IN THE

Supreme Court of the United States

OCTOBER TERM 1961

No. 8 Original

STATE OF ARIZONA,

Complainant,

v.

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

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

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

(See list of attorneys on next page.)

August 14, 1961

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

AUGUST 14, 1961

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ANSWERING BRIEF

This consolidated answering brief of all eight California defendants in response to the opening briefs of the United States, Arizona, and Nevada is filed in accordance with the notice accompanying the order of the Court (364 U.S. 940), dated January 16, 1961.[1]

SUMMARY OF THE ARGUMENT

The Master's severance of the Compact from the limitation on California found in the Project Act and the Limitation Act, together with his proration of the shortage which this severance creates, produces this incredible result: Even if the lower basin enjoys the use of the full quantities aggregating 8.5 million acre-feet under Article III(a) and III(b) of the Compact, and Mexico is satisfied from surplus without invasion of that quantity, California would receive only 3.8 million acre-feet—not even the 4.4 million acre-feet to which the first part of the limitation on California refers.[2]

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[1]In this brief, "Rep. 103" refers to page 103 of the Master's Report; "Rep. app. No. 2" refers to appendix number 2; "Rep. app. 416" refers to page 416 which is in the appendixes. "Op. Br." without a date refers to opening briefs before this Court, filed May 22, 1961.

In 1959, the parties simultaneously submitted to the Special Master proposed findings of fact, conclusions of law, and supporting briefs, and subsequently, simultaneous answering and rebuttal briefs. These are occasionally cited in the course of this brief.

[2]The first paragraph of § 4(a) of the Project Act (45 Stat. 1058 (1928), 43 U.S.C. § 617c(a) (1958), Rep. app. 381-82) required, as an alternative condition to the effectiveness of the act, that California, by legislation, agree to limit its annual consumptive use of Colorado River water to 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 one half of

None of the three briefs which we are here answering deal with the incongruity of this result. Two of the briefs—those of Arizona and Nevada—purport to advance arguments to support the Master's decision, in addition to supporting those states' exceptions. All three briefs fail to disclose that the errors in the Master's Report which each party attacks are in fact essential to his result.

In Part One of this brief we consider the relationship of the limitation on California to the Colorado River Compact, and the consequence of the Master's severing these two inseparable documents. Restricting California to 3.8 million acre-feet instead of to the 4.4 million acre-feet plus one half of "excess or surplus" which the limitation expressly specifies results from two distinct parts of the Master's decision: (1) severance of the Compact from the limitation and relation of the latter to "mainstream" waters (Lake Mead and below), and (2) substitution of parity for priority in allocating the inevitable shortage which that severance creates.

In parts Two, Three, and Four we address ourselves to specific arguments presented in the respective briefs of the United States, Arizona, and Nevada. Each such part of our brief is divided into three sections, dealing respectively with positions in the opening briefs relating to (1) the severance of the Compact from the limitation, (2) the destruction of priorities of existing projects, and (3) miscellaneous matters, if any.

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any "excess or surplus waters unapportioned by said compact"; those uses are "always to be subject to the terms of said compact." The California Limitation Act (CAL. STATS. 1929, ch. 16, p. 38 (Rep. app. No. 4) accepted that offer substantially *in haec verba.*

The Severance Issue

Both Arizona and Nevada in specific terms contradict the Master's conclusion that the Compact may be severed from the limitation. Arizona arrives at an equally untenable alternative conclusion by rewriting the Compact to delete the Compact's express application to lower basin tributary uses, an argument which the Master rejects. Contradicted by the Compact negotiators' reports which Arizona placed in evidence, by the legislative history of the Project Act, and by a decision of this Court,[3] Arizona's surgery produces a compact the operation of which is physically impossible.

Nevada argues that the documents constituting the law of the river are inseparable, and that the Compact applies to the entire river system, but avoids any attempt to reconcile those two sound propositions with the conclusion reached by the Special Master which Nevada says she supports. The United States avoids discussion of the Compact's construction or the severability of Compact and Project Act but resists the Master's conclusions which severance of the Compact from the limitation necessarily produces: truncation of the river at Lake Mead and separation of Lake Mead from its water supply.

The Priority Issue

The United States recognizes two essential premises: that the water supply to Lake Mead must be given effective protection, and that priorities above Lake Mead and priorities below Lake Mead must—to some extent at least—be recognized and integrated. We agree with the United States as far as its argument goes,

[3]Arizona v. California, 292 U.S. 341, 358 (1934).

but disagree with the tortuous route by which the United States seems to arrive in the vicinity of a correct result.

Arizona's argument that the construction of reservoirs which regulate the natural flow of the main stream destroys appropriative priorities is refuted, among other things, expressly by her own evidence and by necessary implication from this Court's decision in *Nebraska v. Wyoming,* 325 U.S. 589 (1945). Preexisting rights which could be satisfied from the natural flow without the conservation and regulation afforded by the reservoir are always protected. Arizona's argument that the Compact (which, she says, has only interbasin effect) destroyed intrabasin priorities within the lower basin leads only to the nihilistic conclusion that the Compact destroyed interstate water rights in the lower basin and left nothing to take their place. Arizona attempts to save the constitutionality of the Master's "contractual allocation scheme" by finding a mandatory statutory allocation in the abortive tri-state compact set forth in the second paragraph of section 4(a) of the Project Act, which no state has ratified. This produces a result more favorable to California than the Master's proposed decision, but attributes to Congress an indefensibly devious design to invite the states to accept by compact a statutory solution which is now imposed as the command of Congress although no state has ratified it. As the Master points out, both the language of the second paragraph of section 4(a) and its legislative history defeat the mandatory statutory allocation which Arizona urges.

Nevada erroneously contends that the Master's proposed decision can be sustained upon equitable apportionment principles. The Master's allocation, which abrogates the priorities of existing projects in California in favor of new projects in Arizona and Nevada, violates equitable apportionment principles which are well established in the interstate decisions of this Court. *E.g., Nebraska v. Wyoming,* 325 U.S. 589, 617-18 (1945).

PART ONE

THE CONSEQUENCES OF THE PROPOSALS ENDORSED BY ARIZONA, NEVADA, AND THE UNITED STATES

ARGUMENT

PART ONE

THE CONSEQUENCES OF THE PROPOSALS ENDORSED BY ARIZONA, NEVADA, AND THE UNITED STATES

§ I. THE SUBJECT IGNORED BY OUR ADVERSARIES: THE DISTORTION OF CONGRESS' AGREEMENT WITH CALIFORNIA ESTABLISHED BY THE LIMITATION ACT

Before dealing separately with the opening briefs of the United States, Arizona, and Nevada (parts Two, Three, and Four of this brief, respectively), it is important to recognize that throughout their arguments, both before the Special Master and now before this Court, runs a common theme. They offer arguments which, if accepted, would produce the following ultimate result despite their basic differences with the Master in the methods of reaching that result:

California in 1929 accepted an express agreement offered by Congress[1] which limited this state to the

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[1]The agreement which Congress offered to California (Project Act § 4(a), Rep. app. 381-82) and which California accepted (Calif. Limitation Act, Rep. app. 397), imposed a limitation upon the aggregate of California's (1) "uses under contracts made under the provisions of this Act" and (2) preexisting appropriative "rights which may now exist." The expression, "rights which may now exist," also appears in Article III(a) of the Compact *(infra)*. The quantitative limitation "shall not exceed four million four hundred thousand 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 Compact provides (Rep. app. 373):

"(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower

annual consumption of 4.4 million acre-feet plus one half of "excess or surplus" and which conversely recognized our right to use water up to those limits.[2] The proposed decision would permit California to receive only *3.8 million acre-feet* even if the lower basin water supply were sufficient to sustain all of the Compact allocations in full, plus all Mexican Treaty requirements and all losses of every description.

The demonstration is simple.

Let us assume that the supply physically available in the lower basin, including the tributaries,[3] is adequate to sustain all of the following requirements:

Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist."

Article II(a) defines the "Colorado River System" as "that portion of the Colorado River and its tributaries within the United States of America" (Rep. app. 372).

[2]California's appropriative rights, in 1929, were already in excess of 4.4 million acre-feet (Calif. Op. Br. 12 n.5). The limitation was demanded of us because of the universal recognition that California's appropriations could and would rise much higher whenever Hoover Dam should regulate the river's flow (Rep. 165). California proved appropriations as of 1929 of projects then using water capable of satisfaction from the unregulated flow of the river, to the extent of approximately 4.5 million acre-feet per year (Calif. Op. Br. 12 n.5). In addition, the appropriations underlying Metropolitan Water District's aqueduct, aggregating 1,212,000 acre-feet per year, were being diligently and vigorously prosecuted; more than $1,600,000 had theretofore been spent on design and preliminaries to construction of the MWD aqueduct (*id.* at A29). The limitation was accepted in consideration of the passage of the Project Act, as § 4(a) of that act recites. Arizona's 1944 water delivery contract, ratified by the Arizona Legislature (Act of Feb. 24, 1944. ARIZ. LAWS 1944, ch. 4, p. 419, in evidence as Ariz. Ex. 11, Tr. 228), in article 7(h) recognizes the right of the United States and agencies of the State of California to contract for storage and delivery of water for beneficial consumptive use up to this limitation (Rep. app. 402). All of the California water delivery contracts had been executed prior to 1944. (Rep. 28.)

[3]The uses on the tributaries are included in the Compact account-

(1) 8.5 million acre-feet of consumptive use throughout the lower basin, which thus includes the full 7.5 million acre-feet apportioned to that basin by Article III(a), as well as the full 1 million acre-feet of additional consumptive use permitted by Article III(b)[4] of the Compact; plus

(2) 1.5 million acre-feet of scheduled deliveries at the Mexican boundary in full discharge of the Mexican Water Treaty guarantee;[5] plus

(3) all evaporation and other losses, whatever those losses may be.[6]

If the Compact were thus fully served, the lower basin allocation of 8.5 million acre-feet of consumptive

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ing (Rep. 142-44), although excluded from the Master's limitation accounting (Rep. 173).

> "[T]he plain words of the Compact permit only one interpretation—that Article III(a), (b), (c), (f) and (g) deal with both the mainstream and the tributaries." (Rep. 142.)
>
> "The various arguments of Arizona fail before this unmistakable language of the Compact. The historical fact that the Upper Basin was primarily concerned with the mainstream will not nullify language of the Compact that subjugates both mainstream and tributaries to its rule." (Rep. 143.)

[4]Article III(b) of the Compact provides (Rep. app. 373):

> "(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum."

[5]Treaty With Mexico Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944, art. 10(a), 59 Stat. 1237, T.S. No. 994 (effective Nov. 8, 1945); quoted in Sp. M. Ex. 4 for iden., Tr. 255 (WILBUR & ELY, HOOVER DAM DOCUMENTS, 1948 ed.), at A851.

For the purpose of this analysis, it does not matter where the 1.5 million acre-feet for Mexico comes from, whether out of the upper basin or out of the waters which the lower basin tributaries contribute to the main stream after sustaining the consumptive uses made by projects located along those tributaries.

