed, the misrepresentation and misconstruction of the Master's Report itself—combine to produce a brief designed to mislead rather than to inform.

The very crux of this case is the intent of Congress in the enactment of the Project Act. Despite the fact that this intent cannot be ascertained and understood without a thorough exploration of the voluminous legislative history of the Act and of the several Swing-Johnson bills considered by Congress preceding enactment of the statute, California's Opening Brief makes only cursory references to this vital material.[4] Even her treatment of such "legislative history" as she presents is a highly colored and fictionalized version of the facts. In the course of this brief we shall demonstrate that the California references to the legislative history of the Project Act misrepresent and distort the true legislative intent, the understanding of which is so essential to a correct construction of the Project Act and a proper determination of the basic issues presented by this case.

Four major fallacies underlie California's position:

First. That the Project Act does not abrogate but preserves principles of priority of appropriation and equitable apportionment and that these principles must be applied by the Court in the disposition of this case (Cal. Op. Br. 52-68, 138-94).

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[4] See Cal. Op. Br. 110-24, 132-37, 144-49, 159-62, 175-88 and 239.

Second. That the reference in §4(a) of the Project Act and in the California Limitation Act to "waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact" means system water, *i.e.*, includes both main stream and tributary water (Cal. Op. Br. 69-137).

Third. That the Project Act does not authorize nor do the Secretary of the Interior's water delivery contracts effectuate a contractual allocation of water among Arizona, California and Nevada (Cal. Op. Br. 195-231).

Fourth. That the dependable future water supply is not only a relevant issue but one which the Court must resolve (Cal. Op. Br. 232-78).

We shall consider each of these fallacies in order in Points I through IV of this brief.

ARGUMENT

I

The Project Act does not preserve principles of prior appropriation and equitable apportionment, as California contends, but makes a statutory apportionment of water which renders these principles inapplicable.[5]

A. California's Position

California attacks as erroneous the Special Master's conclusion (Rep. 138) that "the doctrine of equitable apportionment, and the law of appropriation are . . . irrelevant

[5] This point is directed principally to a refutation of Parts One and Three of California's Opening Brief, pages 52-68 and 138-94 thereof respectively. See also Cal. Op. Br. 25, 37-39, 46-47.

to the allocation" among Arizona, California and Nevada of "mainstream" water as defined in the Report (Cal. Op. Br. 39, 45-47).[6] California asserts that the Master's conclusion conflicts with (1) this Court's holding in *Arizona* v. *California*, 283 U. S. 423, 464 (1931); (2) §§18, 14, 8 and 4 of the Project Act; (3) the legislative history of the Project Act and (4) the administrative, practical, and subsequent congressional construction of that Act (Cal. Op. Br. 53-54, 139-66). We shall discuss each of these contentions in order.

B. The Holding of *Arizona* v. *California*

California states that the Court's decision in *Arizona* v. *California, supra,* "conclusively determined that the Project Act did not abrogate the principles of priority of appropriation and equitable apportionment" (Cal. Op. Br. 139). The Court made no such determination.

The precise holding of the case was that the United States had the constitutional power to authorize in the Project Act the construction of Hoover Dam for the purpose of improving navigation of the Colorado River, a navigable stream, and that, therefore, contrary to one of Arizona's contentions at the time, the Secretary of the Interior was "under no obligation to submit the plans and specifications to the State engineer for approval", despite the fact that the dam and reservoir were to be located partly within the state. 283 U. S. at 451-52 (footnote omitted).

In rejecting Arizona's further contention—that "the mere existence of the Act will invade quasi-sovereign rights of Arizona by preventing the State from exercising its right

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[6] Arizona does not concede that California ever acquired any valid appropriative rights to the water of the Colorado River (see Ariz. Op. Br. 33-35).

to prohibit or permit under its own laws the appropriation of unappropriated waters flowing within or on its borders", 283 U. S. at 458, all the Court held was that, *assuming* these "quasi-sovereign rights" in Arizona survived the Project Act, their alleged threatened invasion was not then so imminent and immediate as to warrant injunctive relief. As Justice Brandeis stated:

> "The claim strenuously urged is that the existence of the Act, and the threatened exercise of the authority to use the stored water pursuant to its terms, will prevent Arizona from exercising its right to control the making of further appropriations.
>
> * * * * * *
>
> "This contention cannot prevail because it is based not on any actual or threatened impairment of Arizona's rights but upon assumed potential invasions." 283 U. S. at 460, 462.

Accordingly, the bill of complaint was

> "dismissed without prejudice to an application for relief in case the stored water is used in such a way as to interfere with the enjoyment by Arizona, or those claiming under it, of *any* rights already perfected or with the right of Arizona to make additional *legal* appropriations and to enjoy the same." 283 U. S. at 464.[7]

The Court noted that when the bill of complaint was filed construction of the dam had not been commenced and that years would elapse before the project was completed. Actually, it was not until February 1, 1935 (almost four years after the decision) that water was first impounded (Rep. 32-33). Clearly then, as of the date of decision (May 18, 1931), there was and could have been no "physical acts"

[7] Unless otherwise indicated, italics appearing in quotations in this brief have been added for emphasis.

by the Secretary of the Interior interfering with rights, if any, in Arizona.

As the Court said:

> "The Act does not purport to affect any legal right of the State, or to limit in any way the exercise of its legal right to appropriate any of the unappropriated 9,000,000 acre-feet which may flow within or on its borders. . . . There is no allegation of definite physical acts by which Wilbur is interfering, or will interfere, with the exercise by Arizona of its right to make further appropriations by means of diversions *above the dam* or with the enjoyment of water so appropriated. Nor any specific allegation of physical acts impeding the exercise of its right to make future appropriations by means of diversions *below the dam,* or limiting the enjoyment of rights so acquired, unless it be by preventing an adequate quantity of water from flowing in the river at any necessary point of diversion." 283 U. S. at 462-63 (footnote omitted).[8]

Lastly, but not of least importance, at the time of this decision Arizona had not ratified the Colorado River Compact and therefore, as the Court noted, was not bound by its terms. 283 U.S. at 462.

Whether or not claimed appropriations of water of the river would give rise to rights to water stored pursuant to the Project Act, which rights the Secretary of the Interior would be bound to respect, was a question clearly not before the Court and not decided. That is one of the basic questions here for adjudication. Nor did the Court have before it for decision the further "question, which must be answered in this litigation, of the extent of the Secretary's authority under the Project Act to control the allocation of water among the states" (Rep. 160).

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[8] The omitted passage in the quotation concerns §18 of the Project Act, which we discuss hereafter (pp. 8-11, *infra*).

The Master does not propose "to distinguish this Court's decision out of existence", as California charges (Cal. Op. Br. 143 note 6). Rather, from the precise holding of the case—that Congress had the constitutional power to enact the Project Act and thereby authorize construction of Hoover Dam as an aid to navigation—the Master validly draws the proper conclusion that "once the United States impounds the water and thereby obtains physical custody of it, the United States may control the allocation and use of unappropriated water so impounded" (Rep. 160-61). It is this necessary consequence of the decision in *Arizona* v. *California* which California strives to avoid by insistently asserting principles of equitable apportionment and priority of appropriation as the source and measure of water rights, which are, in fact, created and controlled exclusively by the Project Act.

C. Project Act §§ 18, 14, 8, and 4

California next argues that "Sections 18, 14, 8, and 4 plainly manifest Congress' intention to preserve existing western water law" (Cal. Op. Br. 145). The provisions, purposes and legislative evolution of these sections expose the lack of merit in this contention.

(1) Section 18

Section 18 does not preserve appropriative rights *interstate* or as against the United States. It merely disclaims any intention to interfere "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" (Ariz. Op. Br. Appendix B, pp. 25a-26a).

In no event can §18 be construed as applying to the *interstate* allocation of water stored pursuant to the Project Act. Once that water is impounded by the United States, it ceases to be water subject to the sovereign dominion of any state. Otherwise, its release and delivery from Lake Mead would be controlled by state law and policy instead of by contracts which the Secretary of the Interior is authorized by §5 of the Project Act to make and without which "no person shall have or be entitled to have the use for any purpose of the water stored as aforesaid. . . ." (Ariz. Op. Br. Appendix B, p. 15a).

California's assertion (Cal. Op. Br. 145-46) that §18 permits rights to water, interstate and intrastate, to be modified only by interstate agreement is wholly unsupported and is unsound. This is demonstrated by the provision of §8(b) which subordinates any interstate compact for allocation of stored water among the Lower Basin states, concluded subsequent to January 1, 1929, to water delivery contracts theretofore made by the Secretary pursuant to §5.

Although this Court in *Arizona* v. *California, supra* at 462, quoted the provisions of §18, it did not state or imply that the general language of that section controlled the specific language of §5. In view of the Court's holding that Congress has the constitutional power to impound the water of the river, it cannot be inferred that Arizona or any other state had the "right" to appropriate or to authorize the appropriation of that water and thereby to impinge upon the Secretary's authority to regulate and control the storage, delivery and use of the water pursuant to §5.

As the Court said in the later case of *Arizona* v. *California,* 298 U. S. 558, 569 (1936):

> "The Colorado River is a navigable stream of the United States. The privilege of the States through which it flows and their inhabitants to appro-

> priate and use the water is subject to the paramount power of the United States to control it for the purpose of improving navigation."

Finally, California asserts that the intent of §18 "to preserve existing law . . . is confirmed by the legislative history of that section" (Cal. Op. Br. 146). This so-called "legislative history" consists of a statement of Senator King,[9] wholly unrelated to §18, in which he questioned the constitutional power of the federal government to exercise dominion over navigable waters and to allocate their use. Senator King reflected views similar to those of some of his colleagues, but it is a fabrication of history for California to say that the "same view of Congress' power was repeated . . . by almost every member of Congress who had anything to do with the legislation" (Cal. Op. Br. 146 note 8).[10] It is also ironical that California now cites Senator King, who bitterly opposed the Swing-Johnson bills as providing for an interstate allocation of water in violation of state sovereignty, when California's Congressman Swing and Senator Johnson, the bills' authors, never denied this would be their effect, never attempted to modify those provisions which Senator King found obnoxious, but instead pushed the legislation through to final passage. Indeed, California's witnesses at the congressional hearings expressed the opinion that Congress had the constitutional power to do the very thing which California now says the Project Act never contemplated—*i.e.*, provide for an allocation of water among the states.[11] The one point on which there was no dissent in Congress was that the Swing-John-

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[9] Senator King was referring to Senator Hayden's proposed amendment to §4(a). 70 Cong. Rec. 169 (1928), Ariz. Legis. Hist. 45-46.

[10] See discussion, pp. 33-44 and note 56, *infra*.

[11] See discussion, pp. 36-37, 41-43, *infra*.

son bills *did* provide for a federal allocation of water among the states.[12]

(2) Section 14

California further contends that "section 14 of the Project Act, incorporating section 8 of the Reclamation Act of 1902, likewise compels recognition of prior appropriation and equitable apportionment principles" (Cal. Op. Br. 147).[13]

Section 14 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.*"

The fact that the Project Act is to be deemed a "supplement to the reclamation law" does not mean that the Reclamation Act itself, or any specific section thereof, is *incorporated* into the Project Act.

Furthermore, §14 expressly limits the application of the Reclamation Act to "the construction, operation, and

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[12] See discussion, pp. 17-20, 33-47 and note 56, *infra.*

[13] Reclamation Act of 1902, §8, 32 Stat. 390, 43 U. S. C. §§372, 383 (1958). Section 8 provides:

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

management of the works herein authorized. . . ." Even in this area, whenever the Reclamation Act conflicts with the Project Act, the latter controls, as is made clear by the clause "except as otherwise herein provided".

The Court, in *Ivanhoe Irr. Dist.* v. *McCracken,* 357 U. S. 275, 291 (1958), interpreted §8 of the Reclamation Act as follows:

> "As we read §8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects."[14]

Section 14 does not provide that the right to receive water shall be governed by the Reclamation Act. That right must be obtained under the provisions of §5 by contract with the Secretary.

California asserts that the congressional intent to recognize in §14 prior appropriation and equitable apportionment principles "is confirmed by the legislative history of that section" (Cal. Op. Br. 147-48). The only "legislative history" referred to in this instance consists of statements of Messrs. Swing and Johnson made in connection with the third Swing-Johnson bill (Cal. Op. Br. 148-49 notes 2, 4). But when they expressed the views cited by California, their pending bills did not contain the provisions of §4(a) as finally enacted nor did they include the proviso later added to §5 that the Secretary's water deliv-

[14] In *Ivanhoe,* counsel for Imperial Irrigation District in the case at bar unsuccessfully argued for appellees in this Court that "federal law leaves to state jurisdiction the capacity of irrigation districts to contract, and the control, appropriation, use, and distribution of water for irrigation purposes." 2 L. Ed. 2d 2124.

ery contracts "shall conform to paragraph (a) of section 4 of this Act".

The actual legislative history, which shows that Congress did not intend by the Project Act that the doctrine of appropriative rights should control the interstate allocation of Colorado River water in the Lower Basin, is discussed later (pp. 17-20, *infra*).

Ickes v. *Fox,* 300 U. S. 82 (1937), and *Nebraska* v. *Wyoming,* 325 U. S. 589 (1945), are cited by California as "conclusively" establishing that "contracts executed by the Secretary of the Interior pursuant to Section 5 of the Project Act, like other reclamation contracts, are merely a step in the acquisition of water rights which come into being by diligence in putting waters to beneficial use in accordance with the principles of priority of appropriation and equitable apportionment" (Cal. Op. Br. 150).

The issue in *Ickes* v. *Fox, supra,* was whether the Secretary of the Interior could require landowners in a reclamation project, as a condition to continuing to receive project water, to pay part of the cost of additional project works from which, it was alleged, they would receive no benefit. Upon the "undenied allegations of the bill" the Court found that the landowners had "fully discharged all their contractual obligations" (including payment in full of their repayment obligation under the original project) and consequently "that their water-rights have become vested; and that ownership is in them and not in the United States." 300 U. S. at 96.

Nebraska v. *Wyoming, supra,* presented the question whether the reclamation project rights should be decreed separately to the United States or included within the state allocations. There was not involved, as there is here, construction of statutory provisions such as §5 of the Project

Act governing administration of project water. The Court was careful to say:

> "We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system." 325 U. S. at 615.

California's attempt to extend the state law of prior appropriation to control the interstate allocation of the water of the Colorado River is incompatible with the allocation scheme envisaged by Congress in §§4(a) and 5 of the Project Act.

California excepts to the Master's holding that contracts for diversion of "mainstream" water executed under the reclamation laws *prior to* the Project Act meet the requirements of §5. She argues that such contracts could not have been made pursuant to a contractual allocation scheme not conceived nor authorized by Congress until years later (Cal. Op. Br. 153-58). But, although antedating the Project Act, these contracts are wholly within the allocation scheme established by the Act.

For example, although the Kunz contract was made in 1910, the Reservation Division of the Yuma Project in California, on which Kunz secured a water right, was recognized in California's Seven-Party Agreement as having a right subordinate only to the first priority of the Palo Verde Irrigation District (Cal. Op. Br. 154). The Seven-Party Agreement was executed at the request of the Secretary and fixed "the relative rights and priorities of those [California] defendants in the water available for use in California under the Colorado River Compact and the California Limitation Act" (Cal. Op. Br. A2). Thus, the Kunz contract is satisfied by water delivered within and from the apportionment made by §4(a) and pursuant to

the Secretary's contracts for the delivery of stored water to California agencies under §5.

Again, the "standard reclamation contracts" for deliveries of water to users in Arizona, made before and after enactment of the Project Act but prior to execution of Arizona's water delivery contract in 1944, are also compatible with the allocation scheme established by the Act. Under the Secretary's contract with Arizona, deliveries of water to Arizona users "shall be made for use within Arizona to such individuals, irrigation districts, corporations or political subdivisons . . . as may contract therefor with the Secretary, and as may qualify under the Reclamation Law. . . ." (Ariz. Op. Br. Appendix E, p. 39a). As the Master concluded:

> "This being the case, the Secretary is free, subject to statutory limitations, to contract with users in Arizona qualifying under the reclamation law for the delivery to them of certain amounts of water out of the total amount allocated to Arizona. This is precisely what the Secretary has done in the contracts which are before us in this case." (Rep. 216)

The Arizona contract also provides in Article 7(*l*):

> "All consumptive uses of water by users in Arizona, of water diverted from Lake Mead or from the main stream of the Colorado River below Boulder Dam, whether made under this contract or not, shall be deemed, when made, a discharge pro tanto of the obligation of this contract."

(3) Sections 8(a) and (b) and 4(a)

California argues that if the Project Act "abrogated appropriations", then the word "appropriators" appearing in §§8(a) and (b) of the Project Act "is not only misused, it is misleading" (Cal. Op. Br. 158). But the

terms "all users and appropriators" appearing in §§8(a) and (b) were employed merely to insure that all persons claiming rights on any basis should be controlled by the Compact or any tri-state compact entered into pursuant to the Act. These provisions were inserted in the Project Act at the insistence of the Upper Basin,[15] which wanted assurance that the vast increase in use of Colorado River water which would follow construction of Hoover Dam would not obligate the Upper Basin to deliver to the Lower Basin more water than that specified in Article III of the Compact. Hence, these provisions neither confirmed nor conferred any rights, but simply subjected any and all claims of right to the Compact.

Section 4(a) provides that the limitation on California shall include "all water necessary for the supply of any rights which may now exist" (Ariz. Op. Br. Appendix B, p. 12a). From this California argues that "those rights must refer to interstate rights under equitable apportionment principles, including priority of appropriation, since no other basis for interstate rights was then recognized in the lower basin" (Cal. Op. Br. 158). This does not follow. Rather, this provision was included to prevent California from successfully asserting that she had rights of any kind, independent of the Project Act and surviving its enactment, by virtue of which she might seek to obtain water in addition to the maximum to which she was "irrevocably and unconditionally" restricted by §4(a) and her Limitation Act (Rep. 306-07).

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[15] *Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. 96-99, 135-89, 196-219 (1926) (hereinafter cited as *"Hearings on H. R. 6251"*).

D. Legislative History and Administrative Construction

(1) Legislative History

California's historiographers must have read a legislative history far different from that which we have read to sustain the California thesis that "the Project Act preserved priority of appropriation and equitable apportionment in the 'mainstream' and in every other part of the Colorado River System in the lower basin" (Cal. Op. Br. 159). The California brief in this particular instance cites only a few isolated statements culled out of the voluminous historical record. These few selections can hardly be dignified as "legislative history".

The only "history" before passage of the Project Act to which reference is made consists of one statement each of Congressman Swing, Senator Johnson and Senator King (Cal. Op. Br. 146-47, 148-49 notes 2 and 4). It is clear that Messrs. Swing and Johnson were not talking about the Project Act's effect on appropriative rights *interstate* but about its effect upon *intrastate* appropriations. Thus Mr. Swing stated that after "it [the Government] turns the water loose", an individual user within a state "will acquire his water right, if he acquires one, from the State and under the laws of the State, in which he puts the water to a beneficial use" (Cal. Op. Br. 148 note 2).[16] Similarly, Senator Johnson stated in effect that state law would govern intrastate appropriations and priorities in accordance with the Reclamation Act (Cal. Op. Br. 149 note 4).

On the other hand, the true legislative history shows overwhelmingly the full realization by both friend and foe of the Swing-Johnson bills that they would inevitably supersede the interstate operation in the Lower Basin of the

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[16] Quoting from *Hearings on H.R. 9826 Before the House Committee on Rules,* 69th Cong., 2d Sess. 116 (1927).

doctrines of prior appropriation and equitable apportionment.

Thus, shortly after the signing of the Compact, in discussing the second Swing-Johnson bill, Congressman Swing expressed his views as to the combined effect of his bill, the Compact and the proposed dam, whether constructed by public or private agency, on whatever appropriative rights might then exist in the Lower Basin:

> "Mr. Raker [of California]. Is it your contention that if such a dam should be built by private individuals, with such reservoir capacity, that the rights of the appropriators farther down the stream would be lost; that is, their right for private appropriation and use would be lost and would have to depend upon the dam?
>
> "Mr. Swing. That is the clear purport of article 8 of the compact. . . .
>
> * * * * * *
>
> "Mr. Raker. Right in that connection, is it your contention, taking the private appropriations of the dam for Arizona and California and the appropriation for the Imperial irrigation district of California and the ordinary mean low flow of water, that this compact would take the right of those private appropriators away, under that compact, even if it was ratified by the seven States and approved by Congress?
>
> "Mr. Swing. I submit to your own judgment the meaning of the English language as set forth in article 8.
>
> "Mr. Raker. I did not put the question before as I did now.
>
> "Mr. Swing. As far as I am willing to go, it is this. It is the clear purport of the paragraph. It

> certainly is what it declares. I do not know how it could be avoided."[17]

Mr. Swing repeated these views in the Senate committee hearings on the pending legislation.[18]

Arthur P. Davis, Director of the Reclamation Service, expressed his understanding of Swing's statement as to the effect of the proposed dam:

> "The representative from Imperial Valley has testified that the district is willing to yield all claim to the low water flow in exchange for a right in the reservoir, and no doubt all irrigators served from the reservoir would do the same."[19]

In the 69th Congress, Mr. Swing again repeated that California was willing to give up her appropriative rights if storage were provided on the river by enactment of his bill:

> "In the interests of peace on the river, all it [California] asks is that it be afforded storage to take the place of its present rights in and to the natural flow of the river."[20]

Before the House Rules Committee in the 70th Congress it was suggested that only a low dam was needed for flood-control purposes. Mr. Swing disagreed:

> "California can not afford to support such a proposal, because under the Colorado River compact, California must surrender her present water rights

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[17] *Hearings on H.R. 2903 Before the House Committee on Irrigation and Reclamation,* 68th Cong., 1st Sess. 1776-77 (1924) (hereinafter cited as *"Hearings on H.R. 2903"*).

[18] *Hearings on S. 727 Before the Senate Committee on Irrigation and Reclamation,* 68th Cong., 2d Sess. 30 (1924).

[19] *Id.* at 81.

[20] *Hearings on H.R. 9826 Before the House Committee on Rules,* 69th Cong., 2d Sess. 107 (1927).

> to the natural flow of the river and look to storage instead.''[21]

Governor Dern of Utah insisted at the Senate hearings in the 70th Congress that state laws regulating the appropriation of water should remain inviolate. He opposed the pending Swing-Johnson bills because, he said:

> ''The pending bills propose an entirely new and revolutionary national policy, and completely reverse the former position of Congress with respect to the waters of western streams. Never before has Congress gone so far as to attempt to appropriate water without the consent of a State. The West has always heretofore seen to it that its sovereign rights were respected.''[22]

In the Senate debate during the first session of the 70th Congress, Senator Johnson was explaining the provisions, then in §5 of the bill, which would limit California to 4,600,000 acre-feet per annum. He apparently could not understand why some Senators still opposed the bill, since their insistence on further protection under the doctrine of prior appropriation would permit ''this water to continue to flow down to the sea for an indefinite period, to go to waste in the Gulf of California. . . .''[23] He concluded this point by saying:

> ''Ah, you will see in the days to come what will happen in that river if no protection be accorded those people and the appropriation law of the West be permitted to obtain. Then will be demonstrated the utter futility of the position that is now maintained by some.''[24]

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[21] *Hearings on Boulder Dam Before the House Committee on Rules,* 70th Cong., 1st Sess. 80 (1928).

[22] *Hearings on S. 728 and S. 1274 Before the Senate Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 144 (1928).

[23] 69 Cong. Rec. 7250 (1928).

[24] 69 Cong. Rec. 7251 (1928).

A major controversy over the Swing-Johnson bills arose from the fact that they would place full control over the water of the Colorado River in the hands of the federal government. It was generally recognized that the legislation would set up machinery to effect a federal allocation of water among the Lower Basin states in disregard of state laws governing the acquisition of water rights under the doctrine of prior appropriation (pp. 33-47, *infra*). It was this very fact—that the Project Act was intended to abrogate and in effect abrogated the interstate application of the doctrine of prior appropriation—which caused many members of Congress and others to oppose it so vehemently.

(2) Administrative Construction

California's claim that the Project Act has been administratively construed as not displacing the doctrine of prior appropriation is based largely upon excerpts from certain documents selected from about sixty papers constituting the "Offer of Proof" which California made in connection with her oral argument on the Draft Report and which was rejected by the Master (Rep. 248-53). In so ruling the Master said:

> "California contends that these papers, if admitted in evidence, would establish:
>
> "(1) That state and federal officials concerned with the administration of the Project Act construed Section 4(a) to be applicable to the tributaries as well as to the mainstream, as California contends . . . ;
>
> "(2) That the Secretary of the Interior had no intention of apportioning water when he entered into water delivery contracts with the several California defendants and with Arizona and Nevada.
>
> "Careful consideration of the Offer of Proof leads to the conclusion that the papers proffered do not establish either of these contentions.
>
> * * * * * *

> "My conclusion is that both Arizona and California have, with respect to the meaning of Section 4(a), taken various positions from time to time as their immediate interests dictated and that the Offer of Proof fails to show a consistent interpretation of the Act by either.
>
> "So far as United States government officials are concerned, the dominant note sounded in the proffered papers is the avowed refusal of these officials to take sides in the Arizona-California controversy. . . ." (Rep. 248, 252)

Despite this ruling of the Master, California refers to these excluded documents as if they had been admitted in evidence as competent, and she attributes to them a persuasiveness which the Master refused to acknowledge. An examination of those documents will demonstrate that the Master was right.

In addition to the materials rejected by the Special Master, California makes reference to a letter of the Acting Secretary of the Interior dated July 31, 1930, answering an inquiry as to whether or not the Palo Verde Irrigation District would need a water delivery contract.

All the Acting Secretary said in his letter of July 31, 1930 was: "If no stored water is required by the Palo Verde Irrigation District, no contract between that district and the United States will be required. The Acting Secretary concluded his letter: "If by any chance it should later develop that stored water is required, the matter can then receive further consideration."[25]

When it later developed that the District did require stored water, the matter was reconsidered and the Secretary's contract with the District, concluded under date of February 7, 1933, recited:

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[25] C 351 (Tr. 9929).

> "(4) Whereas the District is desirous of entering into a contract for the delivery to it of water from the Boulder Canyon Reservoir, and it is to the mutual interest of the parties hereto that such contract be executed *and the rights of the District in and to waters of the river be hereby defined.*" (Ariz. Op. Br. Appendix H, p. 60a)

The rights of the District in and to the waters of the river were thus defined by contract with the Secretary pursuant to Project Act §5, not under the law of prior appropriation, and the rights thus defined were to *stored* water, not to *natural flow.*

California refers to the fact that "at all times, however, users in Arizona, both with and without contracts, have ordered and received 'mainstream' water for consumptive use" (Cal. Op. Br. 164) (footnote omitted). Plate 3 to California's brief is said to illustrate that users in Arizona and California have received "mainstream" water with and without water delivery contracts (Cal. Op. Br. 164 note 8). The non-contract users (shown in red on Plate 3) are the City of Needles in California, which uses well water—not subject to delivery by the Secretary from Lake Mead; the South Gila Valley in the Gila Project in Arizona, which is also irrigated from wells; Yuma Indian Reservation lands in California, which are expressly recognized as having water rights in the Seven-Party Agreement[26]; and the Colorado River Indian Reservation in Arizona, which the Master has held does not require a water delivery contract (Rep. 312 note 3a). These water uses are neither inconsistent with nor violative of the contractual allocation scheme of the Project Act.

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[26] Cal. Op. Br. A3, A13-14.

California asserts that in 1935 Arizona sued the other six Colorado River Basin states for "a judicial apportionment among the states of the Colorado River basin of the unappropriated water of the river", *Arizona* v. *California*, 298 U. S. 558, 560 (1936), and thereby recognized that the Project Act had not nullified the application of the principles of equitable apportionment and priority of appropriation (Cal. Op. Br. 164-65 note 9). The Court there said:

> "The relief asked, and that which upon the facts alleged would alone be of benefit to Arizona, is a decree adjudicating to petitioners the 'unclouded . . . rights to the permanent use' of the water. Such a decree could not be framed without the adjudication of the superior rights asserted by the United States. The 'equitable share' of Arizona in the unappropriated water impounded above Boulder Dam could not be determined without ascertaining the rights of the United States to dispose of that water in aid and support of its project to control navigation, and *without challenging the dispositions already agreed to by the Secretary's contracts with the California corporations, and the provisions as well of §5 of the Boulder Canyon Project Act that no person shall be entitled to the stored water except by contract with the Secretary.*
>
> * * * * * *
>
> *"Every right which Arizona asserts is so subordinate to and dependent upon the rights and the exercise of an authority asserted by the United States that no final determination of the one can be made without a determination of the extent of the other."* 298 U. S. at 571.[27]

Contrary to California's assertion that the Court's opinion did not suggest the possibility that the Project Act nullified

[27] The suit was dismissed because the United States was not a party.

equitable apportionment and priority of appropriation, the foregoing excerpt shows that such a possibility and indeed probability was clearly anticipated by the Court.