[6]These losses are diminutions of supply, not beneficial consumptive uses within the meaning of either the Compact (Rep. 144, 147-49) or the Limitation Act (Rep. 187, 313).

use (item 1 above) would include about 2 million acre-feet of consumptive use on lower basin tributaries,[7] and

[7]The 2 million acre-foot figure for lower basin tributary uses represents the minimum contemplated by the Compact negotiators and by Congress. See, *e.g.*, Ariz. Ex. 49 (Tr. 257) (statement by Judge Sloan of Arizona, legal adviser to the Arizona Compact negotiator), at A69:

> "It may be of interest to know why the figures of 7,500,000 acre-feet for the upper basin and 8,500,000 acre-feet for the lower basin were reached. It grew out of the proposition made by the upper basin that there should be a fifty-fifty division of rights to the use of the water of the river between the upper and lower basins which should include the flow of the Gila, and the insistence of Mr. Norviel, commissioner from Arizona, that no fifty-fifty basis of division would be equitable unless the measurement should be at Lee's Ferry. As a compromise the known requirements of the two basins were to be taken as the basis of allotment with a definite quantity added as a margin of safety. The known requirements of the upper basin being placed at 6,500,000 acre-feet, a million acre-feet of margin gave the upper basin an allotment of 7,500,000 acre-feet. The known future requirements of the lower basin from the Colorado river proper were estimated at 5,100,000 acre-feet. To this, when the total possible consumptive use of 2,350,000 acre-feet from the Gila and its tributaries are added, gives a total of 7,450,000 acre-feet. In addition to this, upon the insistence of Mr. Norviel, 1,000,000 acre-feet was added as a margin of safety, bringing the total allotment for the lower basin up to 8,500,000 acre-feet."

Compare Calif. Exs. 26 (Tr. 4,972), 1302 (Tr. 11,442), 1371 for iden. (Tr. 11,436), and 1377 for iden. (Tr. 11,436); Calif. Op. Br. 20. See Calif. Findings and Conclusions, parts V-G and V-H, pp. V-35 through 48, showing the safe annual yield from the Gila River system in Arizona and New Mexico of 1,750,000 acre-feet per annum; part V-1, p. V-49 (see also Calif. Finding 4F:102, p. IV-55), re other lower basin tributary systems (Little Colorado, Virgin, Kanab Creek, and Bill Williams river systems) showing a safe annual yield of 200,000 acre-feet per annum.

Arizona's present pleadings establish substantially the same figure for consumptive use on the Gila. She alleged (Ariz. Reply, par. 8, p. 17), that these uses, measured by depletion of the main stream, were 960,000 acre-feet in 1929 and 1,170,000 in 1953, but if measured as diversions less returns the quantity would be greater by more than 1,000,000 acre-feet (Complaint, par. XXII, p. 26). The Master held: "Thus whether the limits fixed by Article III(a) and (b) have been reached or exceeded is to be determined by measuring the amount of each Basin's total appropriations through the formula, diversions less return flows" (Rep. 148).

consequently not more than 6.5 million acre-feet would be available for use from the main Colorado River in the lower basin within the "embargo" or "ceiling on appropriations" imposed by Article III(a) and (b) of the Compact.[8] Out of this 6.5 million acre-feet of consumptive use, the Master's recommended decree would allocate California only 44/75 (Rep. 347-48), or 3.8 million acre-feet. Arizona now endorses this ratio.[9]

The effect of the Master's formula, even when applied to a year in which the lower basin's supply is adequate for all components of the Compact in the lower basin, after satisfaction of the treaty requirements, is to repudiate every element of the bargain Congress exacted of California in the limitation. Thus:

(1) It denies California the right to use 4.4 million acre-feet even though the system supply available to the lower basin sustains much more than the 7.5 million

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"[F]or Compact purposes, the accounting is made at the point of diversion" (Rep. 196). He applies the same rule in his limitation accounting (Rep. 313). Arizona's opening brief (p. 105) now says: "Arizona agrees with the Master's conclusion that the § 4(a) apportionment, including the California limitation, is to be measured in terms of consumptive use of water, defined as diversions from the river less return flow (Rep. 182-225)."

[8]"This apportionment is accomplished by establishing a ceiling on the quantity of water which may be appropriated in each Basin as against the other. Although Article III(a) and (b) is not expressed in terms of appropriative rights, this is the purport of that Article" (Rep. 140).

"....The Compact puts an embargo upon the acquisition of appropriative rights in excess of the limits set by Article III(a) and (b). The first call upon any remaining water goes to supply Mexico." (Rep. 196.)

Whether the III(a) apportionment is called a reservation in perpetuity, or a ceiling on appropriations, does not matter for the purpose of this analysis. *Cf.* Calif. Op. Br. 250; Ariz. Exception 1, pp. 3-4.

[9]Ariz. Op. Br. 105.

acre-feet of consumptive use apportioned to it by Article III(a) of the Compact;

(2) It denies California all participation in the million acre-feet of "III(b) water"[10] referred to in the Compact, even though the full 8.5 million of uses were supplied, and makes that million acre-feet available for use only in the other lower basin states. This occurs despite the Master's holding that the waters encompassed by Article III(b) are in the category of "excess or surplus," in which California may share one half (Rep. 196-97), a determination which Arizona now concedes is correct;[1]

(3) It curtails the supply to California's "rights which may now exist" in favor of junior projects in other states whose uses account for the "increase of use" referred to in Article III(b) (Rep. app. 373), notwithstanding (i) the assurance in Article III(a) that that apportionment encompasses "rights which may now exist" (*ibid.*) (the same recognition of "rights which may now exist" appears in the first paragraph of the Project Act's limitation on California) (Rep. app. 382), (ii) the assurance in Article III(c) of the Compact[2]

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[10]We use "III(a) water" and "III(b) water" to refer to the quantities of water required to satisfy the beneficial consumptive use (diversions less returns to the river) specified in Article III(a) and (b), respectively, of the Colorado River Compact. In terms of the flow at any point the aggregate quantity of "III(a) water" and "III(b) water" is always greater than 8.5 million acre-feet.

[1]Ariz. Op. Br. 82. The Master limits the effect of this holding to the main stream supply in excess of that required to sustain 7.5 million acre-feet of consumptive use from the main stream (Rep. 196, 200).

[2]Article III(c) of the Compact provides (Rep. app. 373):

"(c) If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System,

that the Mexican burden must first be satisfied out of waters surplus to the *aggregate* of the quantities specified in III(a) and III(b), and that only in the event of a deficiency in such surplus and in III(b) water should uses of the III(a) apportionment be curtailed, and (iii) the physical existence of such a system surplus in quantity sufficient to supply the full Mexican burden without any curtailment whatever of use of the full III(a) and (b) allocations.[3]

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such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d)."

Article III(d) of the Compact provides (Rep. app. 373):

"(d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact."

[3]Curtailment of California's use of III(a) water in consequence of the Mexican burden at a time when III(b) water is available is incongruous for another reason. In Arizona's brief in Arizona v. California, 283 U.S. 423 (1931), she said of Article III(b) (correctly we think) at 34 (reprinted in Calif. Ex. 2043, pp. 2-3 (Tr. 12,379)):

". . . . Paragraph (b) does not *apportion in perpetuity,* as does paragraph (a), any beneficial use of water. It is very careful not to do this. It is to be read with paragraph (c) and relates solely to the method of sharing between the basins any future Mexican burden which this Government might recognize. This burden is to be satisfied first out of 'surplus' waters, and surplus waters are defined not as surplus over quantities 'apportioned,' but as surplus over quantities '*specified* in paragraphs (a) and (b).' Any deficiency remaining is to be borne equally by the two basins. Thus the Lower Basin, which without paragraph (b) might use water in excess of its apportionment without acquiring any exclusive right in perpetuity thereto, is enabled to retain such uses to the extent of 1,000,000 acre-feet per annum against the first incidence of the Mexican burden. Thereafter it is entitled to require the Upper Basin to share from its apportionment equally in the satisfaction of any deficiency. In other words, all that paragraphs

Thus, even upon this hypothesis of water so abundant as to sustain the Compact allocation, California's limitation ceiling—after subjection to proration—on the interpretation of the Master and Arizona would not be 4.4 million acre-feet plus one half of surplus: rather, it would not exceed 3.8 million acre-feet of consumptive use altogether, and, unfortunately, California's half of the waters over and above 7.5 million acre-feet would not exist at all.[3a]

(b) and (c) accomplish is to require the Upper Basin to reduce its apportionment in favor of Mexico before the Lower Basin is required to do so, the Lower Basin being entitled to contribute first, to the extent of 1,000,000 acre-feet, water which it may have used but to which it has no exclusive right in perpetuity—that is, water not apportioned to it. The water apportioned is that to which exclusive beneficial use in perpetuity is given in paragraph (a), less any deductions which may have to be recognized as provided in paragraphs (b) and (c)."

This is another way of saying that III(b) uses must be curtailed before lower basin III(a) uses are reduced, if the satisfaction of the Mexican burden requires the reduction of the lower basin's consumptive use below 8.5 million acre-feet.

Arizona now says that all of the III(b) water is in the main stream, implying that it is geographically so identified by the Compact (Ariz. Op. Br. 81). If so, it is physically vulnerable to the Mexican Treaty demand. Arizona's geographical identification is approximately correct, but for the wrong reason. The correct reason is that (1) the "increase of use" referred to in Article III(b) commences after the lower basin is required to account, basinwide, for the 7.5 million acre-feet of use referred to in Article III(a); (2) the III(a) accounting is required to include the water to supply all "rights which may now exist" in 1929; (3) the rights (and uses thereunder) on the tributaries in 1929 approximated 2 million acre-feet, exhausting the safe annual yield of the Gila, plus 200,000 acre-feet on other tributaries. Uses on the main stream have already accounted for the margin of 5.5 million in the III(a) apportionment. Therefore, uses in the lower basin which "increase" its aggregate basinwide consumptive use above 7.5 million are main stream uses junior to 5.5 million acre-feet of consumptive use on the main stream. This "increase," under principles of equitable apportionment, would be sacrificed to satisfy the Mexican burden before sacrificing the 1929 "rights which may now exist," or indeed any other senior rights.

[3a]The following table illustrates the difference in result between the Master's allocation and that which we think is correct, if the

The legal drouth thus created in the main stream in the midst of physical plenty in the system is visited most acutely upon the Metropolitan Water District—every drop of its water supply, on the theory of the Master and Arizona, would be beyond the pale,[4] outside the III(a) and (b) ceiling of the Compact, subject to extinction whenever the Compact ceiling is enforced.

By contrast, Arizona's brief accurately quotes debates in which Senators spoke of California's "irreducible minimum" (Ariz. Op. Br. 93, 94), and a difference of only 400,000 acre-feet between California's claim to 4,600,000 acre-feet and Arizona's concession to California of 4,200,000 acre-feet, finally resulting in a compromise giving California 4,400,000 acre-feet, plus one

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Compact allocations are fully served. It illustrates the allocation of consumptive uses available to the lower basin, assuming enforcement of the Compact "ceilings," and a supply adequate to sustain uses up to those "ceilings" (an aggregate of 8.5 million acre-feet of consumptive use, of which 2 million is used on the tributaries and 6.5 million on the main stream):

	Total	To Calif.	To all other lower basin states		
			Total	Main stream	Tributaries
On the Master's interpretation	8.5	3.8*	4.7	2.7	2
On California's interpretation	8.5	4.9**	3.6***	1.6	2

*44/75 of 6.5 million (8.5 million minus 2 million on tributaries)
**4.4 million plus ½ of the lower basin's consumptive use in excess of 7.5 million (8.5 minus 7.5)
***3.1 million apportioned by Article III(a) plus ½ of the lower basin consumptive use in excess of 7.5 million (8.5 minus 7.5)

[4]The Metropolitan Water District's Colorado River Aqueduct is the source of most of the water required for the municipal and industrial needs of 7,000,000 southern Californians. (Calif. Op. Br. A27-28.) Its rights are junior to 3,850,000 acre-feet of agricultural rights established before the aqueduct came into existence (*id.* at A3; Calif. Ex. 1811, Tr. 12,244), as well as to minor quantities for Indian reservations in California.

half of the excess or surplus (*id.* at 93-96). Here is Senator Hayden's explanation of the intended effect of the limitation:[5]

> "The bill itself provides that a million acre-feet may be used in the vicinity of Los Angeles, and some three and one-half million acre-feet through the all-American canal to irrigate the Imperial Valley. Then there is another half million acre-feet which may be used in the vicinity of Yuma and the Paloverde Valley . . . ."

This totals 5 million acre-feet of expected California consumptive use from the flow at the site of Hoover Dam, which Senator Hayden said was about 9.5 million.[6]

The allocation we would receive under the Master's recommended decree is less than Arizona spokesmen have conceded to be ours beyond all controversy. Governor Osborn of Arizona stated the concession in 1943, addressing the Arizona Legislature on the subject of Arizona's 1944 contract and Compact ratification:[7]

> "Now, of course, we would like to take from California some of that 4,400,000 acre feet of

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[5]70 CONG. REC. 464 (1928). See Calif. Op. Br. 236-37 for the remainder of the quotation and footnotes explaining the figures.

[6]*Ibid.* Compare Hayden's flow of 9.5 million at the site of Hoover Dam with that required for full service of the Compact and treaty: 1.5 million for the treaty, 6.5 million for consumptive use from the main stream to serve the III(a) and (b) ceilings, more than 1 million for losses in excess of the tributary inflow, a total of 9 million plus. For the calculation of these losses, see Calif. Op. Br. plate 7 and accompanying notes.

[7]Letter of March 25, 1943, from Governor Sidney P. Osborn to Hon. Dan E. Garvey, Arizona Secretary of State, printed in ARIZ. LAWS 1943, at 231. The Governor reiterated substantially the same views in a message to the Arizona Legislature the following year in presenting the Arizona contract for ratification. Ariz. Senate Journal, 16th Legis., 1st Spec. Sess. 1944, at 16.

water. But neither unrecognized filings against it, nor wishful thinking on our part can accomplish that. Nothing can accomplish it. The Federal Government, having expended tens of millions of dollars of the people's money to provide irrigation and power facilities for the use of this water in one state, will not wipe out that investment and divert that water to another state. Arizona cannot compel that any more than we can turn back the pages of history. The time has long since passed when Arizona could obtain the water which California has already put to beneficial use."

With that explanation Arizona's Legislature ratified the Compact and her proposed contract. The contract recites that "present perfected rights to the beneficial use of waters of the Colorado River *system* are unimpaired by this contract" (art. 7(*l*), Rep. app. 403; emphasis added), and that it is without prejudice to the contention of any state as to "what limitations on use, rights of use, and relative priorities exist as to the waters of the Colorado River system" (art. 10(5), Rep. app. 405).

§ II. THE TWO BASIC SOURCES OF ERROR: (A) SEVERANCE OF THE PROJECT ACT FROM THE COMPACT, AND (B) DISREGARD OF RULES OF PRIORITY WHICH BOTH THE COMPACT AND THE PROJECT ACT RESPECTED

The bizarre result—converting a 4.4 million acre-foot limitation into a 3.8 million acre-foot maximum—is created by the combined effect of two basic elements of the Master's "contractual allocation scheme": (1) The creation of a shortage in "Article III(a)" waters by divorcing the limitation from the Colorado River Compact,

and (2) the proration of that shortage, imposing 44/75 of it upon California. (Arizona and Nevada agree with his result, but they disagree with the premise that the Compact can be severed from the limitation: See parts Three and Four of this brief.)

A. The Issue of Severance of the Compact From the Limitation

The creation of an automatic shortage by the Master's formula is achieved as follows:

The limitation which is stated in the first paragraph of section 4(a) identifies specifically the resource which California may consume—4.4 million acre-feet per year of the 7.5 million acre-feet of consumptive use apportioned by Article III(a) of the Colorado River Compact, plus one half of the excess or surplus waters unapportioned by that Compact—and, on the other hand, the resource from which California is precluded and which only the other lower basin states may appropriate: 3.1 million acre-feet of the 7.5 million acre-feet of consumptive use apportioned by Article III(a), plus the other half of the excess or surplus.

This is the issue: Are the consumptive uses which are made out of the tributaries in the states which those tributaries traverse chargeable against the 3.1 million acre-feet and the one half of excess or surplus from which California is precluded?

We say "Yes." The 7.5 million acre-feet against which both California and the other states assert these claims is identified by the reference in section 4(a) of the Project Act and the reciprocal provisions of the California Limitation Act to Article III(a) of the Compact. Article III(a) of the Compact, as the Master

correctly holds, encompasses the tributaries as well as the main stream (Rep. 142-44, 173). The necessary result is that the quantities which the states other than California may claim from the main stream within the lower basin's "ceiling" are reduced to the extent of their uses on the tributaries.

The Master says "No." The other states may claim all of the 3.1 million acre-feet and all of the one half of excess or surplus from the waters released from Lake Mead, undiminished by their uses upon the tributaries (including as a "tributary" the main stream above Lake Mead): The limitation's reference to Article III(a) of the Compact is "inappropriate" (Rep. 173),[1] and is therefore excised. The reference to Article III(a) means "the water stored in Lake Mead and flowing in the mainstream below Hoover Dam" (Rep. 173).

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

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[1]The United States says that depletions on tributaries and the main stream above Lake Mead are deductible from "allocations" to Arizona and Nevada from the "mainstream," but does not deduct the uses on other tributaries, *e.g.*, the Gila (U.S. Op. Br. 7-21). Arizona and Nevada agree with the Master's result. (See parts Three and Four of this brief.)

the Secretary is required by statute[2] to operate Lake Mead (and each of the dams above Lake Mead) in conformity with the Compact, shortage in the allocations made by the Master's "contractual allocation scheme" is automatic and certain whenever the Secretary restricts either the inflow to, or releases from, Lake Mead to enforce the Compact "ceiling."[3]

Put another way, water to supply 7.5 million acre-feet of consumptive use from Lake Mead and below can only be found if it is assumed that the Compact ceiling on lower basin appropriations will never be enforced. If the Compact is enforced, the Master's formula produces a built-in shortage.[3a] His formula presupposes (1) that the act of Congress that gave consent to the Compact simultaneously created this anomalous result; and (2) that the California Legislature in 1929, after passage of the Project Act, ratified these two inconsistencies,[4] and agreed that California's rights might be reduced, not to 4.4 million acre-feet, but to 44/75 of a quantity which could never be as great as 7.5 million acre-feet if the Compact is enforced.

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[2]Project Act §§ 8(a) (Rep. app. 389) and 13(b) (Rep. app. 393); Colorado River Storage Project Act of 1956, §§ 7 and 14, 70 Stat. 109, 110, 43 U.S.C. §§ 620f, 620m (1958).

[3]The proposed decree would permit Arizona to divert for the Central Arizona Project any quantity it pleased between Lake Mead and Lee Ferry, without accounting for it against Arizona's allocation; if the diversion is made there, the shortage is to that extent deepened.

[3a]Arizona agrees that the Compact controls main stream supply legally available in the lower basin. Ariz. Op. Br. 26.

[4]Ariz. Ex. 12 (Tr. 230), Act of Jan. 10, 1929, CAL. STATS. 1929, ch. 1, p. 1 (ratifying Colorado River Compact as a seven-state agreement); Ariz. Ex. 13 (Tr. 230), Act of March 4, 1929, CAL. STATS. 1929, ch. 15, p. 37 (ratifying Compact as six-state agreement); Ariz. Ex. 14 (Tr. 232), Act of March 4, 1929, CAL. STATS. 1929, ch. 16, p. 38 (California Limitation Act).

Arizona and Nevada apparently recognize that the limitation and the Colorado River Compact must somehow be harmonized.[5] Arizona suggests a method for harmonizing them, in an argument sometimes identified as an alternative ground to sustain the Master's conclusions.

The Arizona alternative would write lower basin tributaries out of the Compact instead of writing the Compact out of the limitation. Arizona insists that it makes little difference which alternative is selected. This is a major error.

The Master's decision and the Arizona alternative argument are contradictory in almost every essential respect. Arizona arrives at a limitation which refers to a "mainstream" from Lee Ferry to Mexico.[6] The Secretary's physical control of the main stream beginning at Lake Mead and an allocation based on that control by means of Lake Mead water delivery contracts cannot physically apply to a main stream which begins at Lee Ferry 275 miles above Lake Mead.

The effect of the Master's construction of the limitation is to defeat every rational purpose to be served by the Limitation Act. California could use any quantity of water diverted between Lee Ferry and Lake Mead, in addition to quantities specified in the limitation. Arizona could use any quantity from the same source without regard to any "contractual allocation." Plans for such diversions by both California and Ari-

[5]"The Master construes the Compact as a separate and independent document wholly apart from and without reference to the Project Act (Rep. 138-51). In this we believe he is in error." Ariz. Op. Br. 67.

Nevada makes essentially the same argument (Nev. Op. Br. 35-36) but apparently fails to recognize that the Master does not harmonize these two documents.

[6]Ariz. Op. Br. 72-81.

zona were under active study when the Project Act was under consideration, as Congress well knew. (Calif. Op. Br. 124-27 and plate 2.)

The Master's decision and the Arizona alternative argument have in common, however, the failure to recognize the purpose and the proper motive of both the Colorado River Compact and the limitation accepted by California for including lower basin tributaries.

1. *The Upper Basin's Interest in the Inclusion of Lower Basin Tributaries in the Compact Accounting*

Manifestly the upper basin states have never had any hope or expectation of using water from lower basin tributaries. The Compact, however, was negotiated in the recognition that supplying water to Mexico was an obligation of both basins.

Article III(c) provides (Rep. app. 373):

> "If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System, [1] such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b) [of Article III]; and [2] if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d) [of Article III]."