E. Sections 5 and 8(b) of the Project Act

California's allegation that the "Master misconstrues and misapplies Sections 5 and 8(b) of the Project Act" (Cal. Op. Br. 166) is based upon the claim that water delivery contracts were not intended as a substitute for an interstate compact, in the absence of which the law of equitable apportionment and priority of appropriation controls the interstate disposition of the waters of the Colorado River system (Cal. Op. Br. 166-67).

At the outset, California agrees with the Master that §§1, 5 and 8(b) of the Project Act reserve "to the United States broad powers over the waters impounded in Lake Mead and delegate this power to the Secretary of the Interior, as agent of the United States" (Cal. Op. Br. 166, quoting from Rep. 152). But California fails to realize that the management and control of the reservoir and dam for the primary purposes of improvement of navigation, flood control and river regulation necessarily preclude the operation of these works and structures to meet demands for delivery of water at the times and in the quantities required to satisfy appropriative rights (Ariz. Op. Br. 41-42). As a practical matter, it would be impossible for the Secretary to satisfy prior appropriative rights and at the same time to exercise the authority and discretion, which California admits he has, "to administer the orderly storage and delivery of water" (Cal. Op. Br. 167).

(1) The Statutory Scheme of the Project Act

California emphasizes the last sentence of §5—

> "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."

—and argues that, since this provision applies only to "stored waters", it must follow that "holders of pre-existing rights in natural flow available for consumptive use without Hoover Dam regulation do not need water delivery contracts" (Cal. Op. Br. 169-70).

California asserts that after construction of Hoover Dam pursuant to the Project Act there were two distinct and separate categories of Colorado River water: (1) that portion of the river which could have been used to satisfy prior rights in the unregulated flow and (2) stored water, *i.e.*, "water in excess of that which could have been used under prior rights from 'unregulated flow' " (Cal. Op. Br. 169 note 5). It is urged as a necessary corollary of this premise that the Secretary's authority under the Project Act is limited to the storage of only such water as is in excess of that which could have been used under prior rights in the unregulated flow. It is argued further that natural flow rights survived the enactment of the Project Act and the construction of Hoover Dam and that the Secretary's water delivery contracts recognize and provide for the satisfaction of such natural flow rights (Cal. Op. Br. 171-75).

This entire line of argument is refuted by the provisions of the Project Act itself. Section 1 expressly authorizes the Secretary of the Interior "to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River" for "the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River. . . ." As the Master found, "Congress

realized that the dam authorized by the Project Act would impound substantially all the water of the mainstream" (Rep. 153) (footnote omitted). Manifestly, the authors of the Project Act intended that the entire flow of the river should be regulated and recognized that the natural flow inevitably would be destroyed.

The administrative practice does not accord with, but negates, California's position. No water users have demanded the release of water in accordance with or in satisfaction of prior appropriative rights (Ariz. Op. Br. 46). If there were any such appropriative rights, they have been abandoned. That Hoover Dam and Lake Mead have continually been operated and that water delivery contracts have consistently been formulated without regard to appropriative rights is persuasive evidence of administrative recognition that the Project Act established a contractual allocation scheme wholly unrelated to and superseding the law of prior appropriation.

The clause in the Secretary's water delivery contract with Palo Verde Irrigation District, which California quotes only in part (Cal. Op. Br. 171), reads as follows:

> "(6) The United States shall, *from storage available in the Boulder Canyon Reservoir,* deliver to the District each year at a point in the Colorado River immediately above the District's point of diversion known as Blythe Intake (or as relocated within two miles of the present intake) so much water as may be necessary to supply the District a total quantity, including all other waters diverted for use of the District from the Colorado River, in the amounts and with priorities in accordance with the recommendation of the Chief of the Division of Water Resources of the State of California, as follows (*subject to availability thereof for use in California under the Colorado River Compact and*

> *the Boulder Canyon Project Act*)." (Ariz. Op. Br. Appendix H, pp. 60a-61a)

There then follow the intrastate allotments among the California water users as fixed in the Seven-Party Agreement.

Article (6) is preceded by Article (4), which provides:

> "(4) Whereas, the District is desirous of entering into a contract for the delivery to it of water *from Boulder Canyon Reservoir,* and it is to the mutual interest of the parties hereto that such contract be executed and *the rights of the District in and to waters of the river be hereby defined.*" (Ariz. Op. Br. Appendix H, p. 60a)

Articles (4) and (6) of the Palo Verde contract, taken together, demonstrate that the District agreed to look to stored water as the exclusive source of supply for the satisfaction of its rights to the delivery of water as defined in the contract.

The Secretary's water delivery contracts with all the California agencies make it self-evident that:

> (1) Only stored water is dealt with.
>
> (2) The deliveries are to be made in accordance with the intrastate *contractual* priorities in stored water established by the Seven-Party Agreement, not the *appropriative* priorities, if any, in the natural flow of the river.
>
> (3) The deliveries are to be of water available for use in California under the Compact and Project Act, not water available under the doctrine of prior appropriation.

The phrase "including all other water diverted for use of the District from the Colorado River" in the Palo Verde contract and language of like import in the contracts of other California defendant agencies were not intended to

provide for the satisfaction of any prior appropriative natural flow rights. Had this been the intention, explicit provisions accomplishing that purpose would have been employed.

The Project Act contemplates release of stored water for purposes other than irrigation and domestic use. It was also recognized that there might be water in the stream released for, but not diverted by, users other than the Palo Verde District. The phrase "including all other water diverted for use of the District from the Colorado River" was inserted in the Palo Verde contract (and the other California water delivery contracts) to make certain that all Colorado River water diverted by the District, whether consisting solely of water released for delivery by the United States at the diversion point specified in the Palo Verde contract or made up in part of water released for other purposes or diverted by the District at other diversion points, should be charged to the District under its contract. This is consistent with the requirement of Project Act §5:

> "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."

Thus the very terms of the California contracts are inconsistent with the California theory that the contracts recognize prior appropriative rights.[28]

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[28] California draws an invalid analogy between a water delivery contract under the Project Act and "a permit or a license to appropriate" (Cal. Op. Br. 174). We agree that an *appropriative* right "is created and preserved by exercising due diligence in putting water to beneficial use, not by a piece of paper. . . ." But a *contractual* right is founded upon contract; and the water delivery contracts required by Congress as a prerequisite to the delivery of Lake Mead water are not mere "pieces of paper" nor are they in any sense "permits or licenses to appropriate" water. They are genuine muniments of title without which no one is entitled to the delivery or use of stored water and with which the contracting party is entitled to water irrespective of prior beneficial use.

(2) Legislative History of §5

In support of the hypothesis that §5 of the Project Act is not a source of authority for the interstate allocation of water (Cal. Op. Br. 168), California refers to a so-called "legislative history" of §5. Once again, California's historiographers misread and miswrite history.

To be sure, while the Swing-Johnson bills were pending, Secretary of the Interior Work recommended that the water to be stored should be administered by means of water delivery contracts (Cal. Op. Br. 176).[29] Subsequently, a committee print of H.R. 6251, considered by the House Committee on February 5, 1926, incorporated for the first time the provision:

> "Sec. 5. That the said Secretary 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. . . ."[30]

Section 5 in this committee print also provided:

> "Contracts respecting water for domestic uses may be for permanent service *but subject to rights of prior appropriators.*"[31]

California makes no mention of this latter sentence or of the fact that the italicized phrase was subsequently deleted in the House committee on April 16, 1926 at the suggestion

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[29] Arizona does not agree with the repeated assertions of California to the effect that Congress intended the proposed water delivery contracts to be "patterned after ordinary reclamation contracts". However, the point is not material because, while these assertions are not a fair reading of Secretary Work's various communications, subsequent congressional action destroys any significance they might otherwise have had.

[30] *Hearings on H.R. 6251,* at 11.

[31] *Id.* at 12. The same language appeared in the companion bill, S. 3331, introduced in the Senate by Senator Johnson on February 27, 1926. Ariz. Legis. Hist. 4-5.

of the Upper Basin group.[32] The expunging of the phrase "but subject to rights of prior appropriators" was a specific rejection of the principle that appropriative rights should survive the Project Act and be recognized and satisfied by the Secretary's water delivery contracts.

To make clear that water rights should be founded upon contracts rather than upon appropriations, there was added, simultaneously with the striking of the clause preserving appropriative rights, the last sentence of §5:

> "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."[33]

California next quotes Delph Carpenter to the effect that this last sentence was proposed by the Upper Basin states so that no use of water might occur from the utilization of the proposed dam which could later be said to be independent of the Compact and to create rights adverse to the Upper Basin states. She emphasizes Mr. Carpenter's statement that:

> "It [the Compact] has nothing to do with the interstate relations between Arizona and California." (Cal. Op. Br. 179)[34]

Much has been omitted from California's version of Mr. Carpenter's testimony which makes clear his recognition that §5, even as it then stood,[35] authorized the Secretary

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[33] *Hearings on H.R. 6251,* at 115.

[33] *Ibid.*

[34] Quoting from *id.* at 163. The California quotation would indicate that "It" referred to the Project Act.

[35] Section 5 did not then contain, as it did when enacted, the clause:

> "Contracts respecting water for irrigation and domestic uses shall . . . conform to paragraph (a) of Section 4 of this Act."

Nor did §4(a) then contain either the California limitation provisions or those relating to the tri-state compact.

to contract for the delivery of stored water regardless of any alleged prior appropriative rights. For example, in response to the suggestion of Congressman Hayden that "should this bill pass, the water will be first applied to a beneficial use in California, and when the time comes for development in Arizona, my State may have no water", Mr. Carpenter stated:

> "It is also true that, under this bill, *the Secretary of the Interior could contract with water users in the State of Arizona for the use of water or power without let or hindrance,* except that the party contracting with the United States would agree that his particular claim should be subordinate to the Colorado River compact, *not subordinate to the rights of the State of California*—simply subordinate to the rights of the upper States as defined in the compact."[36]

This, we believe, is what Mr. Carpenter really meant when he said (as quoted by California):

> "In other words, the compact does not disturb the rights between Arizona, California, and Nevada, *inter sese,* as to their portion of the water." (Cal. Op. Br. 179)

That is to say, the Compact made only an *inter-basin* apportionment and left the Lower Basin states free to contract with the Secretary for stored water on a basis of equality and regardless of prior appropriative rights.

Indeed, Mr. Carpenter was so understood by Mr. Swing, author of the pending House bill. This is shown by the statement he made immediately after the above-quoted Carpenter testimony, which California has omitted from her quotation of that testimony:

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[36] *Hearings on H.R. 6251,* at 162-63, Ariz. Legis. Hist. 9.

> "The water which is stored by the Government at its own expense would be disposed of by contract as provided in this bill. There should be that privilege given Arizona to secure water on the same terms as is afforded to Nevada and California."[37]

California also disregards the following legislative history of §5, which further shows the definite understanding of Congress that that section empowered the Secretary of the Interior to make a contractual allocation of water among the Lower Basin states.

In May, 1928, when the fourth Swing-Johnson bill, H. R. 5773, was debated in the House, the effect of §5 was discussed at length. Mr. Douglas of Arizona stated in opposition to the bill:

> "The bill further provides for congressional amendments of State water codes. Further than that, it vests in the Secretary of the Interior complete and absolute control over the waters of the Colorado below Boulder Dam.
>
> "The compact phase of the measure could be adequately taken care of by a resolution or an act providing for ratification. I point out to Members of the House that there are two very distinct and separable portions of the bill, the first providing for the construction of the project, and the second dealing with allocation of waters as between States."[38]

Mr. Colton of Utah asserted that §5 placed full control over the Colorado River in the United States and he challenged the constitutional power of Congress to do this:

> "So that when you say that the Government of the United States owns and controls waters within that state, can not you see that you strike at the very

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[37] *Hearings on H.R. 6251,* at 163, Ariz. Legis. Hist. 10.

[38] 69 Cong. Rec. 9623 (1928).

> basis of our industrial life? You are saying that you are going to take it away from the States and place it in the Federal Government, and section 5 of this bill asserts that very principle. It provides that the Secretary of the Interior shall have control of all of the water stored in the reservoir and its delivery to any part of the river below."[39]

Quoting the exact provisions of §5, Mr. Colton commented:

> "If that does not give him absolute control of this water, or if it does not seek to give the Secretary of the Interior absolute control of this water, I can not understand the English language; and, gentlemen, that is exactly what we are objecting to. . . ."[40]

Mr. Colton later responded to remarks made by Congressman Taylor of Colorado, one of the leading advocates of the bill:

> "This undertakes to turn over the right to impound these waters, and section 5 provides that the Secretary of the Interior may arrange to distribute or deliver the water lower down the river and also under the canal that is provided for in this bill. That being true, we declare in effect that the water may be allocated by the Secretary of the Interior, and we declare further that the water may be controlled by him. That means that the Congress and the executive department are now embarking upon the policy of controlling, distributing, and allocating the waters of this river."[41]

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[39] 69 Cong. Rec. 9648 (1928).

[40] 69 Cong. Rec. 9649 (1928).

[41] 69 Cong. Rec. 9778 (1928). At the time that this debate took place, the §5 requirement that contracts "shall conform to paragraph (a) of Section 4 of this Act" had not yet been inserted therein. Ariz. Legis. Hist. 73-74.

It is impossible to reconcile this legislative history with the California contention that "section 5 . . . was not a delegation of power to the Secretary to make interstate allocations of water by water delivery contracts. . . ." (Cal. Op. Br. 189)

California also boldly asserts that throughout the legislative history of the four Swing-Johnson bills (the last of which culminated in the Project Act) one of the major areas of agreement by proponents and opponents alike was that "Congress could not make an interstate allocation of the waters of the Colorado River system, because interstate compact or litigation in this Court were the only two ways in which an interstate allocation could be accomplished" (Cal. Op. Br. 181).

The legislative history is directly to the contrary. It unequivocally discloses that one of the major areas of *disagreement* between proponents and opponents of the bills was whether Congress had the constitutional authority to make such an interstate allocation of water. We repeat, no one denied that the various Swing-Johnson bills provided for a federal allocation of water among the states. The bitter cry of the opposition was that, because of this federal allocation, the bills constituted an unconstitutional invasion by Congress of the rights of the states. On the other hand, the defenders of the bills argued vigorously for their constitutionality.

During committee hearings in the House in the 68th Congress a matter of principal concern was the power of Congress to deal with the water to be controlled by the proposed dam. L. Ward Bannister, a Denver attorney and recognized authority in the field of water law, testified:

> "Mr. Bannister. Although I think there is a fair question as to the fact of navigability I should say that the Federal Government, if it wishes to, may

exercise all the power it wants to in order to protect navigation.

"Mr. Raker [of California]. Now, what would that be? Just tell the committee.

"Mr. Bannister. That would be power, for instance, to establish locks on the river for the movement of vessels at the lower end of the river; it would also be the power, I should say, to prevent waters being withdrawn from the river by any of the States for irrigation, if the effect would be to injure navigation.

* * * * * *

"Mr. Raker. Well, before we start in to do any thing, let us see if the Federal Government has that right.

"Mr. Bannister. Well, I have already stated that, if this stream is navigable—and that is your present assumption—then the Federal Government may do anything on that stream necessary to promote navigability; in other words, it may require the release of all waters from the upper States and the lower States both."[42]

In the course of these hearings, much time was devoted to seeking a method of protecting the Upper Basin states in the absence of seven-state ratification of the Compact. William J. Carr, a California attorney representing the Boulder Dam Association, suggested that conditions should be attached to the use of water in the Lower Basin:

". . . But take the regulated flow of the river below the dam; that water will be diverted almost entirely, at least in canals that will be built by the Government, *and there will have to be some appropriate contractual arrangement before that water is put to beneficial use there and a water right is cre-*

[42] *Hearings on H. R. 2903*, at 180-81.

ated, and it would be perfectly proper in the bill to provide the conditions under which any right should be created.

* * * * * *

"Mr. Swing. *May I paraphrase your idea this way? Your position is that Congress has a right to put a limitation upon any person who seeks to benefit by the works which it constructs under this act?*

"Mr. Carr. *Yes.*"[43]

Ottamar Hamele, Chief Counsel for the Bureau of Reclamation, stated his opinion that Congress not only could apportion water between the Upper and Lower Basins, but also could apportion the water allocated to the Lower Basin among Arizona, California and Nevada. He suggested that the following sentence be added to §8 of the pending bill:

> "That every contract made under this act involving any right to the use of water from the development provided for herein shall be made subject to the provisions of the Colorado River compact negotiated at Santa Fe, New Mexico, dated November 24, 1922, and on file with the Department of State."

Mr. Hamele then testified:

> "Mr. Hayden. Then, if it is possible by the language that you have suggested to effect an apportionment between the upper and lower basins without the approval of the compact, *is it also within the power of the Congress to apportion the waters allocated to the lower basin by the compact between the States of Arizona, Colorado, and Nevada by a similar limitation?*
>
> "Mr. Hamele. *I think it is.*"[44]

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[43] *Id.* at 567, 571.
[44] *Id.* at 881-82.

During the hearings on S. 727, the companion bill to H.R. 2903, Senator McNary elicited the following testimony from Mr. Childers, attorney for Imperial Irrigation District:

> "The Chairman. *Yes. Under a certain section of this bill, as I recall it, the Secretary of the Interior could allocate these waters among the different States for the purpose of irrigation.*
>
> "Mr. Childers. *I think that is true.*"[45]

Evolution of a plan for protection of the Upper Basin and development of the formula for apportionment of water among the Lower Basin states continued in the 69th Congress during discussions of the third Swing-Johnson bill. Its proponents asserted the constitutional power of the federal government to take control and dispose of the water of the river. This was vigorously challenged by the measure's opponents, particularly Senator (then Congressman) Hayden of Arizona and Congressman Leatherwood of Utah. But no one denied that the bill, as it was developing, was designed to allocate water among the Lower Basin states.

Mr. Hayden objected that the bill would vest control of the water in the federal government:

> "Mr. Hayden. . . . I doubt very much whether Representatives in Congress from the arid West, where the doctrine of riparian rights does not and has never prevailed, will be in any hurry to accept the theory of this bill that Congress can make appropriations of water; that Congress, without the consent of the State, can take water for beneficial use for power or irrigation or other purposes.
>
> "Mr. Leatherwood. Without the consent of the State?

[45] *Hearings on S. 727 Before the Senate Committee on Irrigation and Reclamation,* 68th Cong., 2d Sess. 155 (1924).

"Mr. Hayden. Not only without the consent of the State but utterly ignoring the State, *yet such are the terms of this bill.* It represents the first attempt to pass legislation by Congress whereby the Federal Government is assumed to have that power."[46]

That this would be the effect of the measure was also recognized by Congressman Leatherwood and Charles P. Squires, a member of the Colorado River Commission of Nevada:

"Mr. Leatherwood. Do you realize that this bill practically nationalizes the river?

"Mr. Squires. Yes, sir.

"Mr. Leatherwood. Do you favor that?

"Mr. Squires. We are perfectly willing that the project shall be under the control of the Federal Government.

"Mr. Leatherwood. Do you favor the policy outlined in this bill of the Government going ahead and doing that by ignoring the several States and their rights?

"Mr. Squires. I favor the Government building the dam."[47]

S. G. Hopkins, Colorado River Commissioner of Wyoming, stated his opinion that Congress could take control of the water and would do so under the proposed bill:

"We found that if the Government constructs this dam for the purpose of flood control, and that is ostensibly the primary purpose of the act, and then incidentally the waters are used for the purpose of generating power and irrigation, that the court would be pretty likely to sustain the act.

* * * * * *

[46] *Hearings on H. R. 6251,* at 16. Mr. Hayden expressed the same views in the Minority Report on H. R. 9826. H. R. REP. No. 1657, 69th Cong., 2d Sess. (pt. 3) 1 (1927).

[47] *Hearings on H. R. 6251,* at 43.

> "... If the Government constructs this reservoir you have only to go to the Government and obtain your water contracts and irrigate your land."[48]

The majority of the House Committee stated in favorably reporting out H.R. 9826:

> *"All rights respecting water or power under the project are, under the terms of the bill, to be disposed of by contract by the Government.* It is not reasonable to assume that the Government will do anything of an unfair or prejudicial nature to Arizona."[49]

The fourth Swing-Johnson bills were introduced in the 70th Congress and again there was no dispute that they would vest control of the river in the federal government and depart from the doctrine of prior appropriation.

Congressman Arentz of Nevada was very plain in stating his views:

> "There must be a definite statement in this bill; *if there cannot be a State compact arrived at among the lower-basin States—there must be a statement in this bill of an allocation among the lower-basin States. What else can you do?*"[50]

Governor Dern of Utah again opposed the legislation:

> "The Swing and Johnson bills propose an entirely new and revolutionary national policy.
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> * * * * * *
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> "The theory advanced by attorneys for the Bureau of Reclamation, and embraced in the Swing and Johnson bills, that Congress has the power to

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[48] *Id.* at 106, 108.

[49] H. R. REP. No. 1657, 69th Cong., 2d Sess. 11 (1926).

[50] *Hearings on H. R. 5773 Before the House Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 51 (1928) (hereinafter referred to as "*Hearings on H. R. 5773*").

> allocate and apportion the waters of any Western river among the States, regardless of their will, is abhorrent to our whole plan of government. It proceeds from the vicious bureaucratic hypothesis that in all the Western States the United States, and not the States, owns and may dispose of the waters of any stream, and that Congress at any time may wholly remove the control of such waters from the States, as is attempted in this bill; and that the States exercise their control by mere sufferance.
>
> * * * * * *
>
> "*Under the Johnson bill the essence of the compact idea is almost removed, and the Federal Government is given outright authority to divide the water of the river.* That the division is to be made according to the terms of the Colorado River compact is a mere incident. *The scheme is Federal division of the water, and the compact is no longer a compact but merely a formula.* If Congress at this session can divide the river according to this formula, then a future Congress, again succumbing to the pressure of intensive propaganda, may amend the law and divide the river according to some other formula without consulting the States at all."[51]

On the other hand, Mr. Childers, attorney for Imperial Irrigation District, appeared before the House Committee in support of the legislation and testified that he believed Congress could and should provide for an allocation of water in the Lower Basin:

> "It is somewhat doubtful if a compact respecting these questions, solemnly approved by the legislatures of the several States and by the Congress, would of itself be so effective as a means of allocating and administering the allocation of water as an act of the Congress. Compacts for this purpose

[51] *Id.* at 208-09, 215.

> have not been adjudicated, just how rights will be affected are not known, and the question of State and Federal control has not been settled."[52]

Francis C. Wilson, appearing before the Senate Committee as a representative of the Governor of New Mexico, testified:

> "Senator Hayden. But unless there were some direct constitutional question involved, wherein authority had been conferred upon the Congress, such apportionment could not be made.
>
> "Mr. Wilson. No; it could not be made. In other words, in this connection as I see it the Congress is passing a law which has to do with the regulation of the Colorado River for the betterment of commerce, to make it more navigable. Incident to that power the Congress can take jurisdiction as I view it over the water of the Colorado River to the extent necessary to execute that authority. *If it is important to the execution of that authority that there should be some allocation between the States of the water, I think the Congress could so act in this connection.*"[53]

The favorable report of the majority of the Senate Committee, *submitted by Senator Johnson,* stated in part:

> "Here finally is presented a unified plan for protecting those entitled to protection, *for the allocation among the States desiring that allocation of the waters of a great river to which all are entitled,* for the elimination of intolerable conditions by which a fertile and productive part of the United States is dependent for its very life upon water which flows through Mexican territory, and finally for converting

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[52] *Id.* at 444.

[53] *Hearings on S. 728 and S. 1274 Before the Senate Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 194 (1928).

> into a great national asset a wasteful and destructive agency, and by its control reclaiming for homes for Americans, land now arid and worthless."[54]

During the Senate debate on the bill in the First Session of the 70th Congress, Senator Smoot of Utah epitomized the views of the opposition when he said:

> "The bill is predicated upon the assumption that the Federal Government has very much greater rights in the Colorado River and older streams generally in the country than has ever been recognized by any judicial tribunal. *Indeed, the theory upon which this bill must be upheld, if it is upheld at all, is that the Federal Government is sovereign over the Colorado River, and that Congress may determine how the waters of the Colorado should be divided between the States.*"[55]

The development of the requirement of the California Limitation Act and the change from an allocation by secretarial contract to the imposition of a mandatory formula for allocation created by the interaction of §§4(a), 5 and 8(b), which took place during the Senate debates in the Second Session of the 70th Congress, has been fully reviewed in our opening brief (Ariz. Op. Br. 38-46, 83-99).

These excerpts from the legislative history, although extensive, are but a few of the many which could be quoted upon this point.[56] All demonstrate a clear recognition that

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[54] S. REP. No. 592, 70th Cong., 1st Sess. 7 (1928).

[55] 69 Cong. Rec. 7538 (1928).

[56] See, for example:

Hearings on H. R. 6251, at 15, 17, 19, 65, 72-73, 99-101, 105, 143, 159-60, 188-89.

69 Cong. Rec. 9648-49, 9653, 9764-65 (1928).

Hearings on H. R. 5773, at 45, 50-51, 56-59, 81-82, 120, 123, 128, 206-08, 212-13, 215, 228, 296, 298-99, 307-08, 335, 337-39, 343, 415-16, 418-20, 438-39, 443-46.

H. R. REP. No. 918, 70 Cong., 1st Sess. 8, 22-23 (1928); see *id.*

the Swing-Johnson bills, if enacted, would impose complete federal control over the water of the Colorado River in the Lower Basin and would provide for a federal allocation of that water among the Lower Basin states. The major controversy was whether Congress had constitutional power to accomplish this purpose. This question was not settled until the decision in *Arizona* v. *California,* 283 U. S. 423 (1931), which sustained the constitutionality of the Project Act.

In view of this overwhelming historical evidence, there is no justification for California's assertion that

> ". . . one of the major areas of legislative agreement expressed throughout the legislative history of the four Swing-Johnson bills (the last of which culminated in the Project Act) by proponents and opponents of the measure alike [was that]: Congress could not make an interstate allocation of the waters of the Colorado River system, because interstate compact or litigation in this Court were the only two ways in which an interstate allocation could be accomplished." (Cal. Op. Br. 181)

(3) Senators Quoted by the Special Master

California takes issue with the Special Master because he relies on certain statements made by Senators Hayden and Pittman and a colloquy between Senators Walsh and Johnson, which California calls "confused" (Cal. Op. Br. 182-88).

(pt. 2) *passim* (Minority Report).

Hearings on S. 728 and S. 1274 Before the Senate Committee on Irrigation and Reclamation, 70 Cong., 1st Sess. 39-40, 53, 64-67, 105-07, 120-21, 127, 144, 147-48, 152-54, 159-62, 194, 222-23, 264, 302-11, 329-30, 338-39, 363, 365, 374, 432-35, 440-53 (1928).

S. REP. No. 592, 70 Cong., 1st Sess. 7, 11-12, 15-16 (1928); see *id.* (pt. 2) *passim* (Minority Report).

See also Arizona's Legislative History for excerpts from the Senate debate in the 70th Congress.

The colloquy between Senators Walsh and Johnson (quoted at Rep. 156-58) is far from "confused". The question under discussion was whether the Secretary of the Interior would be required to recognize the appropriative rights, if any, of the City of Los Angeles. Senator Johnson, with obvious reluctance, finally conceded that under the pending bill the federal government, acting through the Secretary, could dispose of the stored water without regard to appropriative rights:

> "Mr. Walsh of Montana. If the city of Los Angeles has this enormous appropriation of the waters of the Colorado River, a perfected appropriation or an inchoate appropriation, does it follow, if the Government erects this dam across the Colorado River and creates a great storage basin, that it must yield up that amount of water to the city of Los Angeles?
>
> "Mr. Johnson. I rather think so, just exactly as if it were a perfected right for irrigation purposes.
>
> "Mr. Walsh of Montana. Yes; but I always understood that the interest that stores the water has a right superior to prior appropriations that do not store.
>
> "Mr. Johnson. Possibly so. What is the point?
>
> "Mr. Walsh of Montana. The point is that apparently, if that is correct, then this expenditure is being made with no right in the Government of the United States to control the water which is stored, but that it must go to those appropriators.
>
> "Mr. Johnson. No; the bill provides that a contract in advance must be made for the storage of water by the Secretary of the Interior.
>
> "Mr. Walsh of Montana. A contract with whom?
>
> "Mr. Johnson. With those who utilize and take and appropriate the water.
>
> "Mr. Walsh of Montana. That is to say, the Government may dispose of the stored water as it sees fit?

"Mr. Johnson. Yes; under the terms of this bill."[57]

Here is a clear and unconfused declaration by one of the bill's sponsors that it would wipe out appropriative rights and that the only way anyone could get any water was under a contract with the Secretary.[58]

California accuses the Master of quoting Senator Hayden out of context and asserts that in the Hayden-King exchange,[59] from which the Master quoted (Rep. 155), Senator Hayden was in fact referring to a "mandatory tri-state compact", which was then a part of his amendment (Cal. Op. Br. 183-86). Senator Hayden's assertion, which California improperly construes as stating "only that the *mandatory* tri-state compact would make an apportionment", was in fact made by him in response to Senator King's contention that, before Congress would be justified in appropriating funds for construction of Hoover Dam, the bill should expressly provide for a judicial determination of all water rights. Senator Hayden declared that his amendment was intended merely to provide for an interstate apportionment of water and that the determination of individual rights intrastate would be left to the state courts.

California's claim (Cal. Op. Br. 186-87) that the Master quotes Senator Pittman (Rep. 155) out of context is also without foundation. Senator Bratton had objected to

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[57] 70 Cong. Rec. 168 (1928), Ariz. Legis. Hist. 40-41.

[58] The other sponsor of the bill, Congressman Swing, expressed similar views (see pp. 18-20, *supra*).

[59] The extent of California's misrepresentation of the meaning of this exchange in stating that the Special Master "quotes the ambiguity and omits the clarification" (Cal. Op. Br. 186) can only be appreciated by reading the remarks of Senators King and Hayden in full. The text appears at 70 Cong. Rec. 168-69 (1928), Ariz. Legis. Hist. 44-46.

imposing a tri-state compact on the states. Senator Pittman expressed disagreement and pointed out that the states had been unable to agree on a division of water, so that it became the "duty of the United States Senate to settle this matter. . . ."[60] There can be no doubt as to Senator Pittman's understanding, since he repeatedly stated that the bill was making an interstate apportionment of water (Ariz. Op. Br. 93-97). Even after the tri-state compact provision proposed by Senator Hayden had been amended to make it permissive rather than mandatory, Senator Pittman observed:

> "We have already decided as to the division of the water, and we say that if the States wish they can enter into a subsidiary agreement confirming that."[61]

Undoubtedly, he recognized that the Phipps amendment to §5, which required all contracts for water for irrigation and domestic use to "conform to paragraph (a) of section 4 of this Act", would require all secretarial contracts to be for the quantities specified in §4(a).

(4) Section 8(b)

California also disputes the Master's construction of §8(b). He concluded:

> "The intention to exert authority over the allocation and distribution of water stored in Lake Mead can likewise be derived from Section 8(b) of the Act. That section contemplates that Arizona, California and Nevada, or any two of them, might negotiate a compact for the equitable division of Colorado River water but provides that such a

[60] 70 Cong. Rec. 471 (1928), Ariz. Legis. Hist. 130.

[61] 70 Cong. Rec. 471 (1928), Ariz. Legis. Hist. 131.

> compact shall be subject to water delivery contracts made by the Secretary of the Interior prior to congressional approval of such compact." (Rep. 151)[62]

California argues that this interpretation is wrong because the Master's construction of §5 is wrong (Cal. Op. Br. 188-91). California's §5 argument has already been disposed of (pp. 25-47, *supra*).

California further contends that any §8(b) compact would have related only to power or the price (not allocation) of water. Cited in support of this position is a letter of Secretary Wilbur dated May 9, 1930 to Governor Phillips of Arizona.[63] Far from supporting California's position, however, the letter reflects the Secretary's recognition that contracts made by him under §5, whether for power or the delivery of water, would have precedence over any interstate compact concluded after January 1, 1929 with respect either to power or the apportionment of water. Arizona had objected to power contracts which had been executed by the Secretary before the termination of pending negotiations between California and Arizona looking toward an interstate compact "covering power questions as well as water" (Cal. Op. Br. 190-91 note 6). The Secretary responded in his letter of May 9, 1930 that before signing these power contracts the Department of the Interior had waited "until the states had had an opportunity under section 8(b) to compact on or before January 1, 1929, as the law allows . . ."; and he added that the Department had delayed action until April 28, 1930 "in the earnest hope that the states would be able to work out their problems. . . ." In short, realizing that his contracts would have priority over any interstate compact entered into after

[62] Arizona's construction of §8(b) appears at Ariz. Op. Br. 83-88.

[63] C 1835 (Tr. 12,256).

January 1, 1929, the Secretary deferred making such contracts until he felt that he could not justify further delay.

Moreover, it is ridiculous to contend, as California does (Cal. Op. Br. 175), that Congress would impose upon the Secretary the obligation of securing contracts which would provide revenue adequate to repay the cost of the project and then turn right about and authorize the states to compact as to power and the price of water.

The language of §8(b) is plain. It provides authority for the three states, or any two of them, to compact "... for the equitable division of the benefits, including power, arising from the use of water...." This means *all* benefits, including the use of water, subject to the condition that any such compact concluded after January 1, 1929 would be subordinate to all contracts theretofore made by the Secretary under §5.

California concludes its argument on this point by saying:

> "If proponents of section 8(b) had attributed to the proviso of that section the interpretation which the Master derives, its legislative history would have been marked by hot debates about the inclusion of this language of section 8(b). In fact, the record on section 8(b) is singularized by relative silence." (Cal. Op. Br. 191) (footnotes omitted)

But the legislative history of this section[64] discloses that, once again, California is wrong on all points: (1) The record is not silent on this section, (2) the proponents did attribute to it the interpretation derived by the Master and (3) despite the fact that they did so, the legislative history is not marked by hot debates on the subject.

The underlying principle of §8(b) was first suggested in the 69th Congress by Charles P. Squires, a Nevada

[64] Ariz. Legis. Hist. 133-43.

Colorado River Commissioner, representing the Governor of that state. H.R. 6251, the bill then pending before the House Committee, provided in §8(a):

> "That the United States, in managing and operating the dam, canals, and other works herein authorized, including the delivery of water for the generation of power, irrigation, or other uses, shall observe and be subject to and controlled by the Colorado River Compact as signed at Santa Fe, New Mexico, on November 24, 1922 and particularly described in section 13 herein.[65]

Mr. Squires proposed an amendment to this section with the following explanation:

> "I would respectfully suggest to your committee that a clause be added to the committee print bill now under consideration, directing that the Secretary of the Interior, in the allocation of rights, shall make such allocation in accordance with the terms of a compact now in process of negotiation between the States of Arizona, California, and Nevada, provided such a compact shall be negotiated and ratified by the legislatures of said three States and consent thereto be given by Congress on or before March 4, 1927.
>
> "Such a clause, permitting Arizona, California, and Nevada to proceed with the orderly and peaceful solution of their own problems, *but leaving the Secretary of the Interior free to act under the terms of the bill as now drawn in case no agreement is arrived at,* may be added, substantially as follows:
>
> "Page 9, section 8(a), line 7, add, following the word 'herein':

[65] *Hearings on H. R. 6251,* at 3, Ariz. Legis. Hist. 133.

'and by the terms of a compact between the States of Arizona, California, and Nevada for the division of the benefits accruing to said three States, under said Colorado River compact, provided such a compact between said three States shall be negotiated and ratified by the legislatures thereof and consent thereto be given by Congress on or before March 4, 1927.' "[66]

Mr. Squires further explained the purpose of his proposal in answer to questions of Congressman Hayden:

"Mr. Hayden. We are willing to concede that whatever time may be necessary should run to perfect the plan of the original Colorado River compact, but you would set a time limit within which Arizona shall come to an agreement with California and Nevada. Does that appeal to you as entirely fair?

"Mr. Squires. Yes, sir; because there is a year in which to carry it out, and if then it can not be carried out, I suppose we would have to abandon that idea.

"Mr. Hayden. Why not put the same time limit on the approval of the Colorado River compact itself?

"Mr. Squires. This practically does it, I think, because a tri-State compact, which would be an agreement between the three States, would I assume, be predicated upon the terms of the seven-States Colorado River compact.

"Mr. Hayden. *If Congress can legislate after the time limit has expired, what is the necessity of any agreement at all?*

"Mr. Squires. *I think the necessity for action demands that there be legislation.*

"Mr. Hayden. *Regardless of whether the States agree or not?*

[66] *Hearings on H. R. 6251,* at 39, Ariz. Legis. Hist. 134-35.

"Mr. Squires. *I think so.* I think we are leaving the door wide open with an invitation to Arizona to come with us, and it is our desire and hope that that will be done."[67]

H. R. 6251 was later replaced by H.R. 9826 and a committee print of April 14, 1926 contained the Nevada proposal in §8(d).[68]

When Senator Hayden directed attention to this provision, Delph Carpenter of Colorado testified:

"Mr. Hayden. I desire to inquire as to the desirability of fixing a time limit, such as March 4, 1927, within which the State of Arizona must agree?

"Mr. Carpenter. I have been fearful that the section would be misconstrued in the very manner that you suggest. I think it is the intent of the framers of the amendment that the compact when entered into and approved by Congress should be controlling upon the works herein authorized, *but*

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[67] *Hearings on H. R. 6251,* at 41.

[68] "Also the United States, in constructing, managing, and operating the dam, reservoir, canals, and other works herein authorized, including the appropriation delivery and use of water for the generation of power, irrigation, or other uses, and all users of water thus delivered and all users and appropriators of waters stored by said reservoir and/or carried by said canal, including all permittees and licensees of the United States or any of its agencies, shall observe and be subject to and controlled, anything to the contrary herein notwithstanding, by the terms of such compact, if any, between the States of Arizona, California, and Nevada, for the equitable division of the benefits including power, arising from the use of water accruing to said States, subsidiary to and consistent with said Colorado River compact, which may be negotiated and approved by said States and to which Congress shall give its consent and approval on or before March 4, 1927; and the terms of any such compact concluded between said States and approved and consented to by Congress after said dates; Provided, That in the latter case such compact shall be subject to all contracts, if any, made by the Secretary of the Interior under Section 5 hereof prior to the date of such approval and consent by Congress." *Hearings on H. R. 6251,* at 117-18.

> *they wish to fix a reasonable time within which to arrive at a compact to deal with the waters with perfect freedom, knowing that if the Secretary of the Interior enters into contracts for disposition of water and power to be generated, that any compact between the three States would confront those contracts, and the three lower States might be put in a position of recognizing those contracts irrespective of their effect upon any one State. It was the thought of the framers of the amendment to stay the hand of the Secretary of the Interior in any such contracts for such a time as may be necessary for the three lower States to conclude a compact. That is the reason for inclusion of the date.''*[69]

And so the proponents of §8(b) made it perfectly clear that it was their intention to allow the states complete freedom until January 1, 1929 to make a division of the water by compact different from that specified in §4(a), but that after that date the hand of the Secretary to contract pursuant to the division among the states approved in §4(a) should no longer be stayed. If, after January 1, 1929, the states should compact for an allocation of water differing from that approved in §4(a), any such compact should be subject to prior contracts made by the Secretary pursuant to the authority and direction of §§5 and 4(a) (Ariz. Op. Br. 85-86). After enactment of the Project Act, the Secretary of the Interior, as we have seen, construed §8(b) in precisely the same way (see pp. 48-49, *supra*).

F. Section 6 of the Project Act

The Special Master has held (Rep. 308-11) that the only appropriative rights in the Lower Basin which survived the Project Act are the "present perfected rights" referred to in §6:

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[69] *Hearings on H. R. 6251,* at 204, Ariz. Legis. Hist. 140-41.

> "That the dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and *satisfaction of present perfected rights in pursuance of Article VIII* of said Colorado River compact; and third, for power."[70]

The Master has construed §6 as preserving whatever rights to main stream water were perfected in Arizona, California and Nevada when the Project Act became effective on June 25, 1929.

California takes issue with this construction as too narrow, contending that principles of prior appropriation survived the Project Act and govern all interstate rights in the Lower Basin whether acquired before or after June 25, 1929 (Cal. Op. Br. 217-21). In effect, California reargues her basic position regarding the survival of appropriative rights, with which we have dealt previously (pp. 8-53, *supra*).

Arizona disagrees with the Master's construction of §6, and even more so with California's position. As we stated in our opening brief:

> "It is our view that §6 of the Project Act does not recognize or confirm any rights within the Lower Basin at all. Section 6 merely directs that the facili-

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[70] Article VIII of the Compact provides:

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

> ties authorized by §1 shall satisfy the requirements of Article VIII of the Compact—that claims of rights by appropriators and users in the Lower Basin against appropriators and users in the Upper Basin shall attach to and be satisfied from water stored in the Lower Basin. The only portion of Article VIII of the Compact which provides for 'satisfaction' of present perfected rights is the second sentence of the first paragraph and this provision is clearly limited to the satisfaction of perfected rights basin versus basin." (Ariz. Op. Br. 47-48)

After a review of the circumstances existing when the Compact was negotiated, the conclusion was reached that:

> "Thus by the device of preserving perfected rights *basin versus basin* until storage was available, protection was afforded main stream Lower Basin users. After storage was provided as contemplated by Article VIII of the Compact, the first sentence of Article VIII had served its purpose and had no further effect." (Ariz. Op. Br. 49)

Further reflection and analysis of this question, including consideration of the arguments advanced by California, has served only to strengthen our belief in the correctness of this conclusion.

Indeed, as we have previously noted (pp. 18-20, *supra*), Mr. Swing, co-sponsor of the Project Act, expressed these very same views shortly after the Compact was signed.[71]

California repeats her misstatement, based upon a distorted version of testimony by Delph Carpenter, that §6 of the Project Act was inserted at the instance of the

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[71] See also the testimony of Judge Davis, the Compact Commissioner from New Mexico. *Hearings on H. R. 2903,* at 1769-70.

Upper Basin and was not intended "to affect rights of Arizona and California *inter sese*" (Cal. Op. Br. 219; and see 177-81). Actually, in discussing the provisions of §6 that the dam and reservoir should be used, among other purposes, for "satisfaction of present perfected rights," Mr. Carpenter stated:

> "Mr. Carpenter. In lines 1 and 2 the words 'and satisfaction of present perfected rights in pursuance or Article VIII of said Colorado River compact' were inserted by the upper basin States for the reason that the paragraph as drawn did not affirmatively recognize the obligation imposed by Article VIII of the compact to take care of present perfected rights, drawing water from the river below the dam. Article VIII provides that when a reservoir of 5,000,000 acre-feet or more has been constructed in the canyon for the benefit of the lower basin those perfected rights shall look to the reservoir for their supply. We would be sure that there be no question about that. The lake under consideration should perform that duty, along with other duties.
>
> "Mr. Hudspeth. In other words, the lands in the Imperial Valley shall look to this reservoir for their supply of water."[72]

The fact that the portion of §6 referring to "present perfected rights" originated with the Upper Basin is further proof that it was intended to preserve such rights only basin versus basin, until storage was provided, for the Upper Basin had no concern with, nor interest in, the preservation of perfected rights interstate in the Lower Basin.

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[72] *Hearings on H. R. 6251,* at 167. The testimony of Mr. Carpenter quoted at 177-81 of California's Opening Brief referred to §5 not §6 of the Project Act, despite the fact that California, in her argument as to the meaning of §6, at page 219 of her Opening Brief, refers back to pages 177-81 as though Carpenter's testimony in fact concerned the meaning and purpose of §6.

The foregoing provides cogent evidence that §6 of the Project Act was not intended to confirm rights within the Lower Basin nor to preserve any such rights beyond the time when storage capacity, as contemplated by Article VIII of the Compact, was provided. Therefore, there are no "present perfected rights" in Lower Basin main stream water today which have survived the construction of Hoover Dam and the creation of Lake Mead.

G. Summary

To summarize: None of the grounds advanced by California—neither the provisions of the Project Act, nor its legislative history, nor its administrative, practical, or subsequent congressional construction—supports the California position that the Project Act confirmed and did not abrogate the doctrine of prior appropriation and principles of equitable apportionment. To the contrary, these very sources establish the intent of Congress, absent an interstate compact, to make a statutory allocation of water among Arizona, California and Nevada, which, as the Master correctly found, renders the doctrine of equitable apportionment and the law of prior appropriation irrelevant to the decision of this case (Rep. 138).

II

The interpretation of the limitation on California is not controlled by the meaning of the Compact, as California contends, but by the intent of Congress as manifested in the Project Act and its legislative history.[73]

A. The Basic Question

The basic question involved in the construction of the California limitation is:

> Whether the references in §4(a) of the Project Act and in the Limitation Act to [1] "the waters apportioned to the lower basin States" by Article III(a) of the Compact and [2] "excess or surplus waters unapportioned" by the Compact mean main stream water only or include both main stream and Lower Basin tributary water.

B. California's Approach to the Question

California's position before the Master regarding these clauses was ambivalent and inconsistent (Rep. 180 note 40). She insisted that the first phrase—"the waters apportioned to the lower basin States" by Article III(a) of the Compact—must be construed in the Compact sense, *i. e.*, as referring to the same water as that to which the Compact referred. The Compact, she said as she does now, referred

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[73] This point is directed principally to a refutation of Part Two of California's Opening Brief, pages 69-137.

Arizona contends that Congress correctly interpreted Article III of the Compact as referring solely to main stream water (see Ariz. Op. Br. 72-81). But for purposes of this argument only, we shall assume that California's construction of Article III(a) of the Compact is correct.

to *system* water (main stream and tributaries).[74] But with respect to the second clause—"excess or surplus waters unapportioned" by the Compact—California took quite a different view. She argued:

> "Resolution of this issue does not turn on whether the negotiators of the compact intended to classify the waters specified in Article III(b) as 'apportioned.' Rather the issue is whether Congress intended to exclude California from participation in Article III(b) water. *The true question is what Congress* (and the California legislature in complying 'with the conditions respecting limitation' in the Project Act) *intended in 1928, not what the negotiators of the compact intended in 1922.*"[75]

The Master has sustained this California position with respect to III(b) water. He holds that, literally construed, the words "excess or surplus waters unapportioned" by the Compact would exclude California from any share in the water referred to in Article III(b) of the Compact, which he properly holds is "apportioned" water in the Compact sense. But, accepting California's reading of the legislative history of §4(a), the Master concludes that Congress did not intend to exclude California from a share in surplus water in excess of the first 7.5 million acre-feet of main stream water in the Lower Basin in any one year. Therefore, giving effect to the congressional intent that "unapportioned" water should include Article III (b) water, the Master recommends that California be decreed the right to share equally with Arizona in the 1,000,000 acre-

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[74] Article II(a) of the Compact defines the Colorado River System as "that portion of the Colorado River and its tributaries within the United States of America".

[75] Brief of the California Defendants before the Special Master, A2-5.

feet apportioned by Article III(b) of the Compact (Rep. 194-200).[76]

Arizona's concession that the Master's construction of the §4(a) phrase, "excess or surplus waters unapportioned" by the Compact, is sound has rendered the Article III(b) question academic (Ariz. Op. Br. 82). However, it is significant that California has contended successfully before the Master that simply because §4(a) refers to the Compact it does not at all follow that "the meaning of the Compact controls" and that " 'Compact' means Compact" (Cal. Op. Br. 70, 133-37). Indeed, in her Opening Brief California does not hesitate to argue for what she claims is a "sensible" reading of the Compact when a literal interpretation operates to her disadvantage (Cal. Op. Br. 93).

In dealing with the interpretation of clause [1]—"waters apportioned to the lower basin States" by Article III(a) of the Compact—California furloughs her historiographers and puts her literalists in command. She has bottomed her position upon an over-simplified and purely theoretical equation:

> Project Act = Compact = System water (main stream + tributary)

Or in terms of an equally over-simplified and theoretical syllogism:

> Congress in §4(a) employed the phrase "waters apportioned to the lower basin States" by Article III(a) of the Compact.

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[76] Having thus persuaded the Master, California now contends that a "literal reading" of the phrase also achieves the same result (Cal. Op. Br. 73-74). California modifies her position as to clause [2] in order to make it consistent with her position as to clause [1].

> Article III(a) of the Compact apportioned water of the Colorado River system.
>
> *Ergo,* Congress employed this phrase in §4(a) to mean water of the Colorado River system.

Entirely left out of the equation and the syllogism is this vital factor: What did the phrase really mean in the vocabulary of Congress—*what water was Congress talking about?* California pays little or no attention to the extensive legislative history of §4(a), which led the Master to conclude:

> "Certainly Congress intended that the water, to a portion of which California was limited by Section 4(a), would be mainstream water only." (Rep. 174)

California's unrealistic and myopic approach to the problem of interpretation vitiates all of her discussion of it. Although she accepts the Master's construction of the Compact as dealing with system water, she would have the Court reject his conclusion that in formulating the limitation on California Congress intended to and did deal with main stream water only (Cal. Op. Br. 80, *et seq.*).

C. Legislative History

The legislative history shows conclusively that in formulating the California limitation both Congress as a body and the congressional representatives of California in particular understood and agreed that "paragraph (a) of Article III of the Colorado River compact" meant and referred to main stream water only.

California purports to rely on this legislative history, but actually pays only lip-service to it (Cal. Op. Br. 118-24) and ignores the many instances in which the intent of Congress to deal only with main stream water in the Project

Act was clearly and repeatedly expressed (see Ariz. Op. Br. 60-67).

Indeed, California's only comment upon the statements of Senators Pittman, Hayden and Johnson, made during the debate on §4(a) and relied upon by the Special Master as showing they were talking about main stream water only (Rep. 174-80), is that Senators Pittman and Hayden were "confused" and that Senator Johnson's statements "were not always consistent" (Cal. Op. Br. 122-23).

The Pittman-Hayden confusion, if any, concerned the relationship between Article III(a) and (d) as used in the Compact (Rep. 188-90). They were certainly not "confused" regarding the meaning of §4(a) of the Project Act, as their discussion of its provisions on the Senate floor demonstrates beyond dispute. Senator Johnson was equally clear that §4(a) dealt with main stream water only.

Immediately before the Hayden amendment to §4(a) was put to a vote in the Senate, Senators Johnson and Hayden debated how any Mexican treaty burden should be shared between Arizona and California. They both displayed a clear and definite understanding that §4(a) dealt with main stream water only and that the California limitation of 4,400,000 acre-feet and the Arizona allocation of 2,800,000 acre-feet refer to main stream water only:

> "Mr. Johnson. All right. Now, in the division of water that the Senate saw fit to impose yesterday Arizona had 2,800,000 acre-feet, and 3,500,000 acre-feet from the Gila, did it not?
>
> "Mr. Hayden. Correct.
>
> "Mr. Johnson. Making 6,300,000 acre-feet. California was given, with its claims and its perfected rights, 4,400,000 acre-feet. That is correct, is it not? All right. Now, you wish to deduct from the burden that is imposed by water that goes to Mexico, first, 3,500,000 acre-feet, do you not?

"Mr. Hayden. I do.

"Mr. Johnson. Then you wish to put upon California and Arizona—one of them having then 2,800,000 acre-feet and the other 4,400,000 acre-feet remaining—the burden in equal shares, do you not?

"Mr. Hayden. I do.

"Mr. Johnson. All right. That is just what I wanted to demonstrate.

"Mr. Hayden. The Senator is unwilling to do that?

"Mr. Johnson. Of course I am unwilling to do that.

* * * * * *

"Mr. Johnson. Let us say, just by way of example, that 2,000,000 acre-feet would be utilized by Mexico. I am unable to say how much it would be; but a while ago some Senator upon the floor used that as an example—that 2,000,000 acre-feet might be ultimately allotted to Mexico. Under your plan, then, 1,000,000 acre-feet would have to be borne by California and 1,000,000 acre-feet by Arizona, would it not?

"Mr. Hayden. Yes.

"Mr. Johnson. That would leave, then, for California, 3,400,000 acre-feet.

"Mr. Hayden. And for Arizona, *in the main stream,* 1,800,000.

"Mr. Johnson. *Yes; with 3,500,000 added thereto from the Gila.*"[77]

In the foregoing exchange, Senators Johnson and Hayden were discussing §4(a) as it had been altered by the "perfecting amendment" of Senator Phipps, which added the words "paragraph (a) of Article III".[78] Contrary to California's contention, Senator Phipps did not intend, nor did Senators Johnson and Hayden understand,

[77] 70 Cong. Rec. 468 (1928).

[78] 70 Cong. Rec. 459 (1928).

that the Phipps' amendment would have the effect of making §4(a) refer to system water rather than to main stream water only. Shortly before perfecting his amendment, Senator Phipps clearly indicated his understanding that the limitation on California applied only to water sent down the river from the Upper Basin, *i.e.*, main stream water:

> "Just in a word, I wish to state that my understanding of the effect of the pending amendment is that under it or under a 7-State compact, the upper States would be compelled to send down 7,500,000 acre-feet [*sic*] of water in 10 years; or, to put it the other way, they would have for their own uses 7,500,000 acre-feet annually. If the 7-State compact is entered into, it settles that question so far as the upper basin States are concerned.
>
> "If we enact this legislation without providing for a 6-State compact, the discussions and the differences between the lower basin States may continue indefinitely and the upper basin States have no assurance that they are going to be protected in what they conceive to be their rights. The language of the amendment providing for a 6-State compact has incorporated in it the engagement upon the part of California that she will not take for her consumptive use more than 4,600,000 acre-feet—or now 4,400,000 acre-feet—of water out of the estimate 7,500,000 acre-feet annual flow."[79]

In an effort to create the impression that Senator Phipps must have understood that the §4(a) references to Article III(a) of the Compact "embraced both the main stream and the tributaries in the lower basin," California also wrenches out of context a colloquy between Senators Hayden and Phipps and emphasizes the following statement of Senator Phipps:

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[79] 70 Cong. Rec. 390 (1928).

> " '. . . But I do not think that the water from the Gila River, one of the main tributaries of the Colorado, should be eliminated from consideration. I think that California is entitled to have that counted in as being a part of the basic supply of water.' " (Cal. Op. Br. 121)[80]

The Congressional Record establishes, however, that in so stating, Senator Phipps was referring only to Gila River water *which reached the main stream,* since he was under the misapprehension that the La Rue engineering report, which had been submitted to Congress, indicated that a million acre-feet of Gila River water entered the main stream of the Colorado River annually and that Arizona was claiming the right to the exclusive use of this water even after it had reached the main stream. Senator Hayden immediately corrected this misapprehension and made it clear that the million acre-feet discussed by La Rue was not an existing supply, but an anticipated return flow which would occur only if large quantities of Colorado River water were used to irrigate lands in the lower Gila Valley, and that Arizona was making no claim to Gila River water once it became part of the main stream supply.[81]

Thereafter, the Hayden amendment, containing the clause giving Arizona exclusive use of the Gila within her boundaries, was accepted by Senator Phipps as an amendment to his amendment.[82] Thus, in making the statement emphasized by California, Senator Phipps was not at all expressing the view that the proposed limitation on California related to tributaries as well as to the main stream. To the contrary, he was in effect saying that California should be entitled to use within its limitation any water *in the main stream,* regardless of its source.

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[80] Quoting from 70 Cong. Rec. 335 (1928).

[81] 70 Cong. Rec. 335-36 (1928).

[82] 70 Cong. Rec. 472 (1928).

We have fully reviewed (Ariz. Op. Br. 61-67) the Senate debates in the 70th Congress, all of which support the Master's conclusion that the §4(a) phrase, "waters apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact", was intended to mean water of the main stream only. If supplemental proof were needed, however, it may be found in the record of the hearings on the fourth Swing-Johnson bills before the House and Senate Committees.

T. A. Panter of Los Angeles, presented by Congressman Swing as a witness in support of the bill, testified:

> "Mr. Panter. I said that the compact allocates seven and one-half million acre-feet of water to the lower basin directly.
>
> "Mr. Douglas. *At Lees Ferry.*
>
> "Mr. Panter. *At Lees Ferry.* In addition to this amount Arizona has contended that there is 2,000,000 acre-feet of water *coming down* that is unallocated, or that the upper basin will not use. Now, if that is split, just assuming for example that there is a 50-50 split on that, it would bring a million acre-feet down so far as the California intakes."[83]

Just as it did in the Senate,[84] the proposal of the Upper Basin Governors formed the basis for discussions in the House Committee hearings as to the division of water among the Lower Basin states. Francis C. Wilson of New Mexico testified as the representative of the Governor of that state that he had attended the Governors' Conference of 1927 and that he was among those who formulated the recommendation that:

> "Of the average annual delivery of water to be provided by the States of the upper basin *at Lees*

[83] *Hearings on H.R. 5773,* at 275.