The inclusion of the lower basin tributaries in the Compact accounting serves two important and rational purposes for the upper basin, as our bracketed numbers indicate (see upper basin views quoted *infra* at 99-100):

[1] The quantity of consumptive uses on lower basin tributaries affects the quantity of "surplus" water, if any, in the system over and above the aggregate of the quantities specified in Article III(a) and (b). Article III(c) requires that "surplus" water be first yielded to supply Mexico. [2] The quantity of consumptive uses on lower basin tributaries affects the determination of whether there is any "deficiency" in the "surplus" to supply Mexico, and, if so, whether that "deficiency" is being "equally borne" by the upper and lower basins, as Article III(c) also requires.[1]

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[1]The relationship of the lower basin tributaries to the Colorado River Compact was carefully explained by Arizona herself on p. 33 of her brief in Arizona v. California, 283 U.S. 423 (1931) (reproduced in Appendixes to Calif. Answer to Ariz. Bill of Complaint, app. 28 (pp. 386-99), at 398):

> "This 75,000,000 acre-feet is not apportioned to the Lower Basin. It may not be appropriated in the Lower Basin. Only so much of it may be appropriated as together with existing and future appropriations of water in or from tributaries entering the river below Lee Ferry will total 7,500,000 acre-feet per year. The 75,000,000 acre-feet includes all surplus waters which under paragraph (c) must first bear any Mexican burden, which may not be appropriated, and which are subject to apportionment after 1963. It is fundamental to an understanding of the Compact that the annual beneficial consumptive use in perpetuity of 7,500,000 acre-feet of water apportioned by it to the Lower Basin includes all beneficial consumptive use in perpetuity which may be made from the whole river system, and is not merely an apportionment of such uses in main stream water flowing at Lee Ferry. The agreement not to deplete the flow at Lee Ferry below the specified amount does not mean, and cannot under the plain words of the Compact be construed to mean, that the guaranteed flow is apportioned to the Lower Basin or may be appropriated there. As to this, at least, there can be no shadow of doubt."

These two points can be illustrated by one example: Assume that the supply from the main stream and tributaries will sustain 8.5 million acre-feet of consumptive use in the lower basin after satisfaction of the full Mexican Treaty burden:

a. If the lower basin tributaries are included in the Compact allocations, there is no deficiency in the lower basin allocation after satisfaction of the Mexican burden; the treaty requirement has been met out of "surplus." Hence, the lower basin cannot call upon the upper states to deliver additional water at Lee Ferry.

b. If the lower basin tributaries which support 2 million acre-feet of consumptive uses are excluded from the Compact allocations, the remaining lower basin main stream supply will sustain only 6.5 million acre-feet (8.5 million acre-feet minus 2 million acre-feet) of the lower basin's 8.5 million acre-foot allocation under Article III(a) and (b). The deficiency thus created is exactly equal to the measure of the lower basin tributary uses (2 million acre-feet) which are excluded from the accounting. Hence the lower basin can call upon the upper states to deliver additional water at Lee Ferry so that the burden of the deficiency is borne equally under the provisions of Article III(c).[2]

2. *California's Interest in the Inclusion of Lower Basin Tributaries in the Limitation Accounting*

Our interest may most simply be illustrated by the same example given above; 8.5 million acre-feet of con-

[2]The exact measure of that additional delivery at Lee Ferry depends upon (1) the extent of Article III(a) uses in the upper basin (*i.e.*, the deficiency in the upper basin allocation) and (2) certain questions of interpretation of the meaning of "deficiency" and "equally borne" in Article III(c). We do not probe these questions here.

sumptive use throughout the lower basin, of which 2 million acre-feet is from tributaries and 6.5 million acre-feet is from the main stream:

a. If the lower basin tributaries are included in the limitation accounting:

(1) Our 4.4 million acre-feet out of the first 7.5 million acre-feet is assured because there is no shortage even if the main stream supply should be reduced to 5.5 million acre-feet (this is the residue of the III(a) apportionment after deducting therefrom 2 million acre-feet of uses on the tributaries), or 1 million acre-feet below the Compact ceiling of 6.5 million acre-feet on main stream uses.

(2) There is excess or surplus in half of which California may share whenever the main stream supply exceeds 5.5 million acre-feet. One million acre-feet of "excess or surplus," *i.e.*, the million acre-feet referred to in Article III(b), exists within the Compact ceiling of 6.5 million acre-feet on main stream uses.

b. If the lower basin tributaries are excluded from the limitation accounting:

(1) Our 4.4 million acre-feet is subject to reduction if proration is adopted because the main stream supply within the Compact ceiling (which encompasses 2 million acre-feet of uses on the tributaries) is only 6.5 million acre-feet per annum. The problem of shortage in "Article III(a) waters" faces California unless the main stream supply is 7.5 million acre-feet[3] which ex-

[3]The Lee Ferry flow necessary to sustain 7.5 million acre-feet of consumptive use in Arizona, California, and Nevada from the main river must exceed 10 million acre-feet, because more than 2.5 million acre-feet of the Lee Ferry flow cannot be used in the United States. 1.5 million must be passed on to Mexico. In addition, losses below Lee Ferry exceed tributary inflow below

ceeds the Compact III(a) and (b) ceiling by 1 million acre-feet of "surplus."

(2) There can be no excess or surplus, of which we may take one half, unless the main stream supply exceeds the Compact ceiling (6.5 million acre-feet) by more than 1 million acre-feet.

Thus, in effect, the inclusion of lower basin tributaries in the limitation accounting insulates *pro tanto* our rights from being cut back to supply the Mexican Treaty requirement, just as the inclusion of those tributaries in the Compact insulates *pro tanto* the upper basin's Compact apportionment from the impact of the treaty. In each instance the inclusion of tributaries is both rational and fair.

3. *The Irrational Consequences of Severing Compact From Limitation*

Arizona and Nevada, in asserting that the Compact and limitation must be harmonized, at least concede the necessity of avoiding a construction which is incredible in terms of statutory construction and incredible in terms of result.

a. In terms of statutory construction

Under the Master's construction which severs Compact from limitation this result is accomplished in terms of the agreement which California accepted: California is limited to the annual consumption of

> "four million four hundred thousand acre-feet of the waters apportioned to the lower basin States

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that point by about 1 million acre-feet, and if water to supplant those losses is not furnished at Lee Ferry, downstream consumptive use must be curtailed to do so. Calif. Op. Br. plate 7 and accompanying notes. The historic excess of losses over inflow is substantially greater than 1 million acre-feet. For historic inflow, see Rep. 119-23. For historic losses, see Rep. 124-25.

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.*"

We have italicized three references to the Colorado River Compact in the course of the 53 quoted words. Whether appropriate or inappropriate, those three references—"Colorado River compact" and "said compact" (twice)—must mean the same thing. The Master, however, arrives at the incredible result that "Colorado River compact" and "said compact" are inappropriate references to the Compact in the first two instances, but not in the third instance. "Such uses"—*i.e.,* all California uses of "III(a)" and "excess or surplus"—are subject to the terms of "said compact," and in the third instance this means the systemwide Colorado River Compact. Section 8(a) of the Project Act[4] leaves no room for doubt, and nothing in the Master's proposed decision purports to relieve California or the lower basin of the restrictions of the Compact.

b. In terms of result

The terms of the limitation which we quote above are the operative part of the limitation. If the Compact includes lower basin tributaries, as the Master

[4]Section 8(a) of the Project Act provides (Rep. app. 389): "The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried, and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this Act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide."

says, the lower basin rights against the upper basin are diminished by uses on the lower basin tributaries. The lower basin cannot demand from the upper basin water consumed under the Compact allocation from lower basin tributaries.

Under the Master's decision "Compact" means "Compact" in the limitation when the result is to restrict the lower basin, and hence restrict California as a participant in the lower basin's right. "Compact" is an inappropriate reference when the effect would be to make California's right coextensive with the lower basin right. The result, as we have seen, coupled with the destruction of priorities, is that California cannot possibly approach 4.4 million acre-feet which the limitation specifies even though the lower basin's Compact right is fully supplied with the full 8.5 million acre-feet which III(a) and (b) specify.

Arizona's obligation to account for her tributary uses in the allocation of the Mexican burden is inseparable from her reliance upon a contract which, by state and federal statutes, is subject to the Compact,[5] as well as from her asserted ratification of the Colorado River Compact itself. If she effectively ratified that agreement, she assumed its burdens. Among its burdens is the "plain" mandate "that Article III(a), (b), (c), (f) and (g) deal with both the mainstream and the tributaries" (Rep. 142). That obligation runs to all six of the other states, including California. The Compact was not altered by enactment of the Project Act or the Limitation Act. The effect of rewriting either the Limitation Act as the Master proposes or the Compact

[5]Project Act § 8(a), Rep. app. 389; ARIZ. LAWS 1944, ch. 4, p. 419 (Ariz. Ex. 11 (Tr. 228)), ratifying Ariz. 1944 contract; see also art. 13 of that contract, Rep. app. 406.

as Arizona proposes, to exclude the tributaries, would amount to unjustifiable judicial legislation,[6] and would abrogate the bargain of the Limitation Act. But if that is done with respect to "III(a) water in the Project Act sense" (Rep. 149), then it must be done with respect to III(a) water in the "Compact sense" *(ibid.)*, and vice versa.

B. The Issue of Priorities in the Event of Shortage

If the supply which is available from Lake Mead in any given year is inadequate to sustain 4.4 million acre-feet of consumptive use in California, plus the main stream claims of Arizona and Nevada within the Compact ceiling, how is the burden of the shortage to be borne?

The Master says that shortages are to be borne pro rata, in ratios which assume that the 4.4 million acre-feet which California may use, and the 3.1 million from which she is precluded, were all intended to be used from the main stream, on a basis of parity,[7] except for the protection of "present perfected" rights which must not be impaired (but these rights are nevertheless included in his allocation ratios with exactly the same weight as the claims for projects not yet built or authorized).[8] (Rep. 305-12.)

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[6]"It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written." United States v. Great Northern Ry., 343 U.S. 562, 575 (1952). See also United States v. Calamaro, 354 U.S. 351, 357 (1957); Crooks v. Harrelson, 282 U.S. 55, 59-60 (1930).

[7]Rep. 305-14. He derives this ratio, however, not from § 4(a) of the Project Act, which he declines to treat as a mandatory allocation formula (Rep. 162-63, 202), but from a "contractual allocation scheme" of the Secretary which substantially but not precisely followed the pattern suggested in § 4(a) for an interstate compact never consummated (Rep. 221-24).

[8]Arizona alleged that 1.7 million acre-feet of the main stream

California says that the burden of shortages is to be borne in accord with the principles of equitable apportionment, applied interstate, whether the competing claims are rooted in state law or in federal contracts, and that the primary elements of equitable apportionment are (i) interstate priorities of appropriation and (ii) the principle that existing uses which support a going economy are not to be destroyed.

The United States position is ambiguous on this point, conceding the existence of priorities as between projects above and below Hoover Dam, asserting that some of the priority attributes of appropriations attach to federal water contracts, insisting on the Government's right to determine intrastate priorities of its contract holders, but stopping short of recognition of interstate priorities. (U.S. Op. Br. 16-17, 21-47.)

Arizona endorses the principle of proration[9] except for her insistence that her projects' priorities as against Indian reservations survived the enactment of the Project Act.[10] Nevada endorses the Master's scheme but concedes, in discussing the legislative history of the Project Act, that the Senators—

> "unquestionably believed that they were taking effective action on the amount of water which California would have as a *prior right* and thus guaran-

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water she claimed (2.8 million) was "not being presently used and consumed in Arizona." (See Complaint, par. XVII, p. 21; Ariz. Reply, par. 8, pp. 16-17.)

[9]Ariz. Op. Br. 105. However, Arizona finds a mandatory proration formula in § 4(a) of the Project Act (*id.* at 83-99), contrary to the Master (Rep. 162-63). She says that if the act did not lay down such a mandatory formula, the authorization for contracts in § 5 lacks necessary constitutional directions to the Secretary (Ariz. Op. Br. 88-89, 99).