[84] See Ariz. Op. Br. 62-66.

> *Ferry* under the terms of the Colorado River compact, to the State of Nevada, 300,000 acre-feet; to the State of Arizona, 3,000,000 acre-feet; to the State of California, 4,200,000 acre-feet."[85]

Reference was also made in these Committee hearings to a letter written by Mr. Wilson to Congressman Tilson in which he stated:

> "Arizona accepted the suggestion of the governors as regards the division of water *from the main stream* to the extent that those waters are underwritten in the compact by the upper-basin States *at Lees Ferry. . . .*"[86]

Charles Childers, attorney for Imperial Irrigation District, testified as to the basis for California's demand for 4,600,000 acre-feet and stated that California could not accept the Governors' recommendation. He continued:

> "In this statement we are not considering possible surplus water *from the upper basin over and above that allocated by the compact.* It is only in the hope that some water, above the compact allocation, *will flow from the upper basin,* that California made its proposal of approximately 4,600,000 acre-feet as the minimum she could accept. There may be some surplus water, and there may not be, so in all of these discussions we are ignoring surplus water *from the upper basin.*"[87]

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[85] *Hearings on H.R. 5773,* at 292.

[86] *Id.* at 298. For the full text of the Governors' recommendation, see Ariz. Legis. Hist. 158-59.

[87] *Hearings on H.R. 5773,* at 391.

D. Significance of California's Position

Why, in the face of the legislative history, does California seek a "literal" reading of the §4(a) phrase "waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact", while at the same time she accepts the congressional non-literal use of the phrase "excess or surplus waters unapportioned" by the Compact? The Master readily comprehended her reasons and motives. He described them thus (Rep. 177-78):

> "The crux of her case lies in the view that the Project Act adopts and applies the Compact method of accounting. Thus California would total all uses of System water in the Lower Basin until the sum of 7,500,000 has been reached, after which she would assign all remaining uses to 'excess or surplus waters unapportioned by said compact.' There being no tributaries in California, the effect of this thesis is, of course, to exhaust the 7,500,000 apportionment with the help of tributary uses outside of California and to leave a large supply of mainstream water which California shares as 'surplus.' The effect of California's accounting system is disclosed in Part XII of her Proposed Findings and Conclusions. The California position is there revealed as follows:
>
> 1. Art. III(a) of the Compact apportioned 7,500,000 acre-feet of uses to the Lower Basin;
>
> 2. Congress limited California to not more than 4,400,000 acre-feet of uses from this apportionment;
>
> 3. California is using all of the 4,400,000 acre-feet;
>
> 4. Thus, 3,100,000 acre-feet of uses remain for other Lower Basin states out of the III(a) apportionment;
>
> 5. The 3,100,000 acre-feet of uses are exhausted in other states, as follows:

(1) Gila River	1,750,000
(2) Other tributaries	200,000
(3) Mainstream, other than California	1,150,000
Total	3,100,000;

6. Any water remaining in the *mainstream* in excess of 5,550,000 acre-feet (4,400,000 for California and 1,150,00 [*sic*] for others) is surplus, of which California may take as much as one-half.

"Under this hypothesis California argues that she is privileged to take as surplus up to 978,000 acre-feet from the mainstream in addition to taking 4,400,000 acre-feet, also from the mainstream, out of what she interprets to be the Article III(a) System apportionment. *The effect of this argument is to give California 5,378,000 acre-feet out of the first 7,500,000 acre-feet available from the mainstream, leaving only 2,122,000 acre-feet for Arizona and Nevada.*" (Rep. 177-78) (footnote omitted; italics the Master's)

That this result was never intended by Congress is clear, and the Master so found. "Nothing", he says,

"in the words or the legislative history of Section 4(a) lends countenance to this hypothesis. The second paragraph of Section 4(a) contemplates that Arizona could receive 2,800,000 acre-feet of the 7,500,000 acre-feet *in addition* to the exclusive use of the Gila River within her boundaries. Under the California hypothesis, over one-half of Arizona's 2,800,000 acre-feet is used up by appropriations on the Gila.

"After the prolonged dispute between Arizona and California, which was uniformly described as a difference over whether California should be lim-

> ited to 4,200,000 or 4,600,000 out of the first 7,500,000 acre-feet of mainstream water, it would be remarkable indeed to discover at this late date that Congress intended *to give California up to 5,378,000 acre-feet of the first 7,500,000 acre-feet of mainstream water and to assure Arizona of only 1,822,000 acre-feet.*'' (Rep. 179-80) (footnote omitted; first italics the Master's)

While California insists that her position is ''Compact means Compact'', her claims to water which she labels ''excess or surplus waters unapportioned by the Compact'' belie this assertion.

Concededly, California is limited by §4(a) of the Project Act to the ''aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River'' of 4.4 million acre-feet

> ''of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact.''

Article III(a) of the Colorado River Compact provides:

> ''There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin . . . the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum . . .''

California's studies of ''safe annual yield'' are predicated on the assumption that uses in the Upper Basin will not exceed 6,500,000 acre-feet during any one year. The difference of 1,000,000 acre-feet constitutes a part of the ''dependable water supply'' for the Lower Basin in the California computation of ''safe annual yield'' (Cal. Op. Br. 251 note 5).

However, under a literal reading of the Compact, which California urges, this 1,000,000 acre-feet is not "excess or surplus water unapportioned by the Compact", but is water apportioned to the Upper Basin. It would follow, were the Act read literally, that under the provisions of §4(a) and the Limitation Act, California has excluded herself irrevocably and unconditionally from the use of any of this water. Consequently under §§4(a) and 5 of the Project Act, the Secretary could not contract to deliver for use in California any portion of this water, for to do so would violate the plain terms of the California limitation, construed in the literal Compact sense.

Nor, if the Compact is literally incorporated into the Project Act, as California contends, could she presently acquire any firm right to any part of the 1,000,000 acre-feet per annum referred to in Article III(b) of the Compact, for under a literal construction of the Compact this water is also "apportioned" water (Rep. 180 note 40, 194; and see Compact Article III(f)). Hence, California would have no share in the uses specified in Article III(b).

Lastly, if California's pressure for a literal construction is yielded to, she cannot presently acquire a firm right to any part of the "excess or surplus waters unapportioned" by the Compact. This is because under Article III(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 . . . 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)."

Literally and technically, the Secretary of the Interior has no authority to contract now with California agencies for

the delivery of any portion of the "excess or surplus water unapportioned" by the Compact, because his contracts "shall be for permanent service" (Project Act §5). The Secretary cannot create, nor can California acquire, any vested contractual water right which is thus subject to divestment in the future.

Each of the foregoing results follows, it should be noted, whether the apportionment of water made by the Compact is an apportionment of system water or of main stream water only.

Thus, under a literal construction of the Compact terminology used in the Project Act, California is precluded from any share of (1) water apportioned to but unused by the Upper Basin, (2) water apportioned to the Lower Basin by Article III(b) of the Compact and (3) excess or surplus water unapportioned by the Compact. Therefore, it is only in the event that §4(a) of the Project Act is construed, as the Master properly construes it, in the light of the congressional intent as manifested in the other provisions, the purposes and legislative history of the statute that California is entitled to use water in excess of 4.4 million acre-feet of the water apportioned to the Lower Basin by Article III(a) of the Compact.

E. California's Attack on the Master's Construction of §4(a)

The Master observed that a literal reading of §4(a) "would authorize Arizona, California and Nevada to enter into a compact for the division among themselves of all the Lower Basin system water, including water being used by New Mexico and Utah" (Rep. 171); and that "it is preposterous to suggest that such a result would have been accomplished with the active support of Senator Bratton of New Mexico, one of the principal architects of Section 4(a)" (Rep. 175) (footnote omitted).

To this California responds that "New Mexico and Utah would not and could not be excluded from the use of any water by any compact among Arizona, California and Nevada" to which the states of New Mexico and Utah were not parties; and that "Senator Bratton must have believed —correctly—that clauses (1) and (2) of the tri-state compact to which New Mexico was not a party could not affect her rights" (Cal. Op. Br. 86-87) (footnote omitted).

This implies that Senator (now judge) Bratton was playing a crafty political game. The tri-state agreement envisaged in §4(a) was proposed, together with the California limitation, as an equitable settlement of the long-lasting dispute regarding the division of Lower Basin main stream water. Indeed, this controversy threatened to block *in limine* the authorization of the project which California so urgently desired. Yet California would now attribute to Senator Bratton, when he was strongly urging the acceptance of this compromise, a mental reservation that, although in terms it would "literally" deprive his state of New Mexico of a share in system water, in legal effect it could not do so; and hence he would support advance congressional approval of the proposed tri-state compact by the lip service of his vote. Moreover, the California contention necessarily assumes that Congress would solemnly approve in advance a tri-state compact which, if made, would have no validity or utility, since it purported to apportion among the three compacting states tributary water in which two non-compacting states had vested interests.

The same specious argument is advanced by California (Cal. Op. Br. 91) in response to the Master's further observation that, if read literally, §4(a) would "prohibit the states of the Upper Basin from utilizing any of the water unapportioned by the . . . Compact" (Rep. 171).

This time the same political chicanery is attributed to senators of the Upper Division states, men of the stature of King and Smoot of Utah, Kendrick of Wyoming and Phipps of Colorado, all of whom, as representatives of the Upper Division, were anxious to have the Lower Basin controversy settled and settled if possible by interstate compact. Yet California would impute to them also the purpose to authorize a futile and invalid compact.

Finally, the California position implies that the states of the Upper Basin and New Mexico and Utah (as to their Lower Basin uses) would willingly approve in advance a tri-state compact which would create a cloud upon their rights to participate in a further apportionment of water as contemplated by Article III(f) of the Compact.

California argues further that, in any event, the quantity of water from which Utah and New Mexico would have been excluded under a literal interpretation of §4(a) is "insignificant" (Cal. Op. Br. 90). But water in any amount, however small, is never regarded in the arid West as "insignificant". Indeed, uses on Lower Basin tributaries were considered so significant as to warrant extensive litigation in this very case. Utah claimed the right to an annual consumptive use on tributaries of 125,000 acre-feet[88] and New Mexico 111,700 acre-feet[89] or a total of 236,700 acre-feet annually. This is more than the combined annual quantities which Nevada, New Mexico and Utah would receive under California's proposed decree (Cal. Op. Br. 22-23).[90]

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[88] Utah's Proposed Finding of Fact 19a.

[89] New Mexico's Proposed Finding of Fact 31.

[90] Although the Master found that there is no justiciable controversy as to any of these tributaries except the Gila River system, he so held only because present uses were not questioned and the claims for possible future uses were not yet ripe for decision (Rep. 321-24).

In discussing the tri-state compact provisions of §4(a) California makes several misstatements (Cal. Op. Br. 85-90). It is not true that the California limitation was required only in the event of Arizona's failure to ratify the Compact; nor is it true, as California proclaims with emphasis, that: "It was *never* contemplated that the tri-state compact and the limitation on California would coexist" (Cal. Op. Br. 89) (italics California's). The California limitation was required if seven states (including Arizona) failed to ratify the Compact *within six months after June 25, 1929* (Project Act §4(a)(2), Ariz. Op. Br. Appendix B, p. 12a). The very fact that the tri-state agreement proposed by §4(a) was to apportion 2.8 million acre-feet to Arizona and .3 million to Nevada out of the 7.5 million acre-feet referred to, shows plainly that the California limitation and the tri-state compact were to coexist and that, as the Master says, the two "are clearly correlative and contemplate allocation of all the available water among the three states" (Rep. 170, 174-75). That the two cannot be regarded separately is clear from the California argument that they can be so regarded: She says that the California limitation is not a "grant" and hence the tri-state agreement of itself would have made no disposition of the 4.4 million acre-feet or of the surplus water referred to in the California limitation. From this California concludes that there would be a residue of 4.4 million acre-feet of Article III(a) water and one-half of the "excess or surplus" available for use in California, New Mexico and Utah (Cal. Op. Br. 89). That this result was never intended by Congress is indubitable. No one ever thought or intended that New Mexico and Utah would share in the water to the use of which California would be limited.

California next represents that:

> "Article 7(g) [of the Arizona contract] constitutes an important administrative construction by the Secretary as well as a practical construction by Arizona that the lower basin rights of New Mexico and Utah are relevant to, and unimpaired by, the Project Act." (Cal. Op. Br. 90)

That this statement is erroneous is demonstrated by the provisions of Article 10 of the Arizona contract, which expressly disclaim any interpretation whatever by the Secretary or by Arizona of the Compact or the Project Act.[91]

Secretary of the Interior Ickes at the time the Arizona contract was executed stated the purpose of Article 10:

> "Secondly, Article 10 was purposely designed to prevent Arizona, or any other state, from contending that the proposed contract, or any provision of the proposed contract, resolves any issue on the amounts of waters which are apportioned or unapportioned by the compact and the amounts of apportioned or unapportioned water available to the respective states under the compact and the act. It expressly reserves for future judicial determination any issue involving

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[91] Article 10 states:

"Neither Article 7, nor any other provision of this contract, shall impair the right of Arizona and other states and the users of water therein to maintain, prosecute or defend any action respecting, and is without prejudice to, any of the respective contentions of said states and water users as to (1) the intent, effect, meaning, and interpretation of said compact and said act; (2) what part, if any, of the water used or contracted for by any of them falls within Article III(a) of the Colorado River Compact; (3) what part, if any, is within Article III(b) thereof; (4) what part, if any, is excess or surplus waters unapportioned by said Compact; and (5) what limitations on use, rights of use, and relative priorities exist as to the waters of the Colorado River System; provided, however, that by these reservations there is no intent to disturb the apportionment made by Article III(a) of the Colorado River Compact between the Upper Basin and the Lower Basin."

> the intent, effect, meaning and interpretation of the compact and act. The language of Article 10 is plain and unequivocal and adequately reserves all questions of interpretation of the compact and the act."[92]

Finally, as the Master pointed out, "Section 4(a), if read literally, would prohibit California from consuming water from the Colorado River in excess of 4,400,000 acre-feet of consumptive uses per annum until consumptive uses throughout the Colorado River Basin totaled 16,000,000 acre-feet per annum" (Rep. 172). This is because California is limited by §4(a) to not more than 4.4 million acre-feet per annum plus "not more than one-half of surplus waters unapportioned by the Colorado River Compact". Literally construed, Compact Article III(a) and (b) apportions a total of 16,000,000 acre-feet (7,500,000 to each Basin and an additional 1,000,000 to the Lower Basin).

California tries to escape from this *cul de sac* of literalism by claiming that the literal construction of §4(a), if adhered to, would require California to allow water to go to waste if it were not used by those who have a prior or superior right thereto. But this is an argument against, not for, literal construction. It actually points up the absurdity resulting from California's literal interpretation. At this juncture, California abandons her "Compact means Compact" position and advocates, as her only possible answer to the Master's holding, that §4(a) be given a "sensible" rather than a literal construction. She urges:

> "The problems which the Master poses need not exist. By a *sensible* reading, the 'excess or surplus waters unapportioned by said compact' referenced in the limitation means all consumptive use from system

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[92] WILBUR & ELY, THE HOOVER DAM DOCUMENTS A568 (1948).

> water in the lower basin over and above 7.5 million acre-feet per annum of consumptive use." (Cal. Op. Br. 93)

Arguing further for the system-wide accounting, which California claims a literal construction of §4(a) would entail, California says the Master is wrong in holding that the explicit provisions of clause (3) of the second paragraph of §4(a), which assure to Arizona "the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State", militate against such a literal construction. California's attempted refutation of the Master is frivolous. In the teeth of this plain and simple language, California insists that the Gila and its tributaries were included in Arizona's apportionment of 2.8 million acre-feet. She says the Master's holding that clause (3) assures Arizona the use of the Gila system "in addition" to Arizona's 2.8 million acre-foot apportionment is, in effect, an amendment of §4(a) by the Master. California contends that he has converted the "and" introducing clause (3) into "in addition" (Cal. Op. Br. 94). In other words, "(1) and (2) and (3)" are not the same as "(3) in addition to (1) and (2)". To merely state the proposition is to refute it.

The senatorial debates cited by the Master show unmistakably the congressional intent that tributary uses in Arizona should not be deducted from Arizona's main stream allocation of 2.8 million acre-feet (Rep. 179 note 38). In this way, Congress sought to resolve the controversy arising from California's claim, asserted then as it is re-asserted now, that the Gila and its tributaries had been included in the water apportioned by the Compact. This explains why the Gila system in Arizona was singled out

from the other Lower Basin tributaries of the Colorado for special and explicit treatment in §4(a).[93]

Invoking the maxim, *expressio unius exclusio alterius,* California contends that at any rate Lower Basin tributaries other than the Gila are literally included in the §4(a) apportionment (Cal. Op. Br. 95). But here again literalism must give way to realism: the reality with which Congress dealt and intended to deal, as revealed so plainly in the legislative history, was water of the main stream of the Colorado River stored in Lake Mead and released or available for use below Hoover Dam.

California points to the 1939 Act of the Arizona Legislature which approved a proposed tri-state compact containing a clause to the effect that "in addition to" 2.8 million acre-feet of Article III(a) water and one-half of surplus, Arizona should have exclusive use of the Gila within her boundaries. California finds it significant that the Act provided for approval of the contemplated tri-state compact by Congress—an approval which, she argues, would not have been necessary if the exclusion of the Gila from the Arizona apportionment of 2.8 million acre-feet had been intended by the §4(a) tri-state compact which Congress had approved in advance (Cal. Op. Br. 95-96).

The answer is simple: The proposed tri-state agreement set forth in the 1939 statute contained many provisions not included in the tri-state compact approved in

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[93] The Gila and its tributaries were also expressly exempted from use to satisfy the Mexican treaty obligation by subsection (4) of the second paragraph of §4(a) to allay Arizona's fears, which had up to then prevented her ratification of the Compact, that the Gila system would be subjected by the Compact to the Mexican treaty obligation, under the systemwide allocation attributed to the Compact by California. See pp. 62-63, *supra;* 70 Cong. Rec. 466 (1928).

advance by §4(a)[94]; hence congressional ratification of its terms was required. The subsequent 1941 legislation which passed the Arizona Senate but failed in the House did not in terms require further consent of Congress (Cal. Op. Br. 96) because its provisions conformed precisely to those approved in advance in §4(a) of the Project Act.[95]

In attacking the Master's conclusion that Congress intended §4(a) to relate solely to water in Lake Mead and in the main stream below Lake Mead within the United States, California would create the impression that only two words in §4(a)—"Colorado River"—constitute the whole foundation for the Master's conclusion (Cal. Op. Br. 100-01). Important and significant as they are, the Master does not "seize upon" "only two words" in §4(a), "out of the entire statutory language" to support his conclusion. Earlier in his Report he analyzes in detail the provisions of §§1, 5, 6 and 8 and concludes that these sections clearly express the intent of Congress to deal in the Project Act with "the allocation and delivery of water to Arizona, California and Nevada from Lake Mead and from the Colorado River below Lake Mead" (Rep. 151) (footnote omitted).

To be sure, in construing the California limitation, the Master refers to the very language of §4(a), pointing out that "it refers to the Colorado River and not to the System. . . ." But in the very next sentence he states:

> "*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

[94] *E.g.,* Article I stating purposes, Article II defining terms, Article IV making Arizona's ratification of the Colorado River Compact conditional upon approval of the proposed tri-state compact by Congress, California and Nevada. C 1322 for iden. (Tr. 11,436).

[95] C 1323 for iden. (Tr. 11,436).

> 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." (Rep. 174)

The Master then verifies this interpretation of the statutory language by reference to the legislative history (Rep. 174), discussed previously (Ariz. Op. Br. 61-67; pp. 62-67, *supra*).

California finds inconsistency in the Master's conclusion that the §4(a) references to the Compact are employed otherwise than in the Compact sense and urges that other references to that instrument in §§6, 8, 12, 13 and 19 are employed in the Compact sense (Cal. Op. Br. 102). There is good reason for the distinction. These last mentioned sections were intended to preserve inviolate the Compact's *interbasin* apportionment. They have nothing whatever to do with the Lower Basin *interstate* apportionment established by §4(a).

Nor is there inconsistency between the Project Act and the Compact, as California claims (Cal. Op. Br. 104-05). There can be no inconsistency between these two instruments which deal with two different subject matters and are designed to accomplish two different ends. Thus the Compact made only an *interbasin* allocation of water. The Project Act is concerned with an *interstate* allocation of water in the Lower Basin. The fact, if it be a fact,[96] that Congress in the Project Act used Compact terminology in a sense different from that of the Compact's negotiators does not render the two instruments inconsistent or contradictory.

California also questions the Master's holding that "the water to a portion of which California is limited by Section 4(a) is that part of the mainstream which consists of Lake

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[96] Arizona does not agree with the Master's construction of the Compact (see Ariz. Op. Br. 72-81).

Mead and the River below" (Rep. 183). It is argued that the Master is wrong because plans to divert river water above Lake Mead for use in Arizona and California have been considered both before passage of the Project Act and from time to time afterwards down to the present day; and California questions that Congress would have restricted the operation of Project Act §§4(a) and 5 to Lake Mead and below in view of these contemplated diversions above Lake Mead (Cal. Op. Br. 124-27).

To this there are several answers. Congress has exercised its dominant servitude over all water in the main stream, whether that water is delivered at Lee Ferry or constitutes inflow which reaches the main stream between Lake Mead and Lee Ferry; hence any diversion and use of water from the main stream between Lee Ferry and Lake Mead, if made without the consent of Congress, would by necessary implication violate the Project Act (see pp. 156-58, *infra*).

Moreover, the Project Act authorized the Secretary of the Interior "to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River . . . adequate to create a storage reservoir . . . and a main canal," and it specified that the dam site was to be either "at Black Canyon or Boulder Canyon" (Project Act §1). The California limitation includes "all uses under contracts made under the provisions of this Act" (§4(a)), and the Secretary is authorized "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" (§5). The authority conferred on the Secretary by Congress, as the Master observed, specifically applies "only to water in Lake Mead and to water released therefrom. Also Sections 6 and 8 of the Project Act apply in terms to water controlled by the United States by means of Hoover Dam" (Rep. 183).

It is a fact that Senator Cameron of Arizona opposed Black Canyon and Boulder Canyon as alternative sites for the proposed dam and reservoir and urged the adoption of a high dam at Bridge Canyon (Cal. Op. Br. 124-25). But Congress rejected this suggestion when it enacted the Project Act. In so doing Congress fully realized that no projects for the diversion of water from the main stream above the authorized dam and reservoir could be made without congressional approval and consent. This is of course true of the proposed Marble Canyon diversion, which California pretends to view with such alarm.

Therefore, although diversions above the optional dam sites specified by the Project Act were favored by some when the bill was pending enactment, since Congress in enacting the Project Act appropriated the water supply let down from the Upper Basin to improve navigation and for related purposes, including the generation of power to finance the project, Congress assumed no risk in restricting the Project Act interstate apportionment to water in Lake Mead and in the main stream below.

As a final argument in support of the claim that the congressional reference to the Article III(a) apportionment must be construed literally in the Compact sense, California says the terms of the California limitation set forth in §4(a) of the Project Act constituted "an offer to California", which she "accepted . . . by enacting the limitation" and by ratifying the Compact, and that this "offer" and "acceptance" "established a statutory compact" (Cal. Op. Br. 128-37). California further states that this was an offer to the seven basin states to enter into an agreement, which did not become effective until accepted by those states. "Each state," California argues, "had to interpret the offer in order to decide whether to accept it" (Cal. Op. Br. 130).

The terms of the §4(a) limitation do not constitute a contractual offer but a condition precedent laid down by Congress for the effectiveness of the Project Act. "The meaning of the condition is necessarily determined by the congressional intent, just as the interpretation of other provisions of the statute is governed by such intent" (Rep. 181).

It is not the subjective construction put upon the terms of the limitation, whether by California or any of the six "beneficiary" states, which governs; it is the meaning of the words used in the historical and legislative context in which Congress employed them that is determinative. Otherwise, there would be as many individual "statutory compacts" as there are individual state interpretations of the alleged "offer" made by §4(a). Since California and Arizona differ radically as to the meaning of the "offer", there would be at least two "statutory compacts", *i.e.*, the United States-California compact and the United States-Arizona compact.

Moreover, the United States asserts that "the Project Act was made dependent on a modification of the Compact and California's adoption of a Limitation Act accepting a 4,400,000 acre-foot limitation on its use of the initial 7,500,000 acre-feet of mainstream water available annually for the Lower Basin" (U. S. Op. Br. 10). This construction of the §4(a) "offer" directly contradicts California's interpretation of the very same "offer". It is obvious that adoption of the California theory of the "consensual nature of the limitation" would lead inevitably into a morass of utter confusion.

Further, the legislative history—the hearings before the Senate and House Committees on the various Swing-Johnson bills and the debates in the House and Senate upon those

measures—conclusively establish that it was main stream and main stream water only that Congress was dealing with in the California limitation (see Ariz. Op. Br. 61-67; pp. 62-67, *supra*).

III

Contrary to California's contention, the Secretary's water delivery contracts reflect an administrative recognition that the Project Act established a formula for the interstate allocation of main stream water to which the contracts should conform.[97]

A. The Contractual Pattern

The Secretary's water delivery contracts simply cannot be read objectively without observing that they were drawn in an effort to conform with the formula or allocation scheme established by §§4(a) and 5 of the Project Act. From what source has the Secretary derived the quantities of water specified in his contracts other than these provisions of the statute? What other origin is there for the "maximum of 2,800,000 acre-feet" specified in the Arizona contract? Or the "total quantity not to exceed . . . 300,000 . . . acre-feet" in the Nevada supplemental contract? Or the 4,400,000 acre-feet constituting the first four intrastate priorities recited in each of the contracts with California agencies? Surely it cannot be mere coincidence that the total of 3.1 million acre-feet contracted for in the Arizona and Nevada contracts, together with the 4.4 million acre-feet constituting the first four priorities specified in the California contracts, equals precisely the aggregate of 7.5 million acre-feet dealt with in §4(a). Nor can it be merely

[97] This point is directed principally to a refutation of Part Four of California's Opening Brief, pages 195-231.

by chance that the Arizona contract provides for delivery of one-half of surplus, even though the contract purports to recognize rights of Nevada, New Mexico and Utah in that surplus.[98]

Despite all this California insists that she does not perceive in the water delivery contracts the reflection of any allocation scheme whatever.

B. California's Analysis of the Contracts

California would have the Court infer from the fact that the Secretary did not write out "the major elements of [the] . . . scheme on paper, in one place, formally promulgated" that the scheme itself does not exist (Cal. Op. Br. 196). There is nothing in the Project Act requiring the Secretary to commit the allocation scheme to writing in one instrument. Nor does the fact that his general regulations do not make an apportionment of water indicate "his lack of authority to make an interstate allocation for consumptive use" (Cal. Op. Br. 198). It was not the intent of Congress that the Secretary effectuate its allocation scheme by regulation but by contract. The Secretary's regulations recognize this and indeed implement the allocation scheme of the Project Act. They specifically provide that:

> "Contracts respecting water for irrigation and domestic uses shall be for permanent service, and shall conform to Paragraph a of Section 4 of the Boulder Canyon Project Act."[99]

Thus the Secretary's general regulations incorporate by reference the formula established by §4(a).

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[98] See Ariz. Op. Br. 99-104.

[99] General Regulations Governing Contracts for the Storage of Water in Boulder Canyon Reservoir, and the Delivery Thereof §4, Ariz. Op. Br. Appendix D, p. 29a.

From the fact that §5 contains detailed specifications governing the Secretary's contracts for electrical energy, but does not similarly spell out the details of his contracts for the storage and delivery of water, California argues that, while the Secretary was empowered to make an interstate apportionment of power, he was not authorized to make an interstate allocation of water (Cal. Op. Br. 196-200). But §5, by providing that

> "Contracts respecting water for irrigation and domestic uses shall . . . conform to paragraph (a) of Section 4 of this Act"

subjected the Secretary's water delivery contracts to the formula of §4(a) and thereby established standards for his guidance in making those contracts.

No such formula for the allocation of electrical energy is to be found in the Project Act elsewhere than in §5. Hence it is that §5 provides:

> "General and uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the sale and delivery of electrical energy, and for renewals under subdivision (b) of this section, *and in making such contracts the following shall govern. . . .*" [100]

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[100] By excising portions from the quotation of §5 California creates the misleading impression that the first paragraph of that section applies only to the Secretary's authority to promulgate regulations governing his water delivery contracts—which California says are "permissive"—and does not apply to his electrical energy regulations, which California says are mandatory. The first paragraph applies in express terms to *both* species of regulations:

> "The secretary . . . is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon for irrigation and domestic uses, *and generation of electrical energy and delivery at the switch board to States. . . .*"

The italicized provisions have been deleted in the California version (Cal. Op. Br. 197).