[10]Ariz. Op. Br. 181.

tee [*sic*] the allocation of the balance available to the other two States." (Nev. Op. Br. 42. Emphasis added.)

§ III. WATER SUPPLY

In our opening brief (pp. 232-61), we stated the reasons why we believe that the dependable supply of the main stream will not support, on a permanent basis, as much as 6 million acre-feet annually of consumptive use—some 500,000 acre-feet less than the Compact's ceiling on main stream appropriations (*supra* pp. 8-11).

The other parties do not, in their opening briefs, expressly meet this major problem of the determination of the dependable water supply; however, their arguments, significantly, assume the existence of shortage.

Nevada, for example, asserts that her allocation under the Master's formula should not be reduced to supply "present perfected rights" in the other states. Nevada further asserts that, in the alternative, the decree should provide that her allocation should never be reduced below a minimum of 250,000 acre-feet. (Nev. Op. Br. 56-58.) Arizona also contends that "present perfected rights" should not be accorded interstate protection and, in the alternative, argues that such rights are to be measured as of November 24, 1922, rather than as of June 25, 1929 (Ariz. Op. Br. 46-56), so that (she apparently assumes) the quantity of such rights in California would be smaller. The United States contends that the Master's proposed invalidation of the deduction clauses in the Arizona and Nevada water delivery contracts (reducing their deliveries of Lake Mead water because of upstream consumptive uses) will have an "adverse effect upon California's estab-

lished projects" which "ought not to be imposed in the absence of a clear requirement therefor" in the Project Act or its legislative history (U.S. Op. Br. 21).

All of these arguments would be of no practical consequence if the Master's assumption of an abundant water supply into the indefinite future were correct. This paradox suggests that each of these parties is in fact concerned that the supply may indeed be less than 7.5 million acre-feet—a possibility that becomes a certainty whenever the Compact ceiling of 6.5 million acre-feet on main stream consumptive uses is enforced, and that becomes an even bleaker prospect when the main stream supply shrinks to its permanently dependable regimen which will sustain less than 6 million acre-feet annually of consumptive use. The result to California of the Master's proposed "mainstream" allocation, in the face of this inadequate dependable supply, is detailed in our opening brief (pp. 261-77).

PART TWO

ANSWER TO THE UNITED STATES OPENING BRIEF

PART TWO

ANSWER TO THE UNITED STATES OPENING BRIEF

§ I. THE SEVERANCE ISSUE: THE UNITED STATES POSITION IS IRRECONCILABLE WITH THE MASTER'S CONCLUSIONS

The major premise for the Master's construction of the limitation on California and for his "contractual allocation scheme" is that Congress intended the Project Act, particularly sections 4(a) and 5, to apply only to those waters of the Colorado River which could be delivered from Lake Mead and the main stream below Hoover Dam (Rep. 173-74, 183-84). From this premise, the Master reasons that Congress truncated the main stream of the Colorado River at Lake Mead and excluded all tributaries in the lower basin as well as the main stream above Lake Mead, which is redefined as a "tributary." Upon the same reasoning, the Master concludes that uses in Arizona and Nevada above Lake Mead cannot be taken into account by the Secretary of the Interior as deductions in deliveries from Lake Mead in each state. (Rep. 246-47.)

The United States disagrees with the Master's premise and his conclusions that follow. Congress, it argues, did not limit the application of the Project Act to waters physically controlled by Hoover Dam (U.S. Op. Br. 12):

> "[The Master's analysis] . . . appears to attribute to Congress a disregard for anything which might

> happen above the reservoir to frustrate or partially to frustrate the purposes of the dam."

Consequently, the United States apparently argues that the Project Act did not truncate the main stream at Lake Mead. We say "apparently" because the United States does not explicitly state its own definition of "mainstream," and its references to the waters to which section 4(a) refers are not consistent.[1]

The United States likewise asserts that various consumptive uses of water above Lake Mead, both on the main stream and the tributaries, must be taken into account (U.S. Op. Br. 20):

> "This is necessary to achieve Congress' purpose to impound and regulate 'substantially all the mainstream water' and to accomplish the interstate allocation established by the Section 4(a) limitation on California and the delivery contracts with Nevada and Arizona. We urge the Court to adopt this view."

The United States thus attacks major premises of the Master's Report: his construction of the limitation and his contractual allocation scheme which, he declares,

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[1]For example, the United States says it agrees with the Master that "the waters contemplated by Congress in enactment of Section 4(a) of the Project Act are mainstream waters" (U.S. Op. Br. 11), but its statement is found in a section of the United States brief devoted to proving that the Master errs by defining "mainstream" to exclude consideration of all waters above Lake Mead. In answer to the Master's conclusion that depletions of the flow, for instance, of the Little Colorado River into Lake Mead are excluded from the purview of the Project Act, the United States says: "We suggest that the 100,000 acre-feet of Little Colorado depletions is part of the total mainstream supply available for allocation. . . ." (U.S. Op. Br. 20.)

would founder upon the premises then and now asserted by the Government. The Master said:

> "Articles 7(d) and 5(a) [of the Arizona and Nevada contracts, respectively, which the United States asserts are valid] are inconsistent with the Section 4(a) limitation on California's use of mainstream water, and indeed, defeat the basic purpose of the delivery contracts themselves; namely, to provide for the allocation in fixed proportions among Arizona, California and Nevada of all the mainstream water released for use in the United States." (Rep. 241; bracketed material added.)[2]
>
> "[T]he United States' suggestion [requiring accountability for uses above Lake Mead under articles 7(d) and 5(a) of the Arizona and Nevada contracts, respectively] would violate the interpretation of Section 4(a) proposed in this Report, an interpretation to which the United States herself agrees. Thus Section 4(a) limits California to 4.4 plus half of surplus out of the total consumptive use of water diverted from the *mainstream;* it establishes a mainstream, not a system-wide, method of accounting. But the United States' suggestion would import tributary considerations into the Section 4(a) limitation. . . . " (Rep. 244, emphasis in original; bracketed material added.)

We agree with the United States that Congress did not build the great dam and reservoir at Black Canyon without regard to the right of the United States or the water users served to protect the water supply. How-

[2]See also Rep. 183, 185.

ever, the United States has deliberately postponed its major brief on these issues for its answering brief to be filed August 14, 1961. (U.S. Op. Br. 6.) Accordingly, we reserve our further response.

§ II. THE PRIORITY ISSUE: THE RESULT FOR WHICH THE UNITED STATES PROPERLY ARGUES CAN BE ACHIEVED ONLY BY FULL RECOGNITION OF EQUITABLE APPORTIONMENT PRINCIPLES

The United States accepts the premise that the application of principles of priority in a contest between water users above and those below Lake Mead is necessary to protect the Lake Mead water supply and to accord protection to established projects (U.S. Op. Br. 16-17, 21). We agree. But the same necessity compels full recognition of priorities between water users below Lake Mead. The acceptance of the initial premise inevitably leads to that very conclusion.

The United States argument reaches substantially the destination urged by California, but by a route indefensibly tortuous. California argues that the Project Act preserved—within the ceiling established by the limitation—the principles of equitable apportionment and priority of appropriation preexisting that act. Those principles, developed over a period of more than 100 years, clearly define the rights of water users *inter sese* when shortages in water supply occur. Their application requires no semantic exercise, no dubious inferences, and raises no constitutional difficulties. The United States, however, insisting that equitable apportionment was destroyed below Hoover Dam and that rights in water impounded by Lake Mead depend solely upon secretarial water delivery contracts, finds it neces-

sary by implication, inference, and other interpretive techniques to mold water delivery contracts into instruments having the effect of recreating equitable apportionment.

The legislative history and contemporaneous construction of section 5 of the Project Act conclusively demonstrate that the water delivery contracts contemplated by that section were to be executed with water users in the pattern previously established under other provisions of the reclamation law. (See Calif. Op. Br. 175-77.) Nevada has accurately pointed out that the "historical pattern followed under the general Reclamation Law has, of course, been one in which the Secretary has contracted for the delivery of specific quantities of water to the various entities who would be entitled to divert and use them." (Nev. Op. Br. 41.) The Government characterizes such contracts as "definitive contracts for the delivery of specified quantities for specific projects." (U.S. Op. Br. 17.) Such contracts are neither patents nor grants. They evidence the consent of the United States to the initiation of a right of which beneficial use is expressly made "the basis, the measure, and the limit"[3] as under any other appropriation.

If Congress intended secretarial water delivery contracts to be the sole basis of rights to water impounded by Hoover Dam, its choice of language in section 4(a) of the Project Act is incomprehensible. In establishing, as alternative conditions to the effectiveness of the Project Act, seven-state ratification of the Colorado River Compact or six-state ratification of the

[3]Reclamation Act of 1902, § 8, 32 Stat. 390, 43 U.S.C. § 372 (1958).

Compact plus the enactment of the California Limitation Act, Congress declared in section 4(a):

> "[N]o water rights shall be claimed or *initiated* hereunder, and no steps shall be taken by the United States or *by others to initiate or perfect* any claims to the use of water pertinent to such works or structures unless and until . . . ." (Emphasis added.)

The words "initiate" and "perfect" used in connection with "water rights" are words of art which refer to successive steps in acquiring appropriative rights: The term "initiate" refers to the act of filing a notice of appropriation; the term "perfect" relates to the completion of works and (in some instances) the application of water to land. The two steps, in the nature of things, are usually separated by a considerable lapse of time—often many years. Those words cannot refer to a right both initiated and perfected simultaneously in one step by the Secretary's signing a water delivery contract. Moreover, how could "others" than the United States have "initiated" and "perfected" a federal water delivery contract?

The Nevada and Arizona contracts on which the Master and the United States rely in discovering an interstate contractual allocation scheme do not fit that pattern. They do not purport to do so. The United States says that they are documents "designed primarily to allocate waters for use within those States." (U.S. Op. Br. 17.) Manifestly, they are not contracts "for the storage of water in said reservoir and for the delivery thereof at such points on the river as may be agreed on" authorized by section 5 of the Project Act. As "allocations" they are *ultra vires:* Water "alloca-

tion" contracts with states are not contemplated by the Project Act at all. Congress did not delegate power to the Secretary to make interstate allocations of waters of the Colorado River, and the Secretary did not purport to exercise any such power.[3a]

A. The United States Correctly Recognizes (1) That the Purposes of the Boulder Canyon Project Act Would Be Frustrated in the Absence of Protection to Rights to Water Which Supplies Lake Mead and (2) That the Priority Principle Is Essential to That Protection

The Master's decree would allocate among Arizona, California, and Nevada pro rata shares of the water that the Secretary of the Interior may make available for consumptive use from whatever water may happen to reach Lake Mead. The United States attacks two basic aspects of the Master's proposed decision in points I and II of its opening brief (pp. 7-21): (1) the Master's definition of "mainstream" and the limitation of his adjudication to a segment of the main Colorado River in the lower basin; (2) the Master's invalidation of the provisions of the secretarial contracts which provide deductions on account of Arizona and Nevada uses above Lake Mead. The United States objections are well taken.

The United States properly recognizes that neither Congress nor the California Legislature disregarded either the water or the water rights above Lake Mead. The United States likewise recognizes that the Master's

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[3a]The United States confines itself to a statement of its conclusion that secretarial contracts with Arizona and Nevada are interstate allocations. The conclusion cannot be sustained. However, the Government apparently defers its argument in support of this conclusion to a later brief (U.S. Op. Br. 6), and we accordingly defer our reply.

invitation to protect the rights of downstream users and the water supply of Lake Mead by future equitable apportionment suits is entirely unrealistic (U.S. Op. Br. 21):

> "Any problems in administration of the 7(d) and 5(a) contract provisions (Report, p. 246) [the provisions of the Arizona and Nevada contracts invalidated by the Master] would be relatively slight in comparison with the complications which might well be involved in case of suit by California to protect itself against 'undue depletions on the tributaries and the mainstream above Lake Mead * * * .' (Report, p. 247.)[4]
>
> "The adverse effect upon California's established projects of the ruling with respect to the Article 7(d) and 5(a) contract provisions ought not to be imposed in the absence of a clear requirement therefor in the controlling statute or its legislative history. We believe no such requirement exists." (Bracketed material added.)

The vice in the Master's scheme is not its application of equitable apportionment and priority in the rights above Lake Mead. Indeed, there is no discoverable difference among the Master, the United States, and California in respect of those rights. The Master's error

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[4](Footnote ours.) What the United States calls "complications" might better be described as impossibilities. The Master foresees a suit by California, based on appropriations by California projects, to prevent water from being intercepted before it reaches Lake Mead. If such a suit were successful, however, the priorities would precipitate like silt from the water when it reached the storage reservoir, under the Master's scheme, for 31/75 of that water by the terms of the recommended decree would go to Arizona and Nevada, defendants in the hypothetical suit, irrespective of the priorities of their water users. See Calif. Op. Br. 228-31.

is in substituting parity for priority as the basic characteristic of water rights from Lake Mead to Mexico.

The United States perceives the Master's error and takes the first essential steps to remedy it when it correctly maintains that priorities attach both to water rights above Lake Mead and to water rights from Lake Mead to Mexico. In attacking the Master's invalidation of the deduction clauses in the Arizona and Nevada contracts,[5] the United States asserts (U.S. Op. Br. 16):

> "If the contract rights preceded in time the upstream appropriations, the Special Master recognizes (Report, p. 241) that under the law of both States the contract rights would be senior. Thus there would not be permitted any diversion upstream that would interfere with the senior contract use and thus there would be no occasion for any reduction of deliveries under the contracts and no impairment of their permanence. If, on the other hand, new upstream appropriations should precede the execution of contracts for the full allocations to these States, then the Secretary would be authorized to refuse to enter into contracts for the full allotments. Although this would reduce the quantity of water which the Secretary would contract to deliver, it would not affect the permanency of contracts already made."[6]

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[5]The Master gives three reasons for invalidating these deduction clauses: (1) They offend the requirement of § 5 of the Project Act that contracts "shall be for permanent service," (2) they violate § 18 of the Project Act (which the Master says compels recognition of intrastate priorities), and (3) they result in an allocation "totally out of harmony" with the limitation on California. Rep. 237-47.

[6]See also U.S. Op. Br. 4.

These points are implicit in the United States argument:

(1) Appropriative priorities attach to and control rights in the Colorado River system above Lake Mead. The Special Master and California both agree.

(2) Priorities attach to "definitive contracts for the delivery of specific quantities [of water] for specific projects" (U.S. Op. Br. 17), although they do not attach to en bloc contractual "allocations" to states.[7] Apparently, in the United States view, these are not appropriative priorities, but priorities arising on "the execution of contracts." (*Id.* at 16.) We agree with the result urged by the United States but not with its rationale.

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[7]The United States recognizes that there is a sharp distinction between such "definitive contracts" (that is, contracts which comply with the provisions of § 5 of the Project Act for the delivery of water stored in Lake Mead) and contracts like the contract executed by the Secretary with the State of Arizona; to the former the United States attributes the characteristics of water rights, to the latter the United States does not.

Accord, opening statement of Mr. Warner for the United States (Tr. 12,429): "We think that under the Boulder Canyon Project Act the contracts made in conformity to Section 4(a) for delivery of specified quantities to particular projects or districts are the equivalent, for this purpose at least, of valid appropriations for such projects and districts of the navigable waters of the Colorado River, subject only to the exercise by the United States of the navigation servitude and such reservations ahead of the contracts as may have been made and preserved.

"We do think, however, that the Nevada and Arizona contracts do not have this effect, at least to the extent of requiring the United States to pay compensation to anyone if, in pursuance to their constitutional powers a portion of the waters with which those contracts are concerned not previously appropriated to a specific purpose is applied to a proper Federal purpose within either of those States. . . ."

We agree that the latter category of contracts bears no resemblance to water rights. We disagree, however, that those contracts are interstate allocations.

(3) Priorities to the use of water above Lake Mead and to the use of water from Lake Mead and below, whatever the basis of the rights, must necessarily be integrated into a common schedule of priorities. We agree.[8]

The United States explicit and implicit acceptance of these propositions should lead to one, and only one, conclusion: The priority principle (based either on appropriation or on contract) is the fundamental ingredient of water rights of users who face each other across the river as well as those of users who are neighbors on the same bank. But apparently the United States

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[8]A century of experience has demonstrated the practical wisdom of the priority principle, which does not depend on the label attached to the appropriator's piece of paper or the identity of the sovereign issuing that paper. The principle has been applied in a contest between the holder of a state permit to appropriate water and the holder of a prior federal water delivery contract executed under the Warren Act. In Ramshorn Ditch Co. v. United States, 269 Fed. 80 (8th Cir. 1920), the United States was defending its right to dispose of seepage or return flow water from Pathfinder reservoir in Wyoming by Warren Act contract with users in Nebraska against a Nebraska ditch company which asserted rights under a later Nebraska appropriation. The United States prevailed on alternative grounds: (1) The seepage water not abandoned belonged under the law of Nebraska to the United States as the original appropriator and (2) the Warren Act contract and initiation of deliveries under it antedated the ditch company's appropriation. With respect to the second ground, the court said (*id.* at 88):

> "We are also of the opinion that by virtue of the so-called Warren Act, approved February 21, 1911 (36 Stat. 925 [Comp. St. §§ 4738-4740]), and the Nebraska act of April 10, 1911 (Laws 1911, c. 151), apparently passed in aid of the Warren Act, that the contract between appellee and the Tri-State Land Company for the delivery of the water in controversy after the completion of the necessary ditches and controlling works was a valid contract, and gave appellant the right to furnish water for the irrigation of lands under the Farmers' or Tri-State ditch. The date of the contract August 20, 1912, and the furnishing of water thereunder July, 1914, are all prior to September 22, 1916, the date of the permit to the Ramshorn Ditch Company."

does not take the jump at which its argument runs. It injects one dubious and unexplained assertion in footnote 10 on page 30:

> "These contracts[8a] made no provision as to relative priority. *Presumably, then, the rule of ratability would apply as between them* except as the Project Act requirement for satisfaction of 'present perfected rights' establishes a different order." (Emphasis added.)

The United States hint that the chasm between its premises and the Master's conclusions can be closed by some species of presumption whose basis is unexplained[9] founders on impossibility: If priority exists between users above and users below Lake Mead, there must be priority *inter sese* among water users (appropriators or contractees) below Lake Mead. There *cannot* be priority as between contractees below Lake Mead and appropriators above Lake Mead but proration between contractees with respect to each other below Lake Mead. An example will suffice to give the reason:

Suppose that *A, B,* and *C* are water users with rights to 100,000 acre-feet each, initiated in 1945, 1950, and 1955, respectively. *A* and *C* are served by water delivery contracts of 1945 and 1955 below Lake Mead.

[8a](Footnote ours.) The United States refers to "contracts with a water users association and four irrigation districts in Arizona." U.S. Op. Br. 30.

[9]Some of the "definitive contracts" with water users specify priority; some specify proration. (U.S. Op. Br. 29-34.) We fail to see the basis of any presumption, or even inference, that silence is the equivalent of proration even when wholly intrastate problems are concerned. A fortiori, where interstate rights are involved, we think that silence is merely silence, and the result of silence is to leave undisturbed the principles of priority, absent any specific modification thereof.

B, intervening in time, has an appropriation with 1950 priority above Lake Mead. Now comes a shortage, and only 200,000 acre-feet of water is available to serve the rights of *A, B,* and *C,* aggregating 300,000 acre-feet.

Who goes short?

We find it impossible to say, under the mutually contradictory rules suggested by the United States.

Surely not *A.* He has priority over *B.*

Surely not *B.* He is upstream and senior to *C,* and there is enough water by hypothesis to satisfy both himself and *A* who is senior to *B.*

Surely not *C,* if the United States hint is taken seriously, because *C* is on a parity with *A,* and *A* has a full supply.

We do not believe that the United States seriously suggests that Congress or the Secretary of the Interior intended to impose this unworkable system of water rights upon users of water below Hoover Dam.

Moreover, all of the considerations which have historically made the principle of first in time, first in right, universally applicable to appropriations apply also to contracts, assuming *arguendo* that contracts entirely displaced appropriations and were the exclusive source of water rights. The integrity of contracts "for 'permanent service' " requires the same result. If "permanent service" in section 5 on this hypothesis means anything, it means that the United States, having sold a water right to *A,* cannot sell the same water right to *C.* Although *C,* after the fact, might argue for proration in order to find water for himself out of a

supply adequate only to sustain *A*, it is an argument that *C* cannot very well win. The Secretary, by adopting the same principle, can indefinitely dilute *C's* rights (as well as *A's*) by executing further contracts with *D*, *E*, *F*, *et al.* This is impermanent service.

The priority principle stems first of all from practical necessity in the arid West—the universal recognition that proration of shortages destroys the value of the resource for everyone. (Calif. Op. Br. 54-60.)

With the elimination of footnote 10, the United States reaches a sound result but by an indefensibly devious route. The United States creates its own labyrinth by its insistence that Congress intended to delegate to the Secretary of the Interior power to allocate interstate water rights by contracts like those with the states of Arizona and Nevada. We think it clear that Congress did not intend anything of the sort. Hence we turn to our next inquiry to show that the rationale of the United States argument about the basis of water rights is unsound. The power to allocate water rights was not delegated to the Secretary, and the Secretary never purported to exercise such power.

B. Congress Did Not Delegate to the Secretary of the Interior Substantially Unlimited Power To Control Rights to "Mainstream" Water

In proposing that intrastate priorities (and, by inference, principles of equitable apportionment) were supplanted on the Colorado by congressional delegation of unlimited discretion to the Secretary of the Interior, the United States abandons the language of the Project Act, distorts the function of section 8 of the Reclamation Act of 1902, and suggests a concept of secre-

tarial power which we think is both fundamentally in error and capable of far-reaching and mischievous consequences. The United States arguments are made in the course of a section of its brief attacking a determination of the Special Master which is not dispositive of any issue in this case: "'[S]tate law governs intrastate rights and priorities to water diverted from the Colorado River.' (Rept. 216; 303.)"[1]

Over one half of the United States brief (pp. 21-47) is nominally devoted to wresting the word "state" from Article II(C)(1) of the recommended decree and substituting the word "applicable" in its stead, so that the United States would be enjoined from releasing water for "any use or user in violation of *applicable* [not state] law" (U.S. Op. Br. 23-24). The modification sought is no more than a semantic quibble: It is a matter of insignificant moment, if indeed it makes any difference at all, whether the label affixed is "state law," "federal law adopting state law," or "applicable law."[2] But the United States makes broad assertions to reach a result which would otherwise be innocuous.