Then follow in subsections (a) through (d) the detailed provisions that power contracts are required to contain.

California seems to argue that because each one of the Secretary's several water delivery contracts, considered separately, does not purport to make a complete apportionment of water among the three Lower Basin states, no interstate allocation of water is effectuated by all the contracts taken together (Cal. Op. Br. 200). But the interstate allocation made by the statute is put into effect by the contracts *collectively*. Each contract makes the delivery of the quantity of water specified in it "subject to availability thereof for use in . . . [the contracting state or agency] under the Colorado River Compact and the Boulder Canyon Project Act", *i.e.*, subject to its availability under the §4 (a) formula (*e.g.*, Palo Verde Irrigation District Contract Article 6, Ariz. Op. Br. Appendix H, pp. 60a-61a).

Concededly, the water delivery contracts which the Secretary has made do not conform precisely with the formula prescribed by the Project Act. The Master holds that exact conformity with the apportionment proposed by Congress is not required—that substantial compliance is enough (Rep. 162-63). This gives rise to one of Arizona's differences with the Master. We contend that insofar as the contracts do not conform to the formula they are outside the Secretary's delegated authority and are void (Ariz. Op. Br. 83-105).

But it is a far different thing and fallacious to conclude, as California does, that because the Secretary's contracts do not precisely conform to the statutory allocation, the allocation scheme itself is non-existent (Cal. Op. Br. 200-06). Following this reasoning, there would be no congressional standard for the administrative supplementation of any statute which could not be defeated simply by the failure of

the administrator to comply with the standard prescribed. In short, one does not look to the contracts to see if the formula exists; one looks to the formula to see if the contracts are valid.

Thus, the Master properly determines the validity of the provisions of the Arizona and Nevada contracts by applying to them the Project Act authorization for the interstate allocation of water, as he construes it. Having found that the allocation proposed by Congress is not mandatory in the sense that it requires precise contractual conformity (Rep. 162-63), he upholds those contractual departures which he regards as unsubstantial (Rep. 202). On the other hand, when he finds that provisions of the Arizona and Nevada contracts violate the mandatory requirements of Congress, *e.g.*, that they shall be for permanent service (§5), he refuses to sustain their validity (Rep. 237-47).

California points to her own water delivery contracts as proof that no allocation scheme exists. Thus she states that the California contracts provide for the delivery "of the aggregate quantity of water sufficient to satisfy 5,362,000 acre-feet of consumptive use annually . . ."—they do not require delivery "to California [of] 4.4 million acre-feet of consumptive use and one-half of any excess or surplus waters from the 'mainstream' " (Cal. Op. Br. 203). However, the intrastate priorities fixed by the Seven-Party Agreement and incorporated into each California contract show on their face a recognition of, and an attempt to conform to, that integral part of the allocation scheme constituted by the California limitation prescribed by §4(a). The composition of the aggregate of 5,362,000 acre-feet contracted for in the California contracts and the way in which that aggregate is divided among those intrastate priorities is set forth in the Appendix to California's Opening Brief:

Priority No.[101]	Agency and Description	Annual Quantity in Acre-feet (Beneficial Consumptive Use)	
1	Palo Verde Irrigation District—104,500 acres in and adjoining existing district		
2	Yuma Project (California division)—not exceeding 25,000 acres		
3	(a) Imperial Irrigation District and lands in Imperial and Coachella Valleys to be served by All-American Canal	3,850,000	4,400,000[102]
	(b) Palo Verde Irrigation District—16,000 acres of adjoining mesa		
4	Metropolitan Water District and/or City of Los Angeles	550,000	
5	(a) Metropolitan Water District and/or City of Los Angeles	550,000	
	(b) City and/or County of San Diego	112,000	
6	(a) Imperial Irrigation District and lands in Imperial and Coachella Valleys to be served by All-American Canal	300,000	
	(b) Palo Verde Irrigation District—16,000 acres of adjoining mesa		
		5,362,000	
7	Agricultural use in the Colorado River Basin in California, as designated in Map 23000, U. S. Bureau of Reclamation	All remaining water available for use in California	

The total of the first four priorities is exactly 4,400,000 acre-feet. The total of priorities numbered 4 and 5(a) is 1,100,000 acre-feet. Since these two priorities are in favor of the same agency, Metropolitan Water District "and/or" City of Los Angeles, the question naturally arises: Why was the total of 1,100,000 acre-feet split into two distinct priorities of 550,000 acre-feet each? And why was the first

[101] Cal. Op. Br. A3 (footnotes omitted).

[102] Our addition.

priority given precedence over the second? The reason is self-evident: The first four priorities totaling 4.4 million acre-feet (including the first priority of 550,000 acre-feet to Metropolitan Water District "and/or" City of Los Angeles) are to be satisfied out of the 4.4 million acre-feet dealt with in §4(a) of the Project Act, and the balance of the total of 5,362,000 acre-feet, or 962,000 acre-feet, is to be satisfied out of the surplus dealt with in §4(a) as part of the California limitation.

As the Master said:

> "These contracts mean that the Secretary is required to apportion to California users, in accordance with the system of priorities stated in all of the California contracts, 4.4 million acre-feet of the first 7.5 million acre-feet of consumptive use of water from the mainstream in one year, plus one-half of any additional uses apportioned in that year, until a maximum of 5,362,000 acre-feet per annum is consumed in California." (Rep. 222)

And he added:

> "The 5,362,000 acre-feet for which California users have contracted must be satisfied as follows: 4,400,000 acre-feet out of the first 7,500,000 acre-feet; and 962,000 acre-feet out of surplus." (Rep. 224 note 85)

Thus, the California contracts fit into the general allocation scheme even more completely than do the contracts with Arizona and Nevada.[103]

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[103] California also seeks to avoid this contractual conformity with the allocation scheme by contending that the annual quantity of 5,362,000 acre-feet "includes water sufficient to supply Indians, who neither have nor need contracts . . . and non-Indians, on the Reservation Division of the Yuma Project in California, who hold only individual water right applications . . .; it does not include water for the other federal reservations in California" (Cal.

California next asserts that the circumstances surrounding the execution of the water delivery contracts belie the existence of an allocation scheme. It is said, first, that prior to the Metropolitan Water District contract (the first water delivery contract executed pursuant to the Project Act) Secretary of the Interior Wilbur "disclaimed any intention to deal with the allocation of lower basin waters" (Cal. Op. Br. 204) (footnote omitted).[104] California seeks to create the impression that this "disclaimer" was connected with the Metropolitan contract,[105] although the fact is to the contrary. The "disclaimer" is a telegram dated September 27, 1929 from Secretary Wilbur in response to a message from one Van Norden that he was then conferring in Los Angeles in an endeavor to get agreement between Arizona and California on a tri-state compact for the apportionment of Lower Basin water. It was in this connection that Secretary Wilbur responded:

> "We have endeavored to keep out of all controversy regarding allocation lower water basin (*sic*). Do not consider this our field. . . ."

In other words, the Secretary discreetly refused to intervene in any discussions looking toward a division of water by tri-state compact.

Op. Br. 203). The only federal use of Colorado River water within California at the time of the Seven-Party Agreement and the California water delivery contracts was that of the Yuma Indian Reservation, which is recognized and covered by the second priority of the Seven-Party Agreement, which priority also covers non-Indian uses on the Reservation Division of the Yuma Project (see p. 23, *supra*).

[104] California relies on her Exhibit 7553 for iden. (Tr. 22, 760). This is one of the documents included in California's Offer of Proof, which the Master rejected (Rep. 248-53).

[105] A 38 (Tr. 251).

Subsequent Secretaries of the Interior maintained a similar position of neutrality. They did not, as California asserts, disclaim "any intention to deal with the allocation of lower basin waters" (Cal. Op. Br. 204). In concluding water delivery contracts with California public agencies and with Nevada and Arizona, the Secretaries undertook to effectuate the allocation scheme of the Project Act. In every instance the allocation of water among the contractees was made subject to the legal "availability thereof for use . . . under the Colorado River Compact and the Boulder Canyon Project Act" (*e.g.*, Palo Verde Irrigation District Contract Article 6, Ariz. Op. Br. Appendix H, pp. 60a-61a). In this way successive Secretaries made their water delivery contracts without favoring any party in the continuing controversy as to the proper construction of the Compact and the Project Act.[106]

California also refers (Cal. Op. Br. 205) to the fact that the regulations promulgated by Secretary Wilbur in 1933 authorizing a water delivery contract with Arizona said nothing about excess or surplus and that these regulations were later revoked by Secretary Ickes. However, as we have previously noted (p. 86, *supra*), the Project Act did not intend the interstate allocation to be effectuated by the Secretary's regulations but by his *contracts*. While §4(a) made an interstate allocation of water, there was no right to the delivery of water without a contract pursuant to §5.

California next calls attention to the first Nevada contract of 1942, calling for the delivery of up to 100,000 acre-feet of water per annum and asks: "Did this forever

[106] This is how the Special Master read the documents cited by California (Cal. Op. Br. 204 notes 1, 2), which were included in her rejected Offer of Proof.

fix the proportion in which Nevada could share 'mainstream' water?" (Cal. Op. Br. 205) We respond: Although the Secretary's contracts may not exceed the maximum allocation specified by §4(a) in the case of a particular state, nothing requires the Secretary to operate on an "all at once or nothing" basis or prevents him from entering into a contract for a portion of the maximum allocation, as he did in the case of the first Nevada contract. In fact, the first Nevada contract expressly provided in Article 5(a) that "the right of the State to contract for the delivery to it from storage in Lake Mead of additional water is not limited by this contract" (Ariz. Op. Br. Appendix F, p. 46a).

Along the same line, California argues that, while annual delivery of an aggregate of 5,362,000 acre-feet is called for by the contracts with California agencies, the contracts do not themselves add up to that figure, which includes the right of the Yuma Project for which "no contract has ever been written". But California concedes that the Yuma Project is recognized in the contracts as "entitled to a second California priority" (Cal. Op. Br. 205). This priority is for water "for beneficial use not exceeding a gross area of 25,000 acres of land located in said project in California", and it is to be satisfied out of the aggregate of "3,850,000 acre-feet of water per annum" allotted to the first three priorities of the Seven-Party Agreement (*e. g.,* Palo Verde Irrigation District Contract Article 6, Ariz. Op. Br. Appendix H, p. 61a).

As we have said earlier, all the water delivery contracts are uniformly subject to the legal availability, under the Compact and the Project Act, of the water contracted for. This means that should it develop that the Secretary has contracted for either more or less water

than authorized, his contracts by their very terms are to that extent violative of the Project Act.[107] Whether or not this has in fact occurred depends on how this Court construes the Project Act.

California takes issue with the Master's conclusion that "the contractual allocation scheme also determines each state's apportionment in the event of insufficient mainstream water to supply 7.5 million acre-feet of consumptive use in one year. In such event, the allocation scheme requires each state to share the burden of the shortage ratably" (Rep. 233). California denies that if there is a contractual allocation scheme, it controls this issue, or, if it does control, "that it adopts any principles other than those of priority and equitable apportionment" (Cal. Op. Br. 211).

While it is true that in providing for the allocation of water in §4(a) Congress did not expressly take shortages

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[107] For example, the Assistant Chief Counsel for the Bureau of Reclamation, in a memorandum dated January 29, 1944 addressed to the Solicitor of the Department of the Interior, analysed Secretary Wilbur's contracts with California agencies and concluded:

> "It will be noted that the first four priorities total 4,400,000 acre feet, the exact amount California agreed by act of its legislature to accept from the water apportioned to the lower basin by Article III(a) of the compact. The total of the fifth and sixth priorities is 962,000 acre feet which obviously must come out of the 'one-half of any excess or surplus unapportioned by said compact'.
>
> "I have no satisfactory explanation for the reasons which prompted Secretary Wilbur to execute contracts for 962,000 acre feet of water in excess of 4,400,000 acre feet, the amount California is limited to by its act of 1929. It is abundantly clear, however, by the terms of the contracts, and the priority tables which are a part of those contracts, that the Secretary is required to deliver only 4,400,000 acre feet to California, and that he can deliver the excess 962,000 acre feet only from excess or surplus waters unapportioned by the compact after Arizona and Nevada have had delivered to them the apportioned water to which they are entitled under the compact." C 7603 for iden., part of the California Offer of Proof.

into account, it is nevertheless implicit in the basic purpose to make an equitable division of water among the three Lower Basin states that Congress intended shortages to be borne by those states ratably.[108]

Congress specified what it considered to be an equitable division of the first 7,500,000 acre-feet per annum available for use in the Lower Basin: Not more than 4,400,000 acre-feet to California, 2,800,000 acre-feet to Arizona and 300,000 acre-feet to Nevada. Congress made no express provision for the division of water among the three states should less than 7,500,000 acre-feet be available in any one year. But in the absence of any provision to the contrary, Congress must be presumed to have intended that a lesser quantity than 7,500,000 acre-feet should be divided among the states in the same proportions as those which it specified for the division of the 7,500,000 acre-feet. Hence, in prorating shortages, the Master is merely carrying out the equitable division of water which Congress must be presumed to have intended.

C. Prior Appropriation Not the Basis of Water Delivery Contracts

In concluding this point, it should be emphasized that not one of the water delivery contracts contains internal evidence that it was drawn in recognition of or in an attempt to satisfy any appropriative right. The deliveries of water contracted for are not related in any respect to

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[108] If a literal construction of §4(a) of the Project Act is mandatory, as California on occasion contends, such a construction would logically require the conclusion that California bears all shortages. Section 4(a) limits California to the use of "not to exceed" 4,400,000 acre-feet annually and "not to exceed" one-half of the surplus. Arizona and Nevada are each given, respectively, a firm 2,800,000 and 300,000 acre-feet of water annually "for exclusive use in perpetuity" and Arizona is given the firm right to use "annually one half of the excess or surplus waters . . . ."

appropriative rights. The quantities to be delivered are clearly derived from the allocation scheme set forth in §4(a) of the Project Act. The Secretary of the Interior on the one hand, and the contracting states and agencies, on the other, freely and repeatedly entered into contracts which by their very terms bear the impress of the statutory pattern for the interstate allocation of water.[109]

There is no evidence in the record nor is there a single fact which the Court may judicially notice which gives the slightest indication that releases from Lake Mead have ever been made with a view to the satisfaction of prior appropriative rights. The record is clear that no water user, whether in California or in any other state, has sought the release of stored water to satisfy his alleged appropriative rights. No state and no public agency of a state has asserted such a right. For his part, the Secretary has never considered it either necessary or proper to ascertain any claims of right asserted on the basis of prior appropriation in determining the quantity of water which he will deliver to or within the states of the Lower Basin.[110]

A more conclusive administrative and practical construction of a statute could hardly be found.

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[109] As California says: "No one has suggested that the California agencies, during the period 1930-1934 when the contracts were executed, entered into those contracts involuntarily" (Cal. Op. Br. 196 note 4).

[110] See Ariz. Op. Br. 46.

IV

Contrary to California's contentions, it is neither relevant nor necessary to determine water supply.[111]

A. California's Attempt to Disguise the Issue

California, after nine years of litigation, confronted with the Master's Report and Recommended Decree which reject all her major claims, now questions the jurisdiction of the Court to hear and determine the controversy.[112] California would accomplish the grotesque result of a dismissal for want of jurisdiction by injecting a false issue into the case and then insisting that the Court's jurisdiction depends upon the determination of that issue (Cal. Op. Br. 235).

The California position seems to be that no controversy over water rights is justiciable unless there is not enough water physically present in the stream to satisfy the claims asserted against it and that here the water supply available to the Lower Basin is presently sufficient to satisfy all such claims. California further asserts that the only way in which it can be demonstrated that the future water supply available to the Lower Basin will be less than the claims asserted against it is by ascertaining the rate and extent by which the increased uses in the Upper Basin will

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[111] This point is directed to a refutation of Part Five of California's Opening Brief, pages 232-78.

[112] California raised no question as to jurisdiction until August 31, 1960, after the conclusion of oral argument on the comments of the parties to the Master's Draft Report. She then made a motion to reopen the trial for the taking of additional evidence relating to future water supply and at the conclusion of her statement in support of the motion suggested for the first time that if there is sufficient dependable supply to satisfy the demands of all the Lower Basin states it is "impossible . . . to find a justiciable case or controversy" (Cal. Op. Br. A61).

deplete the supply available to the Lower Basin. Accordingly, it is contended that in the absence of a determination of the rate and extent of Upper Basin uses there is nothing to show the existence of a justiciable controversy (Cal. Op. Br. 240).

California refers to the Master's conclusion that there is nothing to show that the Upper Basin depletion will exceed 4.8 million acre-feet per annum and that "existing California uses are in no danger of curtailment unless and until many vast new projects, some of which are not even contemplated at this time, are approved by Congress and constructed" (Rep. 115). She argues that, if these conclusions of the Master are correct, they negative the existence of a justiciable controversy, because they amount to a determination that the quantity of water available to the Lower Basin will always exceed the demands made against it (Cal. Op. Br. 240).

It is further contended by California that the Master's holding that the Compact merely places a ceiling on appropriative rights and is otherwise irrelevant to the issues in this litigation renders this case non-justiciable (Cal. Op. Br. 240), since this precludes a determination of the rights of the Upper Basin to deplete the flow of the stream and that in the absence of such a determination it cannot be shown that Lower Basin claims will exceed the Lower Basin water supply.[113]

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[113] If, as California claims, the "classic test of a justiciable controversy over water rights" is that there is not enough water to satisfy the claims asserted against it and that test is applicable to the present litigation, then a finding that at some future date, perhaps one hundred years hence, the water supply will not be adequate to satisfy all Lower Basin claims would not meet the test and an adjudication of the claims asserted by the parties to this case must be postponed until such time as the available supply proves insufficient to satisfy them.

B. The Real and Justiciable Issue: The Legal Availability of Water

Even assuming that the "classic test of a justiciable controversy over water rights" is that there is not enough water to satisfy all claims made against the available water supply, the justiciability of the case at bar is not to be determined by application of this test. The "classic test" has been laid down and applied in litigation between states over water rights in interstate streams, when the claims of the contending states were required to be determined by the application of principles of equitable apportionment. But, as the Special Master notes, "this case involves a statutory, not an equitable, apportionment and that statutory apportionment applies irrespective of supply" (Rep. 100). We are not here concerned with standards of justiciability governing equitable apportionment cases. As the Master clearly demonstates, the claims of Arizona, California and Nevada in this litigation are governed by the Project Act, the Limitation Act and the water delivery contracts, and the doctrine of equitable apportionment is irrelevant to the determination of these claims (Rep. 100, 138).

The basic issues are stated by the United States in its petition for intervention, which presents a case in the nature of interpleader, over which this Court has exercised jurisdiction in the past. *Texas* v. *Florida,* 306 U. S. 398 (1939). The United States alleges in Paragraph XX of its petition:

> "The contracts which the Secretary of the Interior entered into as set forth in the preceding paragraphs XV through XIX provide for the delivery annually of 8,462,000 acre-feet of water stored at Hoover Dam. Contained in each of the contracts is a provision that the delivery of water by the United States will be from available storage, all to be in accordance with the Colorado River Compact and the Boulder Canyon Project Act. Because of the incorporation in these

> contracts of the limitations and provisions of the Boulder Canyon Project Act and the Colorado River Compact, it is essential that the United States know the proper interpretation of those provisions of the Act last mentioned and the Compact which are in dispute between the parties. As more particularly alleged in paragraphs XXXI through XXXIX below, Arizona and the defendants are in controversy as to the meaning of the limiting provisions of the Boulder Canyon Project Act and the Colorado River Compact, and the United States is therefore uncertain as to how much water it may properly deliver annually under the aforesaid contracts."[114]

There is thus a present clash of interests between the parties which constitutes a "case or controversy", as defined by this Court. *Evers* v. *Dwyer,* 358 U. S. 202 (1958); *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227 (1937).

The Special Master's Report carefully reviews the "compelling reasons which justify an adjudication of the various claims presented in this case to the water flowing in the Colorado River" (Rep. 130; see Rep. 129-35). He demonstrates that the physical presence of water in the Lower Basin does not make it available for use in Arizona, absent a determination of her legal right to utilize that water; and that without such an adjudication of her rights, Arizona is for all practical purposes as effectively pre-

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[114] The prayer of the petition is in part:

> "WHEREFORE, the United States of America respectfully prays this Court
>
> "(1) To adjudge and declare the validity of the treaties and international conventions, compacts, laws, contracts and federal documents to which reference has been made throughout this Petition and the pleadings of the parties;
>
> "(2) To interpret, construe, and resolve the conflicts which have arisen among the parties to this proceeding in connection with the laws, contracts, and documents referred to above. . . ."

cluded from further utilization of this resource as if it were being entirely diverted for use in California. In short, a refusal to determine Arizona's rights would be equivalent to a decision in favor of California (Rep. 133-35). This situation exists regardless of the amount of the depletions in the Upper Basin and irrespective of the water supply available for use in the Lower Basin. The reasoning of the Special Master is unanswerable and California makes no effort to answer it. Instead, she seeks to escape the conclusions which it compels by resort to a test applied in equitable apportionment cases but irrelevant to this litigation, governed by a statutory apportionment.

C. Irrelevance of Future Water Supply to the Question of Congressional Intent

California contends that a prediction in this year 1961 of future water supply in the year 2060 is essential to determine the intent of Congress in the year 1928 in enacting the Project Act and in imposing the perpetual limitation on California's use of water. She argues that Congress never intended to deprive the California defendants, and particularly the Metropolitan Water District, which serves the City of Los Angeles and the surrounding vicinity, of sufficient water to meet their needs (Cal. Op. Br. 236-39).

However, the Master held:

> ". . . But the supply of water which will actually be available in the future for any state or any project does not provide the slightest insight into the intention of Congress when it passed the act in 1928. Obviously the relevant factor in determining Congressional intention is the supply of mainstream water which Congress thought would be available at the time it enacted the Project Act, not the supply which will in fact be available after 1960. . . ." (Rep. 101)

California cites an isolated statement by Senator Hayden to the effect that, under the "set-up" which California's Senator Johnson had described to the Senate, the Project Act provided that "a million acre-feet may be used in the vicinity of Los Angeles. . . ." California adds: "This Congressional purpose the Master would frustrate" (Cal. Op. Br. 238).

However, the complete Senate discussion of California's claimed water rights and demands, of which the Hayden excerpt is an isolated part, and particularly the extensive inventory of these asserted rights and needs which Senator Johnson presented to the Senate, compels the conclusion that California fully realized in 1928 that the maximum of 4,400,000 acre-feet per annum stipulated in the California limitation would leave her with less main stream water than she claimed was necessary to satisfy her asserted ultimate requirements and that she deliberately assumed the calculated risk that there would be enough surplus water to supply the deficiency.

Senator Johnson prefaced his list of California's water rights and needs with the urgent request that, in dividing water among the Lower Basin states, Congress should:

> "Give to Arizona all the water that it is within the realm of possibility that Arizona may use; but do not take from the State of California, which is practically using it to-day, and which within a brief period will put infinitely more water to use, the rights that are hers, through an unjust or an unfair division of that water."[115]

Even though Senator Johnson admitted that California's then existing uses aggregated only 2,159,100 acre-feet[116] per

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[115] 70 Cong. Rec. 234 (1928).

[116] *Ibid.*

Arizona's Reply (par. 28) to the California Answer (par. 28 (b)) did not, as California states, "concede that appropriators in

annum, he then proceeded to state claims of right based on paper filings and the need for future uses as follows:

Areas		Acre-Feet Per Annum[117]
Imperial Valley		3,115,000 } including
Yuma Project		64,500 } existing-uses
Palo Verde Valley		234,000 } of 2,159,100
City of Los Angeles		1,095,000
		4,508,700
Coachella Valley	72,000 acres	
Palo Verde Mesa	18,000 "	
Chucawala	44,000 "	
	134,000 acres	582,800[118]
		5,091,500
Claimed for waste in Imperial Valley		918,000

California beneficially consumed at least 2,900,000 acre-feet annually" from the natural or unregulated flow of the main stream prior to June 25, 1929 (Cal. Op. Br. 262). The averments of the Arizona Reply are nothing more than argumentative allegations that as of June 25, 1929 there were in operation California projects capable of serving 473,500 acres which, if irrigated, would under existing conditions deplete the flow of the stream by about 2,902,000 acre-feet per annum. It is further alleged that any appropriative rights in California were merged in the California water delivery contracts and controlled by the Compact, the Project Act and the Limitation Act. These allegations cannot properly be construed as conceding the extent either of beneficial consumptive uses in California or of established rights in the natural flow in California, whether acquired by appropriation or otherwise.

Moreover, as the Special Master held in denying Arizona's motion to amend its pleadings (so as, among other things, to insert in her Reply a denial of the above allegations in the California Answer):

> "In a litigation of this character it would be strange to hold the parties strictly to their pleadings. See *Kansas* v. *Colorado,* 185 U. S. 125 (1902). . . ."

Clearly the Master considered the issue as to the existence and extent of water rights as of June 25, 1929 to be open for trial and decision (see Recommended Decree, Article VI, Rep. 359).

[117] 70 Cong. Rec. 236 (1928).

[118] 134,000 acres times 4.4 acre-feet per acre asserted by Senator Johnson as the volume of water necessary per acre.

Senator Johnson then proceeded to claim "a total aggregate now appropriated and with rights fully established of 6,009,500 acre-feet per year".[119]

Referring to California's position at the Governors' Conference of 1927, Senator Johnson stated:

> "When California offered to make a compact on a basis of 4,600,000 acre-feet per year plus one-half of the surplus excess and allocated water, it was well recognized that California would be perhaps one and one-half million acre-feet short of its requirements unless a large amount of the surplus water should be available. *In other words, California was willing to take a chance on obtaining surplus water and on the further chance that Arizona would not use the water allocated to her. She would, indeed, be surrendering established rights and substituting therefor simply a chance to obtain water.*"[120]

When California accepted the congressional compromise lowering the limitation provision from 4,600,000 acre-feet to 4,400,000, she did so knowing full well that she was increasing her risk. It is against this background that Senator Johnson's remarks, made near the close of the debate on this phase of the Project Act, emerge in their true significance:

> "I say to the gentlemen from Arizona, 'You say that California shall have but 4,200,000 acre-feet.' We say, and the testimony of Mr. Francis Wilson is the best upon that subject, that the irreducible minimum of the State of California is 4,600,000 feet. You say to us, 'You must bind your people for all time in the future never to go beyond it by this amendment.' The amendment does not divide the

[119] 70 Cong. Rec. 237 (1928).

[120] 70 Cong. Rec. 237 (1928).

> water between Arizona and California. It fixes a maximum amount beyond which California can not go. I say to the gentlemen from Arizona, though I think it is a wicked amendment, though I think it is an amendment that harnesses the State of California and its people as they never should be harnessed in the days to come, though I believe it to be an injustice against those who reside in California and in its southern part to-day and those who may reside there in the future—I say to you that if 200,000 acre-feet of water will settle this controversy with them, whatever the wrong, whatever the injustice, whatever may be the yoke that is put upon our people, I will take that as a compromise and a settlement of the differences that exist.''[121]

It is also clear that the maximum quantity fixed by the California limitation was not designed by Congress to insure the City of Los Angeles or any particular area of the State of California of ample water to supply its alleged ultimate needs.

Senator Hayden categorically denied the validity of the alleged appropriation for Los Angeles of 1,095,000 acre-feet per year stated by Senator Johnson.[122] He also questioned that Los Angeles would require such an amount of water:

> ''I shall concede every figure that the Senator from California [Mr. Johnson] has placed in the Record with respect to irrigation uses in California; every figure of that kind may be conceded; but I do not concede that the City of Los Angeles and the municipalities in Southern California who are asking for 1,095,000 acre-feet of water, need that much water or will need it for a hundred years.''[123]

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[121] 70 Cong. Rec. 385 (1928), Ariz. Legis. Hist. 92.

[122] 70 Cong. Rec. 239 (1928).

[123] 70 Cong. Rec. 383 (1928).

This is undoubtedly the same "million acre-feet" the use of which California asserts that Senator Hayden and Congress assured to the "vicinity of Los Angeles" in the Project Act.