The United States implies that there is here presented a contest between state and federal powers and

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[1]Quoted in U.S. Op. Br. 22.

[2]For 75 years, a theoretical argument has been carried on about whether western appropriative rights arise under an original title created under state law by acts of appropriation or under a federal grant found in the Desert Land Act, 19 Stat. 377 (1877), as amended, 43 U.S.C. §§ 321-39 (1958), and related legislation. There are a number of cases where the choice of theory might affect the result, but the case has not yet arisen where it necessarily does so. *Compare* Howell v. Johnson, 89 Fed. 556 (C.C. D. Mont. 1898) (interstate recognition of appropriations on federal law theory), *with* Willey v. Decker, 11 Wyo. 496, 73 Pac. 210 (1903) (interstate recognition of appropriations on state law theory).

that the Court is called upon to resolve that conflict by its choice of federal or state law.[3] The United States misidentifies the contest. California does not contend that state law, as such, controls the disposition of the waters impounded in Lake Mead. The power which we challenge is the power the United States argues was delegated to the Secretary of the Interior. The United States argues that Congress delegated to the Secretary virtually unlimited power to dispose of the waters impounded by Hoover Dam.[4] We contend that Congress, in the Project Act and the reclamation laws of which it is an integral part, gave the Secretary specific directions controlling his disposition of the waters impounded by Hoover Dam. Among those directions is the command of section 8 of the Reclamation Act, incorporated into the Project Act—a federal command—that the Secretary must proceed in conformity with state law, and that "beneficial use shall be the basis, the measure, and the limit of the right." The Master's proposed "contractual allocation scheme" of perpetual allocations irrespective of use ignores these directions.

The United States suggests that an interpretation of the Project Act to require the Secretary to conform to state law intrastate creates a federal-state conflict on constitutional grounds. No such constitutional question

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[3]See U.S. Op. Br. 36-40. The United States appears to suggest that there is some significant, though unidentified, conflict between priority principles embodied in state law (which the Secretary was commanded to follow by § 8 of the Reclamation Act of 1902) and the federal powers exercised in the Project Act. The conflict is illusory. Moreover, the suggestion ignores the salient fact that the Project Act and most, if not all, of the water delivery contracts executed pursuant to it were written with fastidious regard for avoiding any possible federal-state conflict.

[4]U.S. Op. Br. 25-27.

is presented.[5] The only constitutional question which could be reached is created by the United States interpretation of the Project Act as a delegation to the Secretary of substantially unlimited power to control the disposition of water and water rights.

Nothing in the terms of the Project Act, its legislative history and constitutional background, or its administrative construction lends support to the United States contentions.

1. *The United States Misconstrues Section 5*

a. Language of section 5

The United States argument is nominally based upon the terms of section 5 of the Project Act (U.S. Op. Br. 26-27). But the contentions it makes are primarily inferences the United States draws from language not found in the Project Act at all. The United States thus discusses the powers delegated by Congress to the Secretary in terms of his control of "project water supply" and "project operation." The United States supplies no comprehensible definitions for its new vocabulary;[6] the use of these coined terms obscures the United

[5]The United States appears to argue that the United States under the Constitution has unlimited power to control and dispose of water rights to water impounded by Hoover Dam; that Congress exercised that power in the Project Act and delegated all of its power to the Secretary; any restriction upon the powers of the Secretary is an unwarranted interference with the powers of the United States. The premises are wrong. It is entirely unnecessary to decide the constitutional limits of the United States to control water rights. Congress very clearly did not press its powers to constitutional limits in the Project Act (Arizona v. California, 298 U.S. 558, 570 (1936), discussed in Calif. Op. Br. 142 n.4). Moreover Congress did not purport to delegate any such unrestricted power to the Secretary of the Interior.

[6]The term "project water supply" is a label for peculiarly flexible concepts. Sometimes the United States describes "project water supply" as the "mainstream waters available in the Lower

States analysis. Whatever meaning the United States may assign to its phrases, it is apparent that Congress' intent in the Project Act cannot be divined by an exegesis of words that Congress did not use.

The principal difficulty with the United States rationale is that Congress not only wrote section 5, but sections 14 and 18 of the Project Act as well. In the latter sections, Congress made clear that the "applicable" law controlling the disposition of water rights and controlling the Secretary was founded on the principles of priority of appropriation and equitable apportionment.[7]

b. Constitutional background and legislative history of section 5

The constitutional background and legislative history of the Project Act refute the United States contention that Congress intended to delegate authority to the Secretary of the Interior to make either an interstate or intrastate allocation of the waters of the Colorado River. The constitutional climate prevailing during the 1920's was directly opposed to the Government's conten-

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Basin" (U.S. Op. Br. 4); "substantially all the water of the mainstream" (*id.* at 10); and elsewhere as "the total mainstream supply available for allocation" of which "the 100,000 acre-feet of Little Colorado depletions is [a] part" (*id.* at 20). The meaning the United States ascribes to its term "project operation" is equally uncertain. The United States sometimes appears to suggest that all works and projects in the lower basin (past, present, and prospective) depending upon "project water supply," are one project—the Boulder Canyon Project—and distinctions between projects are thus obliterated. Elsewhere the United States recognizes, correctly, that the several projects and water uses below Lake Mead are not in any sense "one project," a point this Court has clearly recognized. See United States v. Arizona, 295 U.S. 174, 185-87 (1935); *cf.* United States v. Gerlach Live Stock Co., 339 U.S. 725, 733, 737-39 (1950). See U.S. Op. Br. 17, 25 n.6, 43.

[7]See discussion of §§ 14 and 18 *infra* at 62-75.

tions. (See Calif. Op. Br. 179 n.8, 181-82, 183, 186.)

To sustain its construction of section 5 of the Project Act, the United States relies upon remarks of two opponents of the bill denouncing it as an unwarranted assertion of federal power and upon an asserted failure of the proponents of the measure to protest their adversaries' statements. Following a quotation from the remarks of Mr. Colton of Utah, the United States comments: "The proponents of the bill made no response to this interpretation." (U.S. Op. Br. 27 n.8.)

Even if the United States comment were accurate, the inference it draws would be unfounded. Views expressed by opponents of an act are not persuasive legislative history.[8]

In fact, however, this United States comment is inaccurate. Mr. Colton's charges which the United States takes as a guide to construction were refuted by Mr. White of Colorado, a proponent of the bill[9] (and,

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[8]See Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951), per Mr. Justice Douglas: "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt."

In Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956), the Court quoted with approval the foregoing statement from *Schwegmann* and restated the basis for the rule (350 U.S. at 288 n.22): "An unsuccessful minority cannot put words into the mouths of the majority and thus, indirectly, amend a bill."

[9]Mr. White was a member of the committee which considered the fourth Swing-Johnson bill (*Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess., pt. 1, at II (1928)) and which reported favorably on the bill. H.R. REP. No. 918, 70th Cong., 1st Sess., pt. 1 (1928). He spoke in favor of the bill (69 CONG. REC. 9781) and voted against a motion to recommit, which would have defeated it (*id.* at 9989). He voted for the bill as amended by the Senate, which became the Project Act (70 CONG. REC. 837).

in effect, by Mr. Colton himself), in the following colloquy which occurred between the two quotations of Mr. Colton which are selected by the United States (69 CONG. REC. 9648-49):

> "Mr. COLTON. Congress can not allocate water. . . .
>
> ". . . .
>
> "Mr. WHITE of Colorado. A while ago the gentleman stated that he doubted whether or not Congress had the power at this late date to nullify, abrogate, or change the doctrine of priority in the use of the water.
>
> "Mr. COLTON. I think they have not that power.
>
> "Mr. WHITE of Colorado. *There is no attempt to do anything of that kind by this bill.* On the contrary, the bill expressly provides for a compact among six States, and the only State that has shown the slightest tendency to stay out of the compact is Arizona. Now, how can that affect a State that is not a member of the compact?
>
> "Mr. COLTON. It can not." (Emphasis added,)

Shortly before the quoted exchange between Mr. Colton and Mr. White, similar assertions by Mr. Colton were denied by Mr. Bankhead[1] who also favored the

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[1] "Mr. COLTON. . . . You are saying that you are going to take it [control] away from the States and place it in the Federal Government, and section 5 of this bill asserts that very principle. It provides that the Secretary of the Interior shall have control of all of the water stored in the reservoir and its delivery to any part of the river below. We deny that in principle and say it is against the very contract that this country has entered into with our Western States and contrary to the decisions of the United States Supreme Court.

fourth Swing-Johnson bill.[2]

Mr. Swing of California, the House author, responded as follows to Mr. Douglas' long and detailed speech,[3] from which the United States extracts a few lines (69 CONG. REC. 9635):

> "I only wish I had the time to go fully into each and every one of the contentions made by the gentleman from Arizona [Mr. Douglas].[4] They ought to be answered. They can be answered. They have been answered in the investigations made of the project and in the hearings held on this bill. No project has ever been presented to Congress which has been so thoroughly studied."

As Mr. Swing pointed out, the very contentions made by Mr. Douglas on the floor of the House had been challenged and thoroughly refuted in detailed hearings held on the bill; hostile Congressmen denounced the bill in hearings, debates, and lengthy filibusters on many grounds, including interference with states' rights. The charges had been and continued to be repeatedly denied by those favoring the bill.

"Mr. BANKHEAD. As I understand, the whole theory of this bill is predicated on the recognition of the right that the gentleman is now asserting, for the reason that nothing can be done by Congress under this bill until the States acting through this compact shall determine what their respective rights are in reference to this matter." 69 CONG. REC. 9648 (1928).

[2]Mr. Bankhead supported the measure and voted for the bill, 70 CONG. REC. 837 (1928).

[3]Mr. Douglas' full speech appears at 69 CONG. REC. 9623-35.

[4](Footnote ours.) H.R. Res. 208, 70th Cong., 1st Sess. (1928), had limited general debate on the Swing-Johnson bill (H.R. 5773) to eight hours, to be divided equally between opponents and proponents of the bill (69 CONG. REC. 9486, 9490), and part of the time of the proponents had expired (*id.* at 9491-99, 9506-09, 9510-13).

For example, Representative Swing had earlier given a conclusive answer to the United States contention concerning intrastate rights:[5]

> "[The water user] . . . 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. There is nothing in this bill which puts the Government in conflict with the water laws of Arizona or Utah or any other State. As a matter of fact, the reclamation law is adopted by section 13 [section 14 as enacted] of this bill, and section 8 of the reclamation act says that what the Government does must not be in conflict with the water laws of the States, so there can be no violence done State laws on this score.
>
> "If the water is used in Arizona, the water right must be acquired under the laws of Arizona; if in Nevada, under the laws of Nevada; if in California, under the laws of California."

At the time Mr. Swing made this statement, the first paragraph of section 5 of the bill as reported by the House Committee on Irrigation and Reclamation[6] was substantially identical with the first paragraph of section 5 of the act (Rep. app. 384).