That no such assurance was intended or given becomes even clearer from the discussion of Los Angeles' alleged rights. Senator Walsh of Montana stated he understood it to be

> "the contention of the Senator from California [Mr. Johnson] that the hands of the Government are tied; that if we shall erect a dam there at all we shall have to give enough water out of that dam to the city of Los Angeles to satisfy its appropriation." [124]

But Senator Hayden answered:

> "But I am quite sure, if I understood correctly the Senator from California, that he qualified that statement by saying that, after all, the Secretary of the Interior could allow the City of Los Angeles to have such quantity of water as might be determined by contract.
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> * * * * * *
>
> "So far as the other States of the Colorado River Basin are concerned, *whatever use is made of the water by the State of California within the limits allowed to that State* by interstate agreement they have no concern whatever. The other States are not interested as to whether it is used for one purpose or another. The Colorado River compact itself recognizes that domestic use is the highest use. Congress will approve the Colorado River compact if this bill is passed. *Therefore the Secretary of the Interior will naturally decide as between applicants, one who desires to use the water for potable purposes*

[124] 70 Cong. Rec. 169 (1928).

> *in the city and another who desires to use it for irrigation, if there is not enough water to go around, that the city shall have the preference.*
>
> "Mr. Phipps. It seems to me that the division of the available water between the States through mutual understanding and agreement will settle this question, and there will be no difficulty in allotting it to the various applicants who may desire to use it."[125]

The fact that the City of Los Angeles, like all other users of water from the Colorado River in the State of California, was to satisfy its needs out of the State's apportionment under the Project Act was not only thus recognized by the Senate, but also by the California defendants themselves in the Seven-Party Agreement.

California quotes the Master:

> " 'Obviously the relevant factor in determining Congressional intention is the supply of mainstream water which Congress thought would be available at the time it enacted the Project Act, not the supply which will in fact be available after 1960.' " (Cal. Op. Br. 236, quoting from Rep. 101)

She proceeds to attack this conclusion by quoting a remark made by Senator Hayden in the course of debate to the effect that "under the set up to which the senior Senator from California has so often referred there will be available at Boulder Dam on the average about nine and one-half million acre-feet of water. . . ." Senator Hayden then roughly outlines the uses this amount will permit in the Lower Basin (Cal. Op. Br. 237). California says this demonstrates that the "supply at the site of Hoover Dam, of which Senator Hayden spoke, is very close to the determinations of flow at Hoover Dam by expert witnesses whose testimony the Master rejects" (Cal. Op. Br. 237).

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[125] 70 Cong. Rec. 169 (1928).

California again misrepresents the record. Senator Hayden's remarks, read in full,[126] clearly show that he was speaking in generalities of a *net* supply of water available to users, whereas the California estimates relate to *gross* inflow to Lake Mead. These remarks by a single Senator, made argumentatively in debate, stating his views as to probable useable supply, California construes as a congressional finding of fact as to future water supply in the Lower Basin. The argument scarcely warrants the dignity of an answer.

California then characterizes the Sibert Board 1928 Report[127] as "the most authoritative report relating to water supply before Congress when the Project Act was passed" (Cal. Op. Br. 239 note 3). But that report was not even regarded as reliable, much less authoritative, by many Congressmen, particularly Representative Swing, co-author of the Project Act. He criticized the "spirit of extreme conservatism that is manifest throughout the report" and its conclusions as "pessimistic . . . regarding water supply." He called its calculations of flows at Black Canyon "extreme" and "about 25 per cent lower than the indications of 26 years' measurement"; and he characterized the "low period" adopted by the board as "mythical". He complained that the board, "in addition to its extreme assumptions of low water, adds another assumption by concluding that rapid irrigation development is to be expected in the upper basin". Congressman Swing considered far more reliable the findings of the Colorado River Commission. He concluded "that the

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[126] 70 Cong. Rec. 464-65 (1928).

[127] C 202 (Tr. 7714) found in SM 4 for iden. (Tr. 255); 70 Cong. Rec. 280-85 (1928); H. R. Doc. No. 446, 70 Cong., 2d Sess. (1928).

'ultraconservative' findings of the Sibert Board will in all probability never be realized''.[128]

The conclusions of the Sibert Board were certainly not accepted by Senators Hayden,[129] Oddie (Nevada)[130] or Ashurst.[131] Senator Bratton also criticized the Sibert Report.[132]

The Special Master correctly presents the situation prevailing at the time the Project Act was enacted when he says:

> ''And, for all of the uncertainty over the actual supply of water in the Colorado River, one thing that is clear is that the estimates of supply in 1928 were uniformly and substantially larger than even the most optimistic estimates made today.'' (Rep. 101-02) (footnote omitted)

It was on the basis of these estimates and California's own appraisal of her then existing and potential water requirements that she acceded to the limitation upon her use of water imposed by the Project Act and confirmed by the Limitation Act (pp. 103-04, *supra*).

California in effect accuses the Master of failing ''to present the appropriate data'' as to the 1928 estimates of supply, thereby concealing, she says, ''what is, if the Master is correct, one of the century's most astonishing paradoxes''. She adds:

> ''Yet that act [the Project Act] generated an 'allocation scheme' under which most of the water which the Boulder Canyon Project makes available for

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[128] 70 Cong. Rec. 620 (1928).

[129] 70 Cong. Rec. 464-66 (1928).

[130] 70 Cong. Rec. 265 (1928).

[131] 70 Cong. Rec. 287 (1928).

[132] 70 Cong. Rec. 330-31 (1928).

> use, over and above natural flow rights satisfied before Hoover Dam was built, goes to Arizona." (Cal. Op. Br. 239)

This statement is wholly unwarranted. Prior to the passage of the Project Act, California was admittedly diverting no more than 2,159,100 acre-feet per annum of Colorado River water (pp. 103-04, *supra*) and in many years exhausted the low flow of the river which at times was insufficient to irrigate the acreage then in cultivation. California desired to provide a water supply for the Los Angeles area and vicinity, but recognized that this could not be done in the absence of storage. She also realized that she could not enlarge the acreage then being irrigated from the Colorado River unless the flow was regulated.

Contrary to California's claim that most of the benefits under the Boulder Canyon Project Act accrue to Arizona, actually the bulk of these advantages have been conferred on California. The Project Act provided her with a previously unavailable water supply for the area now served by Metropolitan Water District and for Coachella Valley. Since construction of Hoover Dam she has been relieved of the annually recurring threat of floods in Imperial Valley and other areas; she has been provided with the All-American Canal which eliminated the international complications arising from the location of the old canal in Mexico; she has been provided with a supply of silt-free stored water in lieu of an undependable silt-laden natural flow; and she has been enabled to develop a great industrial economy from the use of billions of kilowatt hours of hydroelectric energy which has been made available to her at one of the lowest rates prevailing in the United States.

We can perceive no "paradox" in California's sponsorship and persistent pressure for passage of the Swing-

Johnson bills through four Congresses until the proposed legislation was finally enacted as the Project Act, which conferred upon her all these rich and lasting benefits.[133]

D. The Impossibility of a Reliable Determination of Water Supply

California states, directly contrary to the record, that "the experts were in close agreement as to the permanently dependable supply which will be available to the lower basin" (Cal. Op. Br. 245). She further states that the Master rejects these expert opinions and that he attempts to discredit the science of hydrology. She quotes him only in part as follows:

> "The science of hydrology is not capable of sustaining a prediction accurate enough to shed light on this question." (Rep. 103)

Neither California's assertion of harmony among the experts nor her characterization of the Master's holding is correct, as will be demonstrated immediately hereafter. To begin with, the actual holding of the Master as to the effectiveness of hydrology is:

> "The evidence in this case simply does not permit a prediction of future Lower Basin supply with that refined degree of accuracy necessary to show whether existing California uses can be satisfied from the percentage of future supply apportioned to California. On the contrary, the mass of evidence which has been presented shows only that the science of hydrology is not capable of sustaining a prediction accurate enough to shed light on this question." (Rep. 103)

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[133] See S. Rep. No. 592, 70th Cong., 1st Sess. 8, 16-27 (1928).

The Master did not discredit the science of hydrology nor did he hold that it was of no utility in planning projects. He merely concluded that in the unique situation presented here the application of established hydrological techniques would not permit a prediction of future water supply sufficiently accurate to be of any utility in this case.

California relies upon what she terms "standard techniques understood by all hydrologists and used in planning all great projects" (Cal. Op. Br. 242), which are stated to be set out in detail in California's Proposed Findings, part V (Cal. Op. Br. 244 note 1). California asserts that by these techniques it is possible to determine future water supply and that this Court has done so from far less satisfactory hydrological data in *Nebraska* v. *Wyoming,* 325 U. S. 589 (1945), and *Wyoming* v. *Colorado,* 259 U. S. 419 (1922) (Cal. Op. Br. 242 and note 12).

Neither of these cases involved a situation like that presented here. Each one was an equitable apportionment case; neither one involved a statutory apportionment nor a "flexible formula" authorized by act of Congress for the allocation of varying supplies of water, as the Master found is established by the Project Act and the Secretary's water delivery contracts (Rep. 100-01). Nor was there involved in those cases an interbasin compact governing the delivery and release requirements of the upper reaches of the stream in favor of users of water in the lower. Furthermore, the water supply determinations in both of those cases were based upon then existing conditions and not upon conjecture as to hypothetical upstream depletions which might or might not occur at some unknown future date.

Acceptance of California's studies as to future water supply requires an assumption that the Secretary will accept and employ the criteria used in these studies or that the Court by its decree will direct him to do so, thereby

invading the province of Congress—the exclusive source of his authority. It also necessitates the assumption that suitable reservoir sites are available in the Upper Basin; that Congress will provide the effective storage capacity hypothesized by California's experts; that uses of water in the Upper Basin will result in a uniform depletion of the flow of the Colorado River of 6.5 million acre-feet each and every year; and that releases of water from the Upper Basin will not be less than 7.5 million acre-feet in any year, despite the flexibility accorded the Upper Basin under the delivery requirement of Article III(d) of the Compact.

Since there is a close interrelation between the inapplicability of the so-called "standard techniques", which California asserts are "used continuously by hydrologists" (Cal. Op. Br. 243-44), and California's claim that "the experts were in close agreement" (Cal. Op. Br. 245), we shall consider both of these together.

(1) California's Procedure (a)

> "Selection of a representative long-term period of stream flow including at least one complete climatological cycle of wet years and dry years, the dry period being the most severe and critical of record."[134]

There was a wide divergence of opinion among the expert witnesses as to whether the concept of climatological cycles had any value and, if cycles were to be used, which one should be selected.

California witness Leopold stated:

> "There is no such thing in hydrologic data as a clearly repeating cycle . . . . If there were cycles

[134] California's Proposed Finding 5A: 102, p. V-4.

one could use them for forecasting but since there are not cycles this is an impossibility."[135]

Arizona witness Erickson testified:

"Q. I would like to ask you this: whether on a river in which the annual flow varies, as it does on the Colorado River, as it has over the past 50 years, do you think it is possible to predict for the future, within, say half a million acre feet, what the average annual water supply is going to be over the next 50 years?

"A. No, sir; I don't believe so."[136]

California's witness Riter testified to the difficulties he and his colleagues had experienced in attempting to predict future run-off of the Colorado by the "cycle" method. Said he:

"I have been studying the Colorado River for a good many years. In 1929 I made some operational studies for Lake Mead. We thought we had the answer. Lake Mead was put into operation in 1935. In 1940 we had the horrible experience of a 10-year drought, 1931 to 1940. That gave us a new critical period to study; so we recalculated again in 1940 on the basis of a new critical period.

"In 1950 we studied the river again. At that time the 1931 to 1940 period was still controlling as a drought cycle. Now comes along 1958. We studied the river again in 1958, and we find that we now have a 27-year drought cycle, from 1930 to 1956; so that experiences like this keep a hydrologist very humble. *It makes him realize that he cannot predict.* He has to use all the information he can and then try to project himself into the future."[137]

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[135] Tr. 21,474.

[136] Tr. 18,747.

[137] Tr. 21,338-39.

In selecting a cycle for use in making studies of the Colorado River there was complete lack of agreement among the expert witnesses as to what the proper cycle should be. California's Stetson "selected the cycle 1909 through 1956".[138] Riter "included the period 1914 through 1956, inclusive".[139] California's Leopold "would surely choose the 61-year record" if he "were to make a water supply analysis on the Colorado at Lee Ferry".[140] Witness Hill used "various periods".[141] Arizona witness Erickson stated, "You take a different period, you get a different answer."[142]

In view of the obvious differences in flows for different periods and the divergence of opinion as to what is "a representative long-term period of stream flow"—a disagreement which existed even among California's own witnesses —it is impossible to justify California's statement that

> "the experts agree on all hydrologic factors within a few percentage points." (Cal. Op. Br. 243)

(2) California's Procedure (b)

> "Ascertainment of the maximum active reservoir capacity, surface and underground, which may be expected to be available to regulate the long-term flow."[143]

Patently, any "finding of fact" as to the amount of effective storage which will be available in the Upper Basin

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[138] Tr. 11,705.

[139] Tr. 21,275.

[140] Tr. 21,470.

[141] Tr. 22,182; and see C 5583 (Tr. 21,792).

[142] Tr. 18,698.

[143] California's Proposed Finding 5A: 102, p. V-4.

many years hence must necessarily rest upon sheer speculation and unproved hypothesis.[144]

That there is no reliable evidence as to the probable amount of future effective storage is demonstrated by the widely divergent assumptions made by the experts as to future Upper Basin effective storage:

> California witness Stetson—25,000,000 acre-feet to 52,000,000 acre-feet;[145]
> California witness Riter—31,000,000 acre-feet;[146]
> California witness Hill—21,000,000 acre-feet to 27,000,000 acre-feet.[147]
> Arizona witness Erickson—25,000,000 acre-feet; 35,000,000 acre-feet; 43,000,000 acre-feet and 45,000,000 acre-feet.[148]

Despite this wide variance in the testimony of the experts California assumes an Upper Basin effective storage equivalent to 25,000,000 acre-feet at Lee Ferry (Cal. Op. Br. 244 note 2).

The further unreliability of the California studies respecting reservoir capacities is demonstrated by the fact that such studies completely ignore (1) main stream reservoir capacity now existing in the Lower Basin, namely, that created by Davis and Parker Dams; (2) potential Lower

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[144] The depletion which will result from all the structures existing, authorized and planned will approximate only 4,800,000 acre-feet per annum in the Upper Basin. S. REP. No. 128, 84th Cong., 1st Sess. 4 (1955). How much of this capacity may be then available through structures not yet planned and authorized cannot be the subject of proof at this time.

[145] C 2205A (Tr. 11,731) and C 2206A (Tr. 11,737).

[146] Tr. 21,275-78, 21,282-85, 21,331.

[147] Tr. 21,744, 21,755-59, 22,137.

[148] A 352-54 and A 359-61 (Tr. 18,097); A 366 (Tr. 18,097); A 355-57 (Tr. 18,097) and A 362-64 (Tr. 18,097).

Basin reservoirs, *e.g.*, those which would be provided by Bridge and Marble Dams; and (3) the fact that existing reservoir capacities will be reduced by future accumulations of silt. Despite the fact that California Procedure (b) requires the ascertainment of the capacities of underground as well as surface reservoirs, California's studies do not consider: (1) the existence or effectiveness of groundwater storage in the Upper Basin; and (2) the effect of main stream groundwater reservoirs on main stream water supply in the Lower Basin.

(3) California's Procedure (c)

> "Estimation of the extent to which the water supply may be depleted by up-stream uses."[149]

It is impossible at this time to make a reliable estimate of future depletions in the Upper Basin since the rate and extent of development in the Upper Basin depend upon future physical, economic and political considerations, all of which are of an uncertain nature. Before any reliable estimate may be made it is necessary to ascertain and consider all related physical facts and in some fashion to predict future economic conditions as well as to prophesy feasibility determinations by future Secretaries of the Interior and what, if any, enabling legislation will be enacted by future Congresses. Before such an estimate could be arrived at, it would be necessary to obtain engineering and other expert studies and reports as to acreage, soil, elevation, topography, hydrology, crop requirements and a host of other related facts. Prophecies as to future economic conditions and future actions by government officials and Congresses certainly can form no basis for any reliable appraisal. Moreover, a determination of Upper Basin

[149] California's Proposed Finding 5A: 102, p. V-4.

depletions cannot be made without a resolution of the rights and delivery obligations of the Upper Basin states under the Colorado River Compact—a determination which cannot be made in their absence (see Rep. 145).

The California estimate of Upper Basin depletions is based upon three assumptions: (1) an assumed undepleted stream flow for an arbitrarily selected period; (2) an assumed Upper Basin delivery requirement at Lee Ferry; and (3) an arbitrarily assumed effective storage capacity. The resulting quantity which California labels as "upper basin depletion" is the amount of water which would be *available* for depletion by the Upper Basin if the foregoing assumptions were valid. This *contrived* Upper Basin depletion figure is wholly unrelated to the future physical, economic and political factors, which necessarily will govern the amount of *actual* Upper Basin depletion.

California asserts that "all storage capacity existing or authorized for construction in the upper basin at the time of trial would provide the equivalent of 25,000,000 acre-feet of storage capacity effective at Lee Ferry" (Cal. Op. Br. 244 note 2). This figure is arrived at by reference[150] to existing and authorized projects including those "authorized" by the Colorado River Storage Project Act.[151]

On the basis of this assumed storage capacity, California then arbitrarily makes the further assumption of an Upper Basin depletion of 6,500,000 acre-feet per annum. In so doing, she ignores the fact that the Report of the Senate Committee,[152] which studied the Colorado River

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[150] C 2203, 2203A (Tr. 11,720). And see California's Proposed Finding of Fact 5C: 103(4), p. V-13.

[151] 70 Stat. 105 (1956), 43 U. S. C. §§620-620*o* (1958).

[152] S. REP. No. 128, 84th Cong., 1st Sess. 4 (1955); see also H. R. REP. No. 1087, 84th Cong., 1st Sess. 6 (1955).

Storage Project and potential reservoir construction in the Upper Basin, determined that future Upper Basin consumptive use will not exceed 4,800,000 acre-feet per annum (Rep. 112), even if all projects in all categories listed in the Storage Project Act were to be constructed.

It follows that unless additional works not within the contemplation of the Colorado River Storage Project Act are authorized and constructed to achieve California's assumed depletion of 6,500,000 acre-feet per annum, there will be 1,700,000 acre-feet of water descending to the Lower Basin which is not taken into account in California's studies.

Contrary to California's assertion that there was uniformity in the techniques employed and results achieved, the facts are that the various experts used different reservoir operation criteria, made different assumptions as to the delivery obligations, employed varying stream flow figures and arrived at the widely divergent estimates of 5.7, 6.2, 6.4, 6.5, 6.8, 7.2, 7.3, and 7.5 million acre-feet per annum of hypothetical Upper Basin depletion.[153]

(4) California's Procedure (d)

> "Calculation, through reservoir operation and routing studies, of the extent to which the available reservoir capacity (Item b), had it existed throughout the selected period of study (Item a), would have been capable of regulating the available flow during that period into an equal annual discharge, taking into account reservoir evaporation losses and upstream uses.'"[154]

Since, as we have seen, the requirements of procedures (a) and (b) cannot be met, it follows that procedure (d) has

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[153] C 5572A for iden.

[154] California Proposed Finding 5A: 102, p. V-4.

no utility. Furthermore, before this procedure can be useful, the criteria employed in any reservoir operation or routing study must either be accepted by the Secretary or their use be imposed upon him by the Court.

The California objective of equal quantities of water available for discharge and use each and every year is neither desirable of accomplishment nor possible of achievement. Obviously, varying economic, political, climatic and other conditions will result in varying water needs and any attempt to cast water uses into an inflexible mold is unrealistic and impracticable.[155]

(5) California's Procedure (e)

> "Calculation of the accruals and losses between the points of discharge from the reservoir and the points of diversion to arrive at a net quantity available for beneficial consumptive use on a permanent basis."[156]

Here again there is great divergence of opinion among the experts. A composite tabulation of the most pessimistic expert opinion respecting gains and losses below Lee Ferry, when compared with a tabulation of the most optimistic opinion on this subject, produces results varying from a net loss of 1,325,000 acre-feet per annum to a net gain of 165,000 acre-feet per annum or a total difference of 1,490,000 acre-feet per annum. The tabulation follows:

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[155] C 271 (Tr. 8127) and C 355 (Tr. 8726) clearly demonstrate that there is no uniformity of annual use even by established and stable projects although large quantities of surplus water are available.

[156] California Proposed Finding 5A: 102, p. V-5.

Range in Estimated Gains and Losses in Main Stream Lee Ferry to International Boundary[157]

1	2	3	4
Line No.	Losses	Greatest Loss Acre-feet	Least Loss Acre-feet
1	Evaporation, Lake Mead	700,000	360,000
2	Useable spills, Hoover Dam	500,000	0
3	Evaporation from reservoirs below Hoover Dam	300,000	300,000
4	Channel losses below Hoover Dam	600,000	300,000
5	Regulatory waste	200,000	0
6	Total Losses	2,300,000	960,000
	Gains	Least Gain Acre-feet	Greatest Gain Acre-feet
7	Lee Ferry to Lake Mead	900,000	950,000
8	Hoover Dam to Gila River	75,000	75,000
9	Inflow from Gila	0	100,000
10	Total Gains	975,000	1,125,000
	Net	Loss Acre-feet	Gain Acre-feet
11	Difference between line 10 and line 6	1,325,000	165,000
	Difference		Range Acre-feet
12	Sum of columns 3 & 4 line 11		1,490,000

157 Record References and Explanation

	Col. 3	Col. 4
1	A 351 Lines 1 and 1A (Tr. 18,097)	C 2209A (Tr. 11,753)
2	A 354 (Tr. 18,097)	C 2209A (Tr. 11,753)
3	C 2211 (Tr. 11,755)	A 366 Line 7 (Tr. 18,097)
4	C 2213 (Tr. 11,764) (later corrected at Tr. 18,657, 18,719, 21,836; California Proposed Finding 5E: 102(4))	A 366 Line 9 minus Lines 10a and 10b (Tr. 18,097)
5	C 2216A Line 12 (Tr. 11,825; 11,765-66)	Tr. 18,309-10; 18,098-99

E. The Alleged Concurrence of Stetson and Erickson as to Future Water Supply

As support for the claim that future main stream supply in the Lower Basin is readily determinable, California relies heavily upon a study made by California's witness Stetson and one of the several analyses of the Stetson study made by Arizona's expert Erickson. The Stetson study estimated that future Lower Basin main stream supply will be 6,175,000 acre-feet per annum.[158] The Erickson analysis referred to by California put the figure at 6,100,000 acre-feet per annum.[159] On this basis, California asserts that the "experts were in close agreement as to the permanent dependable supply which will be available to the lower basin" (Cal. Op. Br. 245; see Cal. Op. Br. 245 notes 3 and 4 and table accompanying plates 7 and 8 of Cal. Op. Br.).

The Master, however, was not deceived by this seeming close agreement between the two calculations. He says:

> "The apparent concurrence of the Arizona and California witnesses is deceptive, however. Far from supporting California's position, these studies demonstrate that predictions of future supply are necessarily based on so many significant but unknowable

	Col. 3	Col. 4
6	Sum of Lines 1 through 5	
7	Tr. 21,283	C 2216A Line 4 (Tr. 11,825) A 366 Line 4 (Tr. 18,097)
8	C 2216A Line 8 (Tr. 11,825)	A 366 Line 8 (Tr. 18,097)
9	C 2216A Line 10 (Tr. 11,825)	
10	Sum of Lines 7 through 9	

[158] C 2216A (Tr. 11,825), as corrected at Tr. 21,836 and California's Proposed Finding 5E: 102(10).

[159] Tr. 18,903-15.

> factors that they cannot be accurate enough to be helpful in this case." (Rep. 110)

Actually, Arizona did not present a study of future water supply, as such, since she contended it was irrelevant. Nor did Erickson make an independent study of future water supply. At the request of Arizona's counsel, he made an analysis of Stetson's study by taking Stetson's basic figures as a starting point and applying to them only one of several differing interpretations of the Upper Basin's obligation to release water to the Lower Basin under the Compact.[160] In this way he was able to parallel the Stetson study and to demonstrate the unreliability of Stetson's conclusions.

On cross-examination by California counsel in response to hypothetical questions based on assumptions which Erickson never accepted as sound and which he indeed questioned,[161] Erickson roughly calculated other and widely variant water supply figures.[162] However, all that this cross-examination demonstrated, as the Master remarked at the time and as California's counsel agreed, was "that, on these other assumptions, you will get a reduced net useable supply for the Lower Basin by a substantial amount."[163]

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[160] The Compact interpretation was supplied Erickson by counsel. Contrary to California's assertion (Cal. Op. Br. 245-46 note 4), this interpretation of the Compact was not "later disclaimed" by Arizona's counsel. It never was espoused by Arizona as other than one *possible* interpretation of the Compact, useful only to demonstrate how the obligation of the Upper Basin varied with a varying interpretation of the Compact, and how this in turn changed the estimates of supply available to the Lower Basin (Tr. 18,009-19).

[161] Tr. 18,009-13, 18,597-98.

[162] Tr. 18,801-19, 18,913-14.

[163] Tr. 18,819-20.

The Master's Report epitomizes Erickson's testimony:

> "The very great significance of each of these assumptions to the prediction of future supply is demonstrated by the Erickson study itself. The study on which California relies, which shows the future Lower Basin mainstream supply to be 6,100,000 acre-feet per annum, is only one of a series prepared by Mr. Erickson. His other studies varied certain of the assumptions, such as Upper Basin storage and the interpretation of Article III(c) of the Colorado River Compact. One of these other studies showed future supply to be 6,500,000 acre-feet per annum; another showed it to be 7,400,000 acre-feet per annum. And none of the Erickson studies assumed an Upper Basin depletion at Lee Ferry of less than 6,200,000 acre-feet per annum despite a maximum depletion to date of only 2,200,000 acre-feet and the Senate Committee prediction of less than 4,800,000 acre-feet." (Rep. 112-13) (footnotes omitted)

California's Opening Brief sets forth in an appendix a table purporting to show by a comparison of the Erickson and Stetson testimony that they were in substantial agreement regarding the amounts of gains and losses to the Colorado River from Lee Ferry to the International Boundary (Cal. Op. Br. A46). However, California neglects to advise the Court of the fact that the figures tabulated in the Erickson column are taken from his answers to hypothetical questions put to him on cross-examination by California counsel and the additional fact that, when not circumscribed by these California hypotheses, Erickson on direct examination made estimates regarding these gains and losses which were substantially different from Stetson's forecasts.

There are set forth immediately below in tabular form the gains and losses as testified to by Stetson and by Erickson on direct examination and on cross-examination on the basis of California's hypotheses:

Line	Losses	Erickson Direct[164]	Erickson Cross based on Cal. Hypotheses[165]	Stetson[166]
1	Evaporation from Lake Mead	450,000	700,000	650,000
2	Uncontrollable spills at Hoover Dam	0	500,000	300,000
3	Evaporation for reservoirs, Hoover Dam to Mexican boundary	300,000	300,000	300,000
4	Channel losses, net of channel salvage, Hoover Dam to Mexican boundary	300,000	300,000	600,000[167]
5	Regulating waste (excess arrivals in limitrophe section)	75,000	75,000	200,000
6	Total losses	1,125,000	1,875,000	2,050,000
	Gains			
7	Net gain—Lee Ferry to Lake Mead	950,000	950,000	950,000
8	Bill Williams and miscellaneous inflow below Hoover Dam	75,000	75,000	75,000
9	Total gains	1,025,000	1,025,000	1,025,000
10	Net losses over gains between Lee Ferry and international boundary	100,000	850,000	1,025,000

11 Difference between Erickson and Stetson: 925,000 acre-feet per year, *i.e.*, Stetson's estimated net losses are more than ten times greater than those of Erickson.

Arizona does not vouch for the validity or reliability of any of the foregoing estimates. We agree with the Master's conclusion that prophecies as to future water supply are irrelevant to the issues and that in the circumstances of this case it is not possible to arrive at a determination of future water supply which is of sufficient

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[164] A 366 (Tr. 18,097).

[165] Tr. 18,914-15.

[166] C 2216A (Tr. 11,825).

[167] Corrected to this figure at Tr. 18,657, 18,719, 21,836.

reliability to be of any utility (Rep. 102-13). The above comparative table is intended solely to demonstrate that the Erickson and Stetson estimates of gains and losses to the stream below Lee Ferry are not in close agreement, as claimed by California, but differ by 925,000 acre-feet per year.

F. The Colorado River Storage Project and the Bureau of Reclamation 1960 Power Memorandum

Attempting to buttress her prophecy of extensive future Upper Basin uses, California asserts that "project plans are in being for enough projects in the upper basin to use far more than its maximum apportionment" (Cal. Op. Br. 252) (footnote omitted). But California herself has criticized the report,[168] which is relied upon for this exaggeration, as "essentially a catalogue of potential projects" and as lacking in "factors and data which govern the engineering and financial feasibility of the proposed projects".[169]

California refers specifically to the Colorado River Storage Project Act of 1956.[170] She states:

> "Section 2 of that act . . . provides that the Secretary shall give a number of named participating reclamation projects 'priority to completion,' such projects being the first beneficiaries of the water and power made available by the reservoirs authorized by section 1." (Cal. Op. Br. 252)

But that section does not so provide, as is clear from the full text:

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[168] H. R. Doc. No. 419, 80th Cong., 1st Sess. (1947).

[169] *Id.* at *51-52.*

[170] 70 Stat. 105, 43 U. S. C. §§620-620*o* (1958).

> "In carrying out further investigations of projects under the Federal reclamation laws in the Upper Colorado River Basin, the Secretary shall give priority to completion of *planning reports* on . . . [twenty-five named] participating projects."[171]

Moreover, it is significant that Congress enacted the Colorado River Storage Project Act on the authoritative estimate of the Senate Committee which studied the project "that future Upper Basin consumptive use will not exceed 4,800,000 acre-feet per annum . . . even if the extensive storage capacity envisaged but not as yet authorized for the Upper Basin were eventually constructed" (Rep. 112) (footnote omitted). The Senate Committee Report added:

> "This would leave an unused apportionment of 2.7 million acre-feet of the 7.5 million acre-feet apportioned to the Upper Basin to meet any contingencies arising out of litigation over varying interpretations of the [Colorado River] compact. *In the circumstances, the continuity of the water supply for the Lower Basin would be assured.*"[172]

California's assertion that the Senate in 1961 enacted a bill "after the Master filed his Report, which will increase upper basin depletions by about 360,000 acre-feet" per annum (Cal. Op. Br. 253) (footnote omitted) is misleading. The reference is to the San Juan-Chama-Navajo Project—one of those approved by the Colorado River Storage Project Act of 1956—and the amount of its depletion is

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[171] 70 Stat. 106 (1956), 43 U. S. C. §620a (1958).

[172] S. REP. No. 128, 84 Cong., 1st Sess. 4 (1955). See also H. R. REP. No. 1087, 84 Cong., 1st Sess. 5 (1955).

accounted for and included in the over-all depletion of 4.8 million acre-feet determined by the Senate Committee.[173]

There is substantial agreement that these projects—to the extent that they may be found to be feasible—will not be completed until 75 to 100 years hence and that even then maximum depletion in the Upper Basin will not exceed 4,800,000 acre-feet per annum (Rep. 111-12).

Next, California refers to a 1960 Bureau of Reclamation memorandum, evidently completed after the hearings and while the case was *sub judice* before the Special Master.[174] This document is represented to be "a preview of what the Master anticipates, a determination of the total amount of water to be released by the Secretary from Lake Mead" and as "the latest and most authoritative statement of how the Bureau of Reclamation intends to operate the river" (Cal. Op. Br. 259-60). The document is no such thing.

The true character of the memorandum is shown by its introduction which states:

> "*This memorandum has been prepared to determine and support an average power rate for the Colorado River Storage Project and Participating Projects.* Project costs, generation and sales, Bureau of Reclamation policy and other factors affecting power rates, when approved will be incorporated and summarized in a revision of the Financial and Economic Analysis Report of the Colorado River Storage Project and Participating Projects. *Only factors influencing and relating to costs, cost analysis, power*

[173] *Hearings on S. 500 Before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs,* 84th Cong., 1st Sess. 58 (1955).

[174] Bureau of Reclamation, Regional Office, Region 4, U. S. Dept. of the Interior, Financial and Power Rate Analysis, Colorado River Storage Project and Participating Projects (September 1960).

revenues and repayment are covered in this memorandum."[175]

The fact that the memorandum is related solely to power production is demonstrated by the foregoing quotation and also by the following statement made in the body of the memorandum:

> "Operation studies to determine the hydroelectric energy and capacity potential of the power facilities were based on the water supply previously discussed. Two types of operation studies were made, one to determine the rate of filling of project reservoirs and the energy generation resulting from required releases during the filling period and one to determine the expected reservoir release and energy generation subsequent to the initial filling process."[176]

In short, the memorandum is an analysis of the power potential of the initial units of the Colorado River Storage Project and Lake Mead. It is not and does not purport to be a study of an available water supply for irrigation, domestic or municipal use. As the Court will appreciate, there is a vast difference between the procedures followed in the operation and management of a dam and reservoir solely for power production and those which are applied to supply water for irrigation and domestic use.

California relies on this memorandum, prepared solely to determine potential power production, and uses its computations as the basis of her forecast that by the year 1975 the Metropolitan Water District will be short of water by some 674,000 acre-feet (Cal. Op. Br. 260; and see Table 6).

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[175] *Id.* at 1.

[176] *Id.* at 6.

This claimed shortage entirely ignores the fact that it is accomplished by the withholding in Glen Canyon and Lake Mead reservoirs for power purposes of large quantities of water which will at no time during the period ending in 1975 be less than 40,000,000 acre-feet. Likewise, California's claimed shortage in the year 2006, when it is prophesied that there will be no water at all for Metropolitan, ignores the fact that the storage withheld in these reservoirs for power purposes will at no time during the period ending in 2006 be less than 30,000,000 acre-feet. Also overlooked by California is the fact that these power studies show that water in addition to the quantities specified above will be withheld for power purposes at all times in Blue Mesa, Morrow Point, Crystal, Flaming Gorge and Navajo reservoirs in the Upper Basin.

California's calculations, employing the regional power memorandum as support for her predictions of water shortages, also assume without justification that the Upper Basin reservoirs will withhold for power purposes water needed for Lower Basin domestic and agricultural uses in direct violation of Article III(e) of the Compact which provides:

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

Obviously, claimed shortages which are attributable to a regimen of the stream designed to furnish power rather than to supply water are without validity, since they assume the violation of those provisions of the Compact and Project Act which expressly subordinate uses for power purposes to the use and consumption of Colorado River water for

irrigation and domestic purposes (Compact Article IV(b), Ariz. Op. Br. Appendix A, p. 5a; Project Act §6, Ariz. Op. Br. Appendix B, p. 18a).

G. California's Assumption that Science Will Stand Still

California excludes from her consideration altogether any progress whatever over the next century in the science of water development, conservation and management. Her miserific vision of future water supply assumes that the science of hydrology will stand completely still—despite the fact that even now unprecedented achievements in that field have progressed far beyond nascency. Indeed, the record in this very case discloses that extensive studies and investigations are progressing in fields such as:

1. Water shed management to increase runoff.[177]
2. Improvement of irrigation practices.[178]
3. Weather modification.[179]
4. Demineralization of saline water.[180]
5. Channelization procedures.[181]
6. Control of evaporation from free water surface through the use of monomolecular films or other methods.[182]
7. Control of phreatophytic vegetation.[183]

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[177] Tr. 2047, 2096-2104, 2786, 10,412-13.

[178] Tr. 18,412.

[179] Tr. 2887-89.

[180] Tr. 2885-86.

[181] Tr. 1433, 1435, 12,200-01, 12,213-14, 18,092, 18,896-97, 21,131-32; A 366 (Tr. 18,097).

[182] Tr. 18,410-11, 18,473-75, 18,478.

[183] Tr. 1446-48, 2784-85, 2877-78, 2908-10.

It is impossible to predict what progress will be made in these fields during the next one hundred years, but significant advances in any of them undoubtedly will result in substantial increases in the water supply available for use in the Lower Basin.

H. California's Unfounded Claim of Dire Calamity

California's entire water supply argument is a carefully contrived claim of dire calamity and great disaster to her existing development and economy. Her repeatedly claimed requirements of 5,378,000 acre-feet are greatly inflated. While she speaks in terms of "existing needs" and "present development" and implies that ruin is just around the corner if the Special Master's Recommended Decree is adopted, the truth is that the "existing needs" and "present requirements" actually include domestic and industrial uses for a population of more than 13,000,000 within the Metropolitan Water District, or an increase of approximately 80 per cent over the present population of 7,329,012,[184] as well as more than 900,000 acre-feet of water annually for the irrigation of more than 175,000 acres of new land which is not now and never has been in cultivation.[185]

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[184] Metropolitan Water District of Southern California, 22 ANN. REP. 5 (1960); Tr. 9830, Tr. 9832-33. Local water supply of 1,220,000 (Tr. 9830) acre-feet per annum plus Metropolitan Contract entitlement of 1,212,000 acre-feet per annum aggregate 2,432,000 acre-feet, which at the rate of 162 gallons per capita per day (Tr. 9832-33) will supply the needs of a population of more than 13,000,000.

[185]

Area	New Acreage	Rate of Use ac-ft/ac/yr	New Use ac-ft/yr
Palo Verde Irr. Dist.....	31,000	4.0	124,000
Yuma Proj. Res. Div.....	7,400	3.5	25,900
All-American Canal Project	137,000	5.5	753,500
Total	175,400	—	903,400

In addition, she includes in her "present uses" approximately 1,000,000 acre-feet of water which Imperial is wasting by runoff each year into the Salton Sea.

The Special Master recognized that if the existing situation of abundant water supply in the Lower Basin is changed and water becomes scarce, present wasteful practices must be replaced by more efficient methods. The notable example of waste to which the Master refers is the "very large unused runoff each year into the Salton Sea" (Rep. 103 note 25). According to the evidence the measured inflow into the Salton Sea from the Imperial Irrigation District alone averaged approximately 1,225,000 acre-feet per annum for the last five years (1951-1955) covered

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All figures are derived from Cal. Op. Br. Table 1. Arizona, of course, does not concede the accuracy of these figures.

California's claim that she must have 5.5 acre-feet per acre for the All-American Canal Projects, even after making use of reasonable conservation practices, is wholly unrealistic and grossly inflated. This is true because:

1. No recognition is given to effective precipitation of 0.15 feet per year (Tr. 18,387-95).

2. The "requirements" presuppose a "salt content" of 1.25 tons per acre-foot (t.a.f.) (C 283, Tr. 8204). The average for the 16-year period ending in March, 1958 was only 1.02 t.a.f. (A 422, Tr. 19,571), and in the future will not exceed 1.09 t.a.f. (A 372, Tr. 18,139).

3. There is an assumed leaching requirement of 22% founded on 1.25 t.a.f., although based upon past, present or future conditions, it is 10% or less (Tr. 19,413-27, 19,504-05).

4. It is physically impossible to pass through the average soils of Imperial Valley more than 9% of the water applied (Tr. 19,420-24; A 436, Tr. 22,026; *Drainage Investigation in Imperial Valley, California, 1941-51:* Soil Conservation Service Technical Publication 120, September 1959, pp. 29, 31, 48, 49).

5. Seepage losses from the distribution system may be reduced by 90% by lining portions of the system (Tr. 18,157-61).

by the evidence.[186] No claim of leaching requirements nor any other theory can obscure the fact that the Salton Sea is the product of inefficient water uses and gross waste. It is not realistic to assume that such a shameful waste of a precious commodity will continue to be tolerated if and when it results in shortages which can be eliminated by the conservation of water to satisfy California's actual needs.

If California continues to permit such wasteful practices in times of scarce supply, any "dire calamity" which may result cannot properly be assigned to the disposition of this case recommended by the Special Master. Responsibility for such consequences must be attributed to those in California who sanction an internal division of her share

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6. Approximately 75% of the All-American Canal losses below Pilot Knob could be recovered by pumping (Tr. 18,229-37).

7. Unnecessary seepage loss and waste for system regulation in excess of that occurring in the period 1955-1957 is included (A 426, Tr. 19,594; C 275, Tr. 8210).

8. An amazing 100,000 acre-feet per year to satisfy domestic uses of a static population of approximately 63,000 persons is included (A 426 (Tr. 19,594); California Proposed Finding 4C: 106).

The record does not contain a determination by a disinterested agency of what the needs of these projects will be if reasonable water conservation practices are employed. Hence, for purposes of reply, California's figure of 5.5 acre-feet per acre is necessarily used. The large amount of water involved in even fractional reductions of this use factor becomes apparent when it is recalled that the claim is for water for 661,000 acres of land.

The record discloses that much of the new land intended by California for subjugation and irrigated farming is of questionable economic value—some of it is approximately 90-95% sand. Experiments to determine its adaptability to farming demonstrated that in one instance 70 acre-feet of water per acre per annum were needed and that the average used was 40 acre-feet. The testimony led the Master to remark: "You mean [they] used water and mixed a little sand with it" (Tr. 18,737-38).

[186] C 242 (Tr. 7991), C 243 (Tr. 7994), A 408 (Tr. 19,409).

of Colorado River water which spells the "doomsday for Metropolitan" (Cal. Op. Br. 261), while permitting approximately one million acre-feet of water to be wasted annually into the Salton Sea.

California assumes that, because Arizona did not submit proposed findings on this subject, Arizona concedes the validity of the California arguments that the leaching requirements of Imperial Irrigation District necessitate this waste in order to prevent accumulation of salts and that farm efficiency in Imperial is among the highest. She professes surprise at the Master's reference (Rep. 103 note 25) to the matter (Cal. Op. Br. 276).

Arizona did not propose findings of fact regarding California's wasteful water practices because, as she expressly stated in her Answering Brief before the Master (pp. 73-81), such matters are not material to any issue in this case. Arizona presented evidence of California's wasteful practices only because California insisted, as she continues to insist, that her alleged water requirements, which include large quantities of waste, justify her proposed decree. Only California's persistence in maintaining that her claimed requirements demonstrate the unsoundness of the Master's conclusions caused him to point out in his Report that these alleged requirements are inflated by the inclusion of waste and to reject California's attempted justification of this waste:

> "It is impossible to determine exactly how much more efficiently water will be used if the present condition of abundance turns into one of shortage, but it is clear that savings will be such that California's existing uses could be satisfied *by sustantially less* water than is presently diverted." (Rep. 103 note 25)

The prediction of doom for Metropolitan is also predicated on the assumption that the Colorado River is and

will continue to be the only source of water supply for the District. This is not the fact.

The annual reports of Metropolitan show that in the fiscal year 1960 almost three-fourths of the water used in the Metropolitan area came from sources other than the Colorado River.[187] The California evidence establishes that on a long-time average basis the local water resources and the Owens Valley Aqueduct are capable of an annual yield of 1,220,000 acre-feet.[188] This quantity is sufficient to supply a population of over 6,700,000, based upon Metropolitan's evidence that per capita use within the District in 1970 will be 162 gallons per day.[189]

In addition, on November 4, 1960, Metropolitan executed a contract with the State of California[190] providing for delivery of 1,500,000 acre-feet of water per annum from northern California sources, a part of a much larger quantity planned for delivery to Metropolitan under the California Water Plan.[191] Under the terms of this contract the first delivery of water (110,400 acre-feet) from the Feather River Development and Diversion Project will occur in 1972; thereafter annual deliveries will be gradually increased until 1991 when Metropolitan will receive 1,500,000 acre-feet annually.[192]

Thus in 1991 there will be 2,720,000 (1,220,000 plus 1,500,000) acre-feet available to Metropolitan from sources

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[187] Metropolitan Water District of Southern California, 22 ANN. REP. 43 (1960).

[188] Tr. 9830.

[189] Tr. 9832-33.

[190] A certified copy of the contract has been filed with this brief.

[191] Metropolitan Water District of Southern California, 22 ANN. REP. 70 (1960).

[192] Paragraph B 6(a) and Table A on p. 6/1.

other than the Colorado River, which is sufficient to serve 15,000,000 persons on the basis of 162 gallons per capita per day.

In the foregoing discussion no consideration is given to agricultural use of water in the Metropolitan area. 380,941 acres were irrigated in 1955.[193] It is conceded by Metropolitan that acreage now devoted to agricultural uses will progressively go out of cultivation and will be used for urban development, with the result that water now used for agriculture will be available for municipal purposes.[194]

California asserts that Metropolitan diversions have increased substantially since the trial to "nearly" 900,000 acre-feet in 1960 (Cal. Op. Br. A36). It is impossible to ascertain how much of this increase is for bona fide municipal use. California witnesses admitted at the trial that, in addition to agricultural uses in the Metropolitan area, substantial amounts of Colorado River water diverted by Metropolitan were being released for percolation to the underground to replenish groundwater supplies or act as a barrier to further infiltration of salt.[195]

In our foregoing analysis of California's claims of "dire calamity" and "doomsday" for Metropolitan, no consideration has been given to desalting of ocean and other saline water as a source of supply.

Congress has enacted a Saline Water Act[196] for the specific purpose of conserving and increasing the water resources of the nation and specifically to "provide for the development of practicable low-cost means of producing from sea water, or from other saline waters, water of a

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[193] C 527 (Tr. 9395).

[194] Tr. 9800-03, Tr. 9832-34.

[195] Tr. 9549, 9626-27.

[196] 66 Stat. 328 (1952), 42 U. S. C. §§1951-58g (1958).

quality suitable for agriculture, industrial, municipal, and other beneficial consumptive uses".[197] The Assistant Secretary of the Interior in charge of this program reported to Congress in 1959 as follows:

> "Progress in the field of lower cost conversion or desalting of saline waters has been such that we can state that the prospects are excellent."[198]

Desalinization plants are presently in operation not only in the United States but throughout the world, either on an experimental basis or actually supplying potable water to areas in which fresh water is in short supply.

This source of an unlimited supply of water is physically available to California but is geographically inaccessible to Arizona.

It is abundantly clear from the foregoing that California's water supply future, contrary to her doleful cries, is bright indeed.

I. Arizona's Critical Needs

As we have seen, the California protestation that unless she receives 5,378,000 acre-feet of Colorado River water each and every year she will be visited with disaster is without substance. Equally without foundation are the California insinuations (Cal. Op. Br. 276-77, 292) that Arizona's

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[197] 66 Stat. 328 (1952), 42 U. S. C. §1951 (1958).

[198] *Senate Select Committee on National Water Resources, Saline Water Conversion, Committee Print No. 26,* 86th Cong., 1st Sess. V (1959). In the same communication the Assistant Secretary indicated that "if the people of California fail to authorize the proposed $1.75 billion bond issue to inaugurate the $12 billion California water plan, which is a distinct possibility, widespread use of converted sea water can be expected in Southern California in the immediate future." *Id.* at VII.

needs for additional Colorado River water are neither immediate nor necessary for the preservation of Arizona's present development and going economy. The truth is that the whole purpose and justification of the proposed Central Arizona Project is to rescue and preserve an existing Arizona development and a present economy which is now and has been for some time faced with extinction. Already thousands of once fertile and productive acres in Central Arizona have been returned to the desert due to the failing water resources of that area and ultimately between 375,000 and 425,000 acres of agricultural lands in central Arizona must go out of cultivation if the local water supply is not supplemented by Colorado River water (see Ariz. Op. Br. 21-23, 190-92). Use of Colorado River water in central Arizona through the facilities of the proposed Central Arizona Project will provide an irrigation supply solely for lands with an agricultural history and no new lands not previously cultivated are to be placed in production through the use of Colorado River water. As stated in the Report and Findings on the Central Arizona Project filed with the Secretary of the Interior by the Bureau of Reclamation:

> "It has been shown previously that the central Arizona project is essentially *a rescue project* designed to eliminate the threat of a serious disruption of the area's economy. This threat is the result of a serious overdraft upon the groundwater supply and failure to drain harmful salts from the area. It has been shown also that the whole of the potential supply, including Colorado River water, will be adequate only for those lands presently irrigated and those in the area irrigated in the past but now idle."[199]

California makes an impassioned plea for projects which were rushed to completion in the face of known Arizona

[199] A 71, p. 118 (Tr. 310).

shortages and for new acreages which have never been in cultivation. At the same time California brushes aside the conceded actual shortages in the central Arizona area with the assertion that under her proposed decree "Arizona will receive only 80,000 acre-feet per annum less than the full ultimate requirements of her existing main stream projects" (Cal. Op. Br. 22). However, California's testimony showed that in the Gila Basin in Arizona there was 3,093,141 acre-feet of agricultural consumptive use in 1953[200] and she concedes that the long-term supply available to meet this use is only 1,715,000 acre-feet per annum. She thus recognizes an ultimate annual shortage of 1,378,141 acre-feet (Cal. Op. Br. 22).[201]

J. Metropolitan's Alleged Equitable Claims

California also argues that the Metropolitan Water District was required to and did underwrite approximately one-third of the cost of the Government's investment in Hoover Dam as a consideration for getting its water delivery contract; that in pursuance of this requirement Metropolitan has paid large sums to the United States and that in reliance on her water delivery contract and interpretations of the Compact and Project Act, which California claims were substantially the same interpretations as were "then" asserted by Arizona, additional large sums have been expended on projects for the utilization of Colorado River water. California concludes that in view of these circumstances the allocation of water proposed by the Special Master, and which California insists would destroy the water rights of the Metropolitan Water District, is inequita-

[200] Tr. 10,638; C 1514A sheet 3 (Tr. 10,638).

[201] According to Arizona's testimony the shortage is materially higher. Tr. 19,198, A 397 (Tr. 18,494).

ble and violative of the principles of "fair play" (Cal. Op. Br. 266-71).

Metropolitan was not required to, nor did it, "underwrite" any portion of the costs of Hoover Dam. Metropolitan contracted to pay at a very favorable rate for approximately 36 per cent of the power output of Hoover Dam only after it had unsuccessfully attempted to obtain 50% of such power.[202]

It is recognized that the Boulder Canyon Project Adjustment Act [203] worked some price changes. However, the bargain which Metropolitan received from her share of this eagerly sought after power is illustrated by the facts disclosed in Metropolitan's Annual Report for its Fiscal Year 1960, to which California refers in her Opening Brief (Cal. Op. Br. 270 note 1). The Report (p. 24) shows that Metropolitan paid 1.8 mills per kilowatt hour for 1,239,926,326 kilowatt hours of energy generated at Hoover Dam and that 264,323,912 kilowatt hours of energy generated at Parker Dam cost Metropolitan 1.373 mills per kilowatt hour. The Report also shows that Metropolitan purchased from other sources 49,299,179 kilowatt hours of

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[202] When the Secretary of the Interior, on September 10, 1929 issued invitations for applications to purchase "Boulder" power, 27 applications were submitted: the three principal applicants were the City of Los Angeles, the Southern California Edison Company and the Metropolitan Water District. Each of the first two asked for the entire output of Hoover Dam which it was then assumed would be 3,600,000,000 kilowatt hours. The Metropolitan Water District asked for approximately one-half that amount and the State of Nevada asked for one-third of it. The total of the applications was for well over three times the amount of power which it was then considered would be available. Negotiations to resolve the problem of allocating power among the conflicting applications resulted in Metropolitan being awarded approximately 36% of the firm power output with first call upon all unused firm and secondary power developed at Hoover Dam up to the Metropolitan requirement for pumping into and in the Aqueduct. WILBUR & ELY, THE HOOVER DAM CONTRACTS 17-24 (1933).

[203] 54 Stat. 774 (1940), 43 U. S. C. §§618-618p (1958).

steam-generated, off-peak energy at a cost of 6.016 mills per kilowatt hour.

Equally without foundation is the California assertion that Metropolitan expended large sums in reliance upon Compact and Project Act interpretations which were substantially in agreement with the Arizona construction of those instruments (Cal. Op. Br. 270). Although California does not in this portion of her brief identify the interpretations referred to, it is assumed that they are the same so often stated and referred to in California's Opening Brief: namely, that the water dealt with in the Compact and the Project Act is system rather than main stream water and that the 2,800,000 acre-feet per annum for Arizona is not main stream water only but consists of main stream and tributary water. California was at all times well aware that the Project Act and Limitation Act dealt only with main stream water in Lake Mead. Senator Hiram Johnson had no doubt that the water supply with which Congress was dealing in §4(a) of the Project Act was main stream water nor did any other Senator (see pp. 62-67, *supra*; Ariz. Op. Br. 61-67).

In 1930, Ralph L. Griswell, then Colorado River Agent, Department of Water and Power, Los Angeles, California (formerly President, Los Angeles City Council) stated:

> "Whether Arizona approves the Colorado River Compact or whether she does not approve it, *under the terms of the Boulder Canyon Project Act she will receive 2,800,000 acre feet and one-half of the unapportioned water from the main stream of the Colorado River and all the waters of her tributary streams.* . . . This leaves only one point in controversy, the title to the 1,000,000 acre feet of water set up in paragraph B of Article III."[204]

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[204] Griswell, *Colorado River Development and Related Problems*, 148 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 1, 18-19 (1930).

Colonel William J. Donovan's report of the conferences held in February 1930, in an effort to work out a tri-state compact between Arizona, California and Nevada regarding a division of Lower Basin water discloses clearly that Arizona then contended for 2,800,000 acre-feet per annum of main stream water plus half of surplus, without any diminution by reason of her tributary uses and that California distinctly so understood. Arizona's position, as stated in these conferences, was consistent with that asserted by her in earlier conferences with California in March, 1929.[205]

In this connection, California makes no mention of the 1939 and 1941 bills introduced into the Arizona legislature to which we have previously referred (pp. 79-80, *supra*), in which a firm claim was asserted to 2,800,000 acre-feet per annum of main stream water on behalf of Arizona.

A clear recognition by the Secretary of the Interior that his water delivery contracts dealt with main stream water is shown by his account of developments subsequent to enactment of the Project Act:

> "Fourth, the Department has promulgated regulations designed to assure a water supply to Arizona. These regulations are included as an appendix in this volume. They outline the form of a Hoover Dam water-delivery contract which the United States will enter into with Arizona upon certain conditions. Briefly, the contract calls for the delivery of 2,800,000 acre-feet annually, in return for which Arizona undertakes to make no interference with the diversions by other Government contractors. This quantity of water is adequate for all of the Arizona projects below Hoover Dam, and is without prejudice to

[205] 72 Cong. Rec. 11,770-72, 11,778-81 (1930).

> the power of the parties to contract in the future for delivery of additional water required . . . *Arizona is thus offered an assurance of 2,800,000 acre-feet of main-stream water,* and given an opportunity to look to the United States rather than to an agreement with the other States for a delivery of that quantity of water, in return for an agreement not to interfere with diversions by her sister States."[206]

Certainly, California could not very well have misunderstood Senator Hayden's assertion of Arizona's position in 1949 made in response to Senator Downey of California:

> "Senator Downey. Mr. Chairman, in view of that very bitter statement that I think is totally uncalled for and that I very much resent, on which specific act does the Senator base that statement? What specific act?
>
> "Senator Hayden. The assertion, for example, that the State of California could count in the waters of the Gila River as a part of the lower basin waters to which they might lay claim. That is perfectly idiotic. There is not a thing like it in the record. It never was in the mind of Senator Hiram Johnson. It never was in the mind of Sam Shortridge. It never was in the mind of any Senator that any such cock-eyed idea could ever be advanced, and yet it has since been seriously advanced by California over and over again."[207]

California's efforts to embrace the doctrine of "fair play" come with peculiar ill grace from a sovereign state which, having gained vast benefits by reason of her "unconditional and irrevocable" agreement made by solemn act of

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[206] WILBUR & ELY, THE HOOVER DAM CONTRACTS 41-42 (1933).

[207] *Hearings on S. 75 and S. J. Res. 4 Before the Senate Committee on Interior and Insular Affairs,* 81st Cong., 1st Sess. 743 (1949).

her legislature, resorts to every device which ingenious minds can conjure to evade the bargain which she made.

V

California's suggested modifications of the Recommended Decree should be rejected.[208]

A. The Suggestion that Injunctive Relief Is Not Appropriate

California objects (Cal. Op. Br. 284-87) to Article II of the Recommended Decree (Rep. 346-53), which enjoins the United States from operating regulatory structures and from releasing water under its control except in accordance with the priorities stated and the interstate allocations set forth in the Decree. She also objects to Article III of the Recommended Decree (Rep. 353-54), which enjoins the states and public agencies which are parties to the suit from interfering with the United States in its management of structures and in its releases and deliveries of water in conformity with Article II of the Decree and also enjoins the states and agencies from diverting or consuming or permitting the diversion or consumption of water in violation of the proposed Decree.[209]

California first argues that this suit is declaratory in nature and that the joinder of equitable relief with declar-

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[208] This point is directed to a refutation of Part Six of California's Opening Brief, pages 279-91 thereof.

[209] Arizona excepts (A Exc. 35) only to those provisions of Article III of the Recommended Decree which enjoin her from "permitting the interference" with the performance by the United States of Article II. Arizona's exception is grounded on the fact that those provisions apparently would transfer to her duties which the Secretary is required to perform under the Project Act and his water delivery contracts and on the further fact that the authority of Arizona to prevent the interference, diversions and uses referred to is questionable.

atory relief is inappropriate. Even if California were correct (and she is not) in contending that the present action is solely declaratory in nature, she would be wrong in her conclusion. The federal courts have expressly held that it is proper and appropriate to combine injunctive with declaratory relief. *United States Galvanizing & Plating Equipment Corp.* v. *Hanson-Van Winkle-Munning Co.*, 104 F. 2d 856, 861 (4th Cir. 1939); *National Hairdressers' & Cosmetologists' Ass'n, Inc.* v. *Philad Co.*, 41 F. Supp. 701 (D. Del. 1941), *aff'd*, 129 F. 2d 1020 (3d Cir. 1942); see Declaratory Judgment Act, 28 U. S. C. §§2201-02 (1958); 6 MOORE'S FEDERAL PRACTICE 3047 (2d Ed. 1953).

The injunctive provisions of Article III of the Recommended Decree are also criticized as unwarranted, since, it is claimed, wrongful conduct on the part of the California defendants would be physically impossible. If that is the fact, these injunctive provisions constitute no bar against any acts of the California defendants and it is difficult to understand their concern. But it is, of course, easy to conceive of numerous instances in which it would be possible for the California defendants, if they so desired, to violate the provisions of the Decree, either by interference with the activities of the United States or by themselves diverting or consuming water to which they are not entitled under the Decree.

California next argues that her agencies should not be subjected to an injunction, since they "expressly declare" that they "will not knowingly violate any provisions of the Decree of this Court" (Cal. Op. Br. 285). The fact that a defendant disclaims an intention to violate an injunction should not prevent the entry of an injunctive decree. *Wyoming* v. *Colorado*, 298 U. S. 573 (1936), does not hold otherwise. There an injunction against Colorado had been entered in an earlier suit. *Wyoming* v. *Colorado*, 259 U. S.

419 (1922). In the later suit, Wyoming sought an injunction against Colorado "enforcing adherence to that decree". 298 U. S. at 575. The alleged violations of the earlier decree were discontinued by Colorado while the case was *sub judice* and this, coupled with the assurance of Colorado counsel that they would not be resumed, rendered it unnecessary for the Court to grant Wyoming injunctive relief *in addition* to that provided for in the original decree.

The situation is far different here. California has made and persists in making claims to water of the Colorado River system, including Arizona's tributaries. These claims have cast a cloud upon Arizona's right to such water and have had the practical effect of preventing congressional authorization of the Central Arizona Project. If upheld, the claims would deprive Arizona of water indispensable to the maintenance of her existing economy. This case is not, therefore, merely "declaratory in nature" (Cal. Op. Br. 284). Indeed, it is a case of immediate danger of irreparable harm, warranting the injunctive intervention of the Court.

Finally, California objects to the application of the injunctive provisions to the California agencies which are parties to the case as "unfairly subjecting those agencies to an injunction which does not apply to their counterparts in Arizona and Nevada" (Cal. Op. Br. 286). The answer is, of course, obvious. The California agencies are parties to the litigation. Those in Arizona and Nevada are not.

B. The Suggestion That Jurisdiction Be Retained Over Possible Future Controversies

California urges the Court to retain jurisdiction to adjudicate "controversies" between "mainstream" users and "tributary" users, which the Master holds are not presently justiciable (Rep. 318-21), "if, as, and when they become justiciable" (Cal. Op. Br. 288). In other words,

California suggests that under the guise of permitting the parties to apply at the foot of the decree for further relief, the Court should assume jurisdiction prospectively of any "new suit" by California against Arizona involving a possible future controversy which is not now justiciable (Cal. Op. Br. 287-88). Such a procedure would deprive of all meaning the constitutional limitation of the Court's jurisdiction to the decision of "cases or controversies".

This procedure would also be contrary to the practice of this Court. For example, in *Arizona* v. *California,* 283 U. S. 423, 464 (1931), the Court, although expressly recognizing the possibility of future litigation between the parties over water of the Colorado River, declined to retain jurisdiction because there was not at the time of suit a justiciable controversy. The Court dismissed the action "without prejudice to an application for relief" in the future. The retention of jurisdiction would have been improper there, as it would be here, since in each case the anticipated future dispute presented no presently justiciable controversy.

C. The Suggestion That Underground Uses Be Included in the Decree

California urges that the definition of "consumptive use" in the Recommended Decree be enlarged to include not only diversions from the stream but "all related ground water" uses as well (Cal. Op. Br. 289-90). Application of such a definition would not be feasible. The basic difficulty lies in defining "related ground water". We submit to the Court, as we did to the Master, that it is preferable to define "consumptive use", as the Recommended Decree defines it—"diversions from the stream less . . . return flow" (Rep. 345)—and to reserve for determination by the Secretary of the Interior, with the aid of his hydrologists,

whether in a particular case the use of underground water constitutes a "diversion" within the meaning of the decree.[210]

D. The Suggestion that Holders of Natural Flow Rights Are Entitled to Water Delivery Contracts

California requests (Cal. Op. Br. 290-91) that the Recommended Decree be amended to require the issuance of contracts to holders of natural flow rights pre-existing enactment of the Project Act. However, the language suggested (Cal. Op. Br. 291) as an addition to Article II (B) (7) of the Recommended Decree (Rep. 349) goes far beyond this goal. The sweeping language proposed by California appears to have been designed to effectuate her thesis that appropriative rights recognized under state law are controlling in the determination of rights to, and the distribution of, main stream water in Lake Mead and below. This California thesis was rejected by the Special Master; we have dealt with it at length in both this brief and in Arizona's Opening Brief (pp. 8-53, *supra;* Ariz. Op. Br. 40-46). Further discussion of this California contention is not warranted.

Moreover, insofar as the language suggested by California as an addition to Article II (B) (7) of the Recommended Decree would require the issuance of contracts to holders of "present perfected rights" as defined by the Master, it is superfluous. Article I (G) and (H) of the Recommended Decree (Rep. 346) defines "present perfected rights" existing under state law as of the effective

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[210] See the transcript of Conference before the Special Master on the Recommended Decree, August 19, 1960, pp. 8-14.

date of the Project Act. Article II (B) (5) and (6) (Rep. 348-49) gives priority to such rights in times of shortage, and Article VI (Rep. 359) makes provision for determining the existence and extent of "present perfected rights". Thus, the Decree recommended by the Special Master makes provision for holders of "present perfected rights". It provides that such holders shall be entitled to the delivery of water by the Secretary of the Interior in satisfaction of their rights and to preferences in the order of their priorities in times of shortage. The Decree implicitly requires that the Secretary do whatever is necessary to effectuate the delivery of water in satisfaction of "present perfected rights", including the execution of additional water delivery contracts, if necessary.

Brief reference is made by California to riparian rights which she says "may be senior to the appropriative rights recognized in the existing California water delivery contracts" (Cal. Op. Br. 290). If this be true, it poses no particular problem since the Master's definition of present perfected rights is broad enough to cover all uses which come within that definition, whether made under the law of prior appropriation or the riparian rights doctrine.

Likewise irrelevant is the California reference to claimed reliance by California users (unnamed and unspecified) on the language of the Acting Secretary of the Interior used in his correspondence with the Palo Verde District prior to the execution of the water delivery contract with that District. Whether or not others in California chose to rely on this opinion, even though the District to whom it was addressed did not, is of no moment. Those users who qualify as holders of "present perfected rights" are entitled to receive water under the Recommended Decree without any further showing and regardless of their reliance or lack of

reliance on claimed secretarial construction of the Project Act.[211]

VI

Contrary to the contention of the United States, the Secretary of the Interior is not authorized in allocating water from Lake Mead among Lower Basin main stream states to deduct the amount of upstream consumptive uses in Arizona and Nevada of water which would otherwise flow into Lake Mead.[212]

The United States argues that the Special Master erred in holding invalid Article 7(d) of the Arizona water delivery contract and Article 5(a) of the amended Nevada water delivery contract, which require that deliveries of water to Arizona and Nevada from Lake Mead or below shall be diminished to the extent that uses in those states above Lake Mead lessen the flow into Lake Mead.

The United States asserts that:

> ". . . under a proper construction of the Boulder Canyon Project Act, the Secretary is required to consider uses in Arizona and Nevada from the mainstream above Lake Mead and from tributaries entering the mainstream between Lee Ferry and Lake Mead. Thus we would include in the waters to be distributed to California, Arizona, and Nevada pursuant to Section 4(a) of the Project Act not only waters impounded in Lake Mead, but also all water

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[211] Arizona does not agree with the Master's interpretation of the phrase "present perfected rights" in §6 of the Project Act. Her construction of the phrase is discussed at Ariz. Op. Br. 46-55 and pp. 53-57, *supra*.

[212] This point is directed to a refutation of Points I and II of the Opening Brief of the United States, pages 7-21 thereof.

> which would have reached the mainstream above Hoover Dam except for consumptive uses in Arizona and Nevada." (U. S. Op. Br. 9)

However, the Special Master concluded that the water to be distributed among the three Lower Basin main stream states pursuant to the Project Act is limited to main stream water available for consumptive use from Lake Mead and below Hoover Dam. Accordingly, the Master's Recommended Decree provides for an apportionment only of main stream water in Lake Mead and below. The United States contends, to the contrary, for an apportionment of system water which includes the amount of water which Lower Basin tributaries would have contributed to storage in Lake Mead if there had been no uses in Arizona or Nevada on the tributaries above Lake Mead.

The United States, in this instance, misconceives the meaning and intent of the Project Act. As we have seen, the provisions and legislative history of the Project Act make manifest the intent of Congress to provide only for a division of main stream water without taking into account Lower Basin tributaries or the use of tributary water before its entry into the main stream (Rep. 173-80; Ariz. Op. Br. 57-67). It is enough simply to note once again that Congress dealt with and made provision only for water stored in Lake Mead. There is no indication that Congress intended to exercise control over the water of Lower Basin tributaries.

Congress was well aware that uses on Lower Basin tributaries above Lake Mead, while not large in quantity, were numerous and of long-standing not only in Arizona and Nevada but also in New Mexico and Utah.[213] There is nothing to indicate that Congress had any thought of wip-

[213] A 45, p. 31 (Tr. 254).

ing out these uses by exercise of its dominion over the main stream. Nor is there any indication that Congress intended to empower the Secretary to deduct from any state's apportionment of Lake Mead water the amount by which the state's tributary uses above Lake Mead deplete the flow into Lake Mead, whether on the theory that this tributary water is a part of the Lake Mead supply to which the Secretary must look in order to discharge his responsibilities with respect to his contractual allocation of water stored in Lake Mead or on any other hypothesis.

In an effort to sustain all the provisions of the Secretary's water delivery contracts, the United States contends for a construction of the Project Act which would cause numerous complications and which is fundamentally at odds with the interpretation of §4(a) for which the United States elsewhere contends.

Thus the United States ignores the fact that the waters of these tributaries flow in and are used in New Mexico and Utah. If, as the United States argues, the contribution which these streams might otherwise make to Lake Mead storage must be regarded as a part of "the waters to be distributed to California, Arizona, and Nevada pursuant to Section 4(a) of the Project Act", there is no justification for ignoring the depletions of main stream supply caused by uses on these tributaries in New Mexico and Utah, and the quantities of water represented by these depletions in Utah and New Mexico must in some fashion be included in "the waters to be distributed to California, Arizona, and Nevada pursuant to Section 4(a) of the Project Act" (U. S. Op. Br. 9). This poses a difficult problem indeed, since tributary water consumed in New Mexico and Utah never reaches Lake Mead and since neither New Mexico nor Utah receives any Lake Mead storage from

which the depletions of storage occasioned by such uses may be subtracted.

Far from solving this problem, Article 7(g) and (b) of the Arizona water delivery contract (Ariz. Op. Br. Appendix E, pp. 37a-38a) serves only to complicate it. Paragraph (g) states that Arizona "recognizes" the rights of New Mexico and Utah to an equitable share in two categories of water: (1) water apportioned by the Colorado River Compact to the Lower Basin and (2) water unapportioned by the Compact. Paragraph (b) provides for the deduction from Arizona's share of excess or surplus water unapportioned by the Compact of such quantities as may be the equitable shares of New Mexico and Utah in water unapportioned by the Compact. Enforcement of these provisions would require determination of what water is apportioned and what water is unapportioned by the Compact, ascertainment of the equitable shares of New Mexico and Utah in each category of water, and determination of the extent to which uses on the tributaries in these states fall within each category. The resolution of these questions is obviously unrelated to the Secretary's authority over water stored in Lake Mead. Some of them cannot be decided at all in the absence of the Upper Basin states.

Further complications are created by the fact that water of the Gila River and its tributaries flows through and is used in New Mexico. Although the United States agrees that the water of this tributary forms no part of the water to be distributed to the Lower Basin main stream states pursuant to § 4(a) of the Project Act, yet presumably the water of the Gila River within New Mexico constitutes a part of the supply under the concept of system water apportionment which paragraph (g) of Article 7 of Arizona's water delivery contract seems to envisage.

The labyrinth into which the theory of the United States —that water in Lower Basin tributaries above Lake Mead is included in the water to be distributed to the Lower Basin main stream states—leads, emphasizes the wisdom of the congressional decision to provide for the apportionment of main stream water only and the soundness of the Master's construction of the Project Act as limited in its application to this water.

The same reasoning by which the Master rejects as unsound the California contention that the water dealt with by the Project and Limitation Acts includes water of Lower Basin tributaries also demonstrates that the water used on the tributaries above Hoover Dam does not constitute a part of "the waters to be distributed to California, Arizona, and Nevada pursuant to Section 4(a) of the Project Act". The failure of Congress to make provision with respect to the entitlements of New Mexico and Utah in tributary water within their boundaries cannot be reconciled with either the California argument or the position of the United States.

The United States contends that the purpose of Congress in enacting the Project Act would be frustrated if some of the states could avoid the Act's allocations by taking the water prior to its entry into Lake Mead, and hence that the provisions of Articles 7(d) and 5(a) of the Arizona and Nevada contracts are necessary to carry out the objectives of the Project Act (U. S. Op. Br. 10). But, so far as water of Lower Basin tributaries above Lake Mead is concerned, the argument begs the question by assuming that it was the congressional intent that Lower Basin tributaries above Lake Mead should constitute a part of the water supply covered by the Project Act allocations. As we have seen, the congressional intent was to provide for the allocation of main stream water only.

Nor are these provisions of the Arizona and Nevada contracts necesary to prevent frustration of the purpose of the Project Act by diversions from the main stream above Lake Mead.

Although, as the Special Master concludes, Congress did not intend the water of the tributaries above Lake Mead to be a part of the water distributed to the Lower Basin main stream states pursuant to §4 (a) of the Project Act, it is nevertheless clear that to the extent that inflow from these tributaries reaches the main stream, Congress regarded that inflow as a part of the water to be allocated pursuant to §4(a) of the Project Act. Over all Lower Basin main stream water, whether it be water at Lee Ferry or tributary inflow entering the main stream between Lee Ferry and Lake Mead, Congress has exercised its dominant servitude under the Commerce Clause, and any interference therewith would be in violation of the Project Act. See *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377 (1940). Appropriate remedies are at hand to prevent or abate such violations. Nevertheless, the Secretary is without authority to override the command of Congress by sanctioning such violations provided that the resulting depletions of Lake Mead storage are offset against the state's contract entitlement.

In attacking the Master's conclusion that Articles 7(d) of the Arizona contract and 5(a) of the amended Nevada contract (Ariz. Op. Br. Appendix G, p. 56a) are "contrary to the command of Section 5 of the Project Act that contracts respecting water for irrigation and domestic use shall be for permanent service" (Rep. 237), the United States argues that "the flaw . . . is the assumption that upstream uses under new appropriations would cut into deliveries under existing contracts" (U. S. Op. Br. 16). The United

States appears to regard a contract right to Lake Mead storage as being in the nature of an appropriative right with a priority date as of the date of the contract. The Government argues from this that Arizona may insure permanent service for the Arizona holders of contract rights by refusing to permit "new" appropriations upstream which would be junior in priority date to the contract rights (U. S. Op. Br. 16).

This argument assumes that tributary uses under appropriative rights, which have priorities senior to contract rights to Lake Mead storage, will aggregate precisely the same quantity each year, regardless of the amount of tributary flow and other variable conditions, such as acreage in cultivation, volume of water available in storage reservoirs, local rainfall and economic conditions. The exact synchronization of contract rights and uses with tributary rights and uses, which the United States contends would insure permanent service under the Secretary's water delivery contracts, is obviously unattainable under the variable conditions affecting the uses of water in this arid region. Moreover, the argument entirely ignores depletions resulting from tributary uses in New Mexico and Utah which, under the United States concept of system water allocation, would include water apportioned to the three Lower Basin main stream states. Certainly Arizona and Nevada are powerless to control or prevent uses in New Mexico and Utah, whether by "new" appropriations or otherwise, or to insure permanent service to their contract users undiminished by uses in New Mexico or Utah.

The contention of the United States that the Master is in error in concluding that Article 7(d) of the Arizona contract and Article 5(a) of the Nevada contract violate §18 of the Project Act is supported by a reiteration of the United States claim that the Master improperly construes

these contract provisions as requiring that rights to the delivery of water under contract be terminated by later upstream appropriations (U. S. Op. Br. 17-18). The choice, which the United States asserts rests with the states of Arizona and Nevada (U. S. Op. Br. 17), is more illusory than real. Clearly it was not contemplated by Congress when it included §18 in the Project Act that any such "choice" be forced upon Arizona or Nevada.

As we understand it, the United States contends that it is entirely up to Arizona whether or not she permits "new" uses on the tributaries which deplete the supply otherwise available in Lake Mead for delivery to Arizona under her contract. The United States concludes, in view of this asserted choice, that Article 7(d) of the Arizona contract does not contravene §18 of the Project Act, which provides that nothing in the Act

> "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 interstate agreement."

We perceive no connection between the premise which the United States asserts and the conclusion which it draws. The evident purpose of §18 was to insure that nothing in the Act or any water delivery contract should override the then existing rights of the states in at least the tributary streams within their borders, or should prevent the states from controlling the use of such water through whatever policies or laws each state might consider appropriate, subject to the provisions of the Colorado River Compact or any interstate agreement. Obviously, the control by the states of the water of their tributaries within their boundaries

is impaired if a right to use that water may be awarded only if the rights of other users within the state to Lake Mead storage are correspondingly reduced or terminated.

This argument of the United States reads into Article 7(d) of the Arizona contract a choice not justified by its plain terms and one which would operate to interfere with the rights of the state to control the use of the water of its tributary streams, contrary to the command of §18.

The Master's conclusion that these provisions of the Arizona and Nevada water delivery contracts "result in an allocation of mainstream water totally out of harmony with the limitation on California contained in Section 4(a)" (Rep. 237), and the reasoning by which he demonstrates that the enforcement of these provisions would result in water in storage which could not be used under the statutory and contractual limitations (Rep. 242-43) are briefly disposed of by the United States in its contention that the water apportioned to the Lower Basin main stream states pursuant to §4(a) of the Project Act is system water, rather than main stream water, and includes the water in tributaries above Lake Mead (U. S. Op. Br. 19-20). We have previously demonstrated that this concept is contrary to the intent of Congress as evidenced by the legislative history and the provisions of the Project Act.

Finally, the United States seeks to answer the Master's criticism that these provisions of the water delivery contracts and the views of the United States in support of their validity attempt to equate consumptive use measured by diversions less returns with depletion of the flow into Lake Mead (Rep. 243-44). The United States argues the appropriateness and fairness of charging Arizona and New Mexico for tributary uses only to the extent that they deplete Lake Mead storage and contends that a computa-

tion of the amount by which these tributary uses deplete the flow into Lake Mead is possible through the application of "concepts and standards which receive rather general acceptance in the engineering profession today" (U. S. Op. Br. 21).

All of this misses the point made by the Special Master: That the Project Act directs that accountability for the water apportioned pursuant to the Act shall be measured in terms of consumptive use (diversions less returns) and not in terms of depletion at a given point. If, as the United States claims, the water apportioned pursuant to the Project Act includes the water of the Lower Basin tributaries above Lake Mead, then the use of such water cannot, consistently with the provisions of the Project Act, be measured other than in terms of diversions less returns. The very fact that the water apportioned pursuant to the Project Act must be measured in terms of diversions less returns is itself an indication that tributary water was not within the contemplation of Congress; for, as the United States points out, if the states are to be charged with consumptive use on the tributaries, then they must be charged with use of a greater quantity of water than that by which such uses deplete the supply in Lake Mead. If Congress had intended to include tributary uses, it would have specified that such uses be measured in terms of depletion of the flow into Lake Mead and that the consumptive use measurement of diversions less returns specified in the Project Act should not apply to these tributary uses.

VII

Contrary to the contention of the United States, the Secretary of the Interior does not have uncontrolled discretion to create or determine priorities among intrastate users of Colorado River water.[214]

So far as the uses of Colorado River water within Arizona are concerned, the questions of who has the authority to determine (1) what particular projects or users within the state shall be entitled to the delivery and use of the state's apportionment of that water and (2) how much a particular project or user may receive out of the state's apportionment appear to have been settled by the water delivery contract between the Secretary of the Interior and Arizona.

Article 7(*l*) of the Arizona contract directs that:

> "Deliveries of water hereunder shall be made for use within Arizona to such individuals, irrigation districts, corporations or political subdivisions therein of Arizona as may contract therefor with the Secretary, and as may qualify under the Reclamation Law or other federal statutes or to lands of the United States within Arizona. All consumptive uses of water by users in Arizona, of water diverted from Lake Mead or from the main stream of the Colorado River below Boulder Dam, whether made under this contract or not, shall be deemed, when made, a discharge pro tanto of the obligation of this contract. . . ."

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[214] This point is directed to a refutation of Point III of the Opening Brief of the United States, pages 21-47 thereof.

The United States has entered into water delivery contracts directly with various users in Arizona as thus contemplated by the Arizona contract. Although the Special Master refused to pass on the question as to the amount of water which these users are entitled to receive under their particular contracts or "to determine the right of any reclamation project or other user to receive water as against competing users in the same state" (Rep. 218-19), his Report does consider the validity of all contracts between the Secretary and Arizona users entered into prior to the completion of the trial of this case (Rep. 210-21). He holds that, with one minor exception, all these contracts are authorized by the Project Act and are valid (Rep. 218).

Construing Article 7(*l*) of the Secretary's contract with the State of Arizona, the Master finds that it "obligates him [the Secretary] to deliver a certain quantity of water for use within the state, but this contract leaves it to the Secretary to decide with which users within Arizona he will contract for the delivery of all or part of Arizona's allotment" (Rep. 216). The Master rejects Arizona's contention that the Secretary is confined to contracting with the State of Arizona and that it is for the state to decide which projects will share in the state's allotment of water; he concludes that under the Arizona contract "the Secretary is free, subject to statutory limitations, to contract with users in Arizona qualifying under the reclamation law for delivery to them of certain amounts of water out of the total amount allocated to Arizona" (Rep. 216).

Arizona agrees with the Special Master that these water delivery contracts with individual projects and users in Arizona are valid and she has not excepted to the foregoing construction by the Special Master of the contract between the Secretary and the State of Arizona. Accordingly, we

shall not undertake an analysis of what the Project Act provides, independently of contractual arrangements with the states or with users within a state, with respect to the authority to determine what projects or users shall receive Colorado River water or to decide how much a particular project or user shall receive.

However, the Arizona contract is silent on the power to fix relative priorities among Arizona intrastate users and, contrary to the position of the United States, we deny that the Secretary has full or indeed any authority to fix and determine relative priorities among such users.

We agree that Congress has full dominion and control under the Commerce Clause over the water stored by authority of the Project Act. But what Congress has done depends not upon the existence of its power, but upon the extent to which it elected to exercise that power in the Project Act. Consideration of the provisions of the Project Act and the intent of Congress establishes that, other than specifying preferences among different kinds of uses in §6 of the statute, Congress did not contemplate that there should be any preferences in the use of the water stored pursuant to the authority of the Act but rather intended that all contracts for the use of stored water for irrigation and domestic purposes should be on a parity. Section 6 of the Project Act directs:

> "That the dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power."

Except for these directions there is no provision or implication in the Project Act that different users shall

have different kinds of rights in the water stored in Lake Mead. The Special Master has found and the United States and Arizona agree that, as to the allocation among the states, no preferences or priorities exist and that, if and when they occur, shortages shall be borne ratably by the Lower Basin main stream states (Rep. 306).[215] The same considerations which led the Master to conclude that the Project Act envisions a ratable sharing of water between the states in the event of shortage impels the conclusion that Congress contemplated that ratable sharing among the users within a state should also obtain in times of shortage.

The fact that the Secretary and the California agencies with the consent and approval of the Division of Water Resources of California have agreed by contract for priority of uses among California users does not mean, as the United States appears to argue, that such priorities among California users result solely from the acts of the Secretary or rest entirely within his discretion or that the Project Act authorizes him to impose priorities among users within a state even though the state and its users do not consent thereto. The fact that the Project Act does not expressly direct that there may be preferences among users of the water stored in Lake Mead and does not authorize the Secretary to impose such preferences constitutes no impediment to a voluntary arrangement between the Secretary on the one hand and the state and its users on the other whereby the state's allocation is to be distributed in the order of the priorities agreed upon.

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[215] The Master has, of course, construed the "present perfected rights" clause of §6 of the Project Act to grant priority to holders of such rights as he defines them.

Nor do the provisions of the Reclamation[216] and Federal Power[217] Acts or the construction placed on those Acts by the Court aid in determining this question. These statutes were enacted to accomplish very different objectives from those intended by the Project Act and were designed to govern circumstances widely variant from those dealt with by that Act. Whatever the proper construction of the Reclamation and Federal Power Acts may be, they cannot be the vehicle for reading into the Project Act a purpose to authorize the Secretary of the Interior to impose, according to his uncontrolled discretion, preferences to the use of water contrary to the congressional intent that all uses of stored water for irrigation and domestic purposes shall be on a parity and that the principle of ratability shall govern if and when the supply of water is not sufficient to satisfy in full the entitlements of all users under their water delivery contracts.

VIII

The contention of the United States respecting water which it claims will be salvaged in the development of federal wildlife refuges is unsound.[218]

The United States asserts:

> "With respect to the Havasu Lake National Wildlife Refuge and the Imperial National Wildlife Refuge, both on the mainstream of the Colorado River, the

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[216] Reclamation Act of 1902, 32 Stat. 388 (codified in scattered sections of 43 U. S. C.).

[217] Federal Power Act, 41 Stat. 1063 (1920), as amended, 16 U. S. C. §§791a-825r (1958).

[218] This point is directed to a refutation of Point V of the Opening Brief of the United States, pages 51-53 thereof.

> United States proved that the change in and control of the vegetation which will be effected by the development of these refuge areas will result in water consumption less than that which presently occurs in the overflow and undeveloped areas where the refuges are presently located." (U. S. Op. Br. 51-52)

The evidence proffered by the United States to support these claims was insubstantial; at least it did not convince the Special Master, for he did not adopt the relevant findings of fact proposed by the Government.

The modification of the Recommended Decree requested by the United States is to the effect that any water which it salvages may be used on federal wildlife refuges without regard to the priority date decreed for the respective refuge areas. The theory urged by the United States is that salvaged water belongs to the salvager. The water which the United States claims it will salvage will not consist of any of the water apportioned to the Lower Basin main stream states but will represent what otherwise would constitute losses to the supply which the Master's Recommended Decree directs shall be treated as diminution of supply (Rep. 313).

Under these circumstances it would not be proper to charge the use by the United States of salvaged water against the apportionment of the state in which the use occurs. While it might be thought that this would be of benefit to Arizona and to other states in which the use of salvaged water takes place, we are disturbed by the thought that the salvaged water doctrine is applicable to the situation which exists on the Colorado River in the Lower Basin, and we seriously question the wisdom and propriety of applying that principle in this case.

The situation at bar is not comparable to that which was before the Court in the cases cited by the United States in support of its argument under this point (U. S. Op. Br. 52). Here, the United States has exercised its dominion over the entire reach of the stream extending from Lee Ferry to the International Boundary and it has constructed great works to control, regulate and distribute the water of that portion of the river. It has also provided for the allocation of water among the states to be measured in terms of diversions less returns (Rep. 345). If the Court adopts the salvaged water concept urged by the United States, each state or user in the Lower Basin could contend that it should be charged, not in terms of diversions less returns, but for some lesser portion of its diversions based on expert opinion as to how much of the water diverted is salvaged by the use to which it is put and what portion of the water so diverted would have been lost if the user had not diverted it.

The principles applicable to salvaged water appear to run counter to the whole scheme of water allocation and accountability for uses against that allocation envisaged by the Project Act. We submit that a modification of the Recommended Decree which would depart from the measurement of diversions less returns and would incorporate into the Decree principles of water salvage not recognized or contemplated by the Project Act is not warranted.

CONCLUSION

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

Respectfully submitted,

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