It is unlikely that any member of the House took seriously Mr. Douglas' diatribe. For example, Mr. Douglas charged (69 CONG. REC. 9627):

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[5]*Hearings on H.R. 9826 Before the House Committee on Rules,* 69th Cong., 2d Sess., pt. 3, at 116 (1927). *Accord,* Mr. Swing's statement in *Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 56-57 (1928) (reproduced in Calif. Ex. 1804 (Tr. 12,237), at 2-4).

[6]H.R. REP. No. 1657, 69th Cong., 2d Sess., pt. 1, at 31 (Dec. 22, 1926); Calif. Ex. 2053 for iden. (Tr. 11,177) at 19.

> "[The bill] . . . vests in the Secretary of the Interior complete control over the waters of the Colorado in and below Boulder Dam. In doing that . . . there will be erected upon the ruins of the rights of States a great tyrannical, socialistic bureaucracy. Democracy will be in its throes of death."

The proponents of the bill did not directly respond to this interpretation. Would the United States therefore argue that the Secretary's power is intended to be coextensive with that of a "tyrannical, socialistic bureaucracy"?

Fears expressed by opponents of the measure in the House were echoed in the Senate. The charge that the bill gave control of water rights to the Secretary of the Interior was repeatedly answered by the proponents of the measure. Senator King offered an amendment, accepted as part of the bill, which became section 18 of the Project Act,[7] preserving state law as the foundation of water rights. Senator King's views, stoutly opposing federal control of water rights, were well known to the Senate.[8]

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[7]70 CONG. REC. 593 (Dec. 14, 1928). Section 18 provides: "Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement." Section 18 is discussed *infra* pp. 70-75.

[8]For example, eight days before Senator King offered § 18, he told the Senate, 70 CONG. REC. 169: "If the Senator [Hayden] means by his statement that the Federal Government may go into a stream, whether it be the Colorado River, the Sacramento River, or a river in the State of Montana, and put its powerful hands down upon the stream and say, 'This is mine; I can build a dam there and allocate water to whom I please, regardless of other rights, either suspended, inchoate, or perfected,' I deny the position which the Senator takes."

Senator King voted for the bill. 70 CONG. REC. 603 (1928).

Senator Hayden, at all times denying that Congress had the power to allocate the waters of the Colorado River, attacked the bill as an attempted assertion of unwarranted federal power; Senator Borah of Idaho totally rejected Senator Hayden's characterization of the bill.[9]

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[9]"Mr. HAYDEN. . . . We look upon the passage of the bill as an assault upon the sovereignty of the State of Arizona. It could be based upon no other theory than that Congress has the right to apportion the waters of the Colorado River *and its tributaries* in accordance with a certain document, regardless of the wishes of the State of California. It seeks to impose the terms of the Colorado River compact upon the State of Arizona without the consent of that State. Therefore we resist it. . . . [W]e feel justified in opposing the passage of any proposed legislation that in any manner may seek to divide the waters of the Colorado River, in which the State of Arizona has an interest, without the consent of that State.

"Mr. BORAH. Mr. President, I do not desire to argue the question, but lest I may be misunderstood in the future—because this question is likely to come back here in another form with reference to some other bill—when I shall vote for this bill I shall vote for it upon the supposition that a mere act of Congress can not take away any rights of the State of Arizona." 70 CONG. REC. 390-91 (1928). (Emphasis added.) Senator Borah voted for the bill. *Id.* at 603 (1928).

Later, during the same colloquy with Senator Hayden, Senator Borah said, *id.* at 391-92: "I can see how Arizona might lose her rights, not by reason of this legislation, but by reason of acts of appropriation going on in carrying out the terms of this bill in case Arizona did not assert her rights in court. If she stood by and water were appropriated to beneficial use in other States, she might lose her rights. She would not lose them, however, by reason of this legislation, but by reason of the acts of appropriation."

Senator Borah amplified his remarks shortly thereafter, *id.* at 392: "Undoubtedly, if Arizona stands idly by and does not protect her rights, either by appropriation or by such action in the courts as will protect them, she will lose her rights ultimately. That is one of the penalties of living under the doctrine of prior appropriation. If an individual has a farm or ranch, and the water is running by it, if he does not use it, his neighbor below him or above him can appropriate it and take it away from him, ultimately. So here, I presume, if Arizona should not act, she perhaps would be prejudiced by this legislation in the sense that the acts carrying it out would result in appropriations by others. *It would not be the act of Congress which took away her rights, however, but the acts of appropriation following as a result of it.*" (Emphasis added.)

c. Administrative construction

The United States contends that administrative practice establishes that the rule of ratability, not the principle of priority, applies to the rights intrastate of federal contractees *inter sese,* absent express contractual provisions to the contrary. The United States argument, if we understand it, is this: Administrative practice on the Colorado River, as evidenced by secretarial water delivery contracts, has been to disregard state law and to treat "applicable federal law" as controlling. There is no "applicable federal law" dictating how shortages shall be borne among "mainstream" contractees *inter sese,* except the water delivery contracts themselves. Provisions for ratability frequently appear in federal water delivery contracts with water users in a particular project. (U.S. Op. Br. 30-34.) Contracts containing no provisions relating to how shortages shall be borne "presumably [apply] the rule of ratability," says the Government in footnote 10, page 30.

Both the United States premises and its conclusions are unsound.[1]

The "applicable federal law" contains express provisions about how shortages are borne. The Boulder Canyon Project Act and the Reclamation Act of 1902 of which it is a part adopt state law with respect to intrastate water rights, and this, in turn, in the absence of express statutory or contractual provisions to the contrary, establishes priority a the basic characteristic of water rights.

The Reclamation Act was designed by Congress to

[1]See discussion *supra* pp. 42-46.

insure priorities for each individual reclamation project initiated under that law.[2] Since its enactment in 1902,

[2]Congress recognized that priorities were necessary to insure the integrity of the water right for each project. Representative Mondell of Wyoming, the House manager for the bill which became the Reclamation Act of 1902, explictly told the House (35 CONG. REC. 6678 (1902)):

"Section 8 follows the well-established precedent in national legislation of recognizing local and State laws relative to the appropriation and distribution of water, and instructs the Secretary of the Interior in carrying out the provisions of the act to conform to these laws. This section also clearly recognizes the rule of prior appropriation which prevails in the arid region and, what is highly important, specifies the character of the water right which is provided for under the provisions of the act."

See also Calif. Rebuttal Brief (filed with the Special Master, June 30, 1959) at 65-72 for a fuller discussion of the legislative history of § 8.

In the same vein, the United States argued in Kansas v. Colorado, 206 U.S. 46, 74 (1906), the principles of the riparian doctrine, which include proration, "would have the result of preventing the reclamation and cultivation of public arid lands and defeat the policy of the Government with respect thereto and would obstruct the administration of the so-called Reclamation Act of June 17, 1902." The Government told the Court that priority of appropriation, applied interstate, was the only appropriate doctrine to apply in that dispute (*id.* at 74-75):

"When, therefore, a dispute arises in respect to the waters of an interstate stream, such as involved in the present proceeding, the question to be determined is, What rule of law shall be applied, and what tribunal has the power to enforce the rule? The Government contends that this court has the power to find, apply and to enforce the proper rule. That it should find the same outside of the law of either State, not within the common law doctrine of riparian rights, strict or modified, but within the maxim *salus populi est suprema lex.* The rule to be applied should be one capable of enforcement and uniform application in both States. The rule which meets the requirements is not 'water runs; let it run'; but that 'water irrigates; let it irrigate.' In other words, that such waters may be appropriated and used . . . subject, also, to the limitation that priority of time of appropriation determines priority of right, irrespective of state lines."

It is apparent that Congress' effort to reclaim the public lands would be severely hampered if each federal reclamation project were required to prorate its water supply in times of shortage with junior users on a particular stream system, many of which are nonfederal projects against which the Secretary has no effective protection except the priority acquired pursuant to §§ 8 or 7 of the act.

each individual reclamation project throughout the West has acquired a priority under state law vis-a-vis other projects on that same stream system. The contracts executed with the appropriate entity representing the water users on a particular project or a division thereof (see, *e.g.,* Rep. 211-14), of course, make no reference to relative priorities as between that project and others, because such priorities have been established among them under the principle of priority embodied in state law in accordance with the directive of section 8. We would not expect the Government (at least the Secretary of the Interior) to seriously contend that the projects on other stream systems where the Government has complied with state law are on a parity with one another because the water delivery contracts serving those projects say nothing about relative inter-project priorities. Such a contention could never be sustained.

Moreover the United States inaccurately describes the administrative practice on the Colorado River. The United States suggests that water right application contracts with individual non-Indian landowners in the Reservation Division of the Yuma Project demonstrate the Secretary's practice to prorate shortages among "mainstream" federal contractees. It quotes from a water right application contract which provides an "equitable proportionate share * * * of the water actually available at the time for all of the area being watered from the same source of supply, *such proportionate share to be determined by the project manager.*" (U.S. Op. Br. 31, quoting Calif. Ex. 380; emphasis by the United States.) California Exhibits 378, 379, and 380 are water right applications bearing dates respectively of 1917, 1910, and 1948. All relate to the

same project and all relate to an appropriation by J. B. Lippincott for the United States, recorded July 13, 1905 (Calif. Ex. 13 (Tr. 8,833)).[3] Those exhibits refer to a proportionate share in a right with a 1905 priority under the United States appropriation. They do not refer to a proportionate share in "project water supply" in the Boulder Canyon Project—a project which did not come into existence until decades after many of the contract applications, of which these are illustrative, were written.

The United States reliance in footnote 11, page 31, upon the Secretary's 1959 contract with the city of Yuma, Arizona, is equally puzzling.[4] The city of

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[3]U.S. Finding 7.1.6, pp. 146-47, recited these facts:

"On July 8, 1905, J. B. Lippincott, Supervising Engineer, United States Geological Survey, for and on behalf of the United States of America, posted a notice of appropriation on the left bank of the Colorado River claiming three thousand cubic feet per second of the water of the Colorado River for irrigation, domestic, power, mechanical, and other beneficial uses in and upon lands in Yuma County, Arizona Territory which were to be served by the construction of Laguna Dam and a canal system extending from the Dam. On the same day a similar notice was posted on the right bank of the Colorado River claiming six thousand cubic feet per second of the water of the Colorado River for irrigation, domestic, power, mechanical, and other beneficial uses in and upon lands in 'the Yuma Valley adjacent to the Colorado River, below the point of diversion, and in the Imperial Valley, all situated in San Diego County, State of California,' which were to be served by the construction of Laguna Dam and a canal system extending from the Dam.

"Calif. Exs. 12, 13; U.S. Ex. 5, Tr. 15,366-15,369

"The lands described in these notices included the lands of the Reservation Division and almost all of the lands of the Valley Division of the Yuma Project. . . ."

[4]The text of the 1959 Yuma contract is reproduced in Calif. Ex. 7611 for iden. (Tr. 22,760). The contract (art. 6(a)(1), p. 4 of second pagination) is expressly subject to the prior fulfillment of all contracts for diversion at Imperial Dam for irrigation in Arizona; it subordinates Yuma's 1893 priority for 1,000 miner's inches (about 14,500 acre-feet annually at continuous flow) and substitutes a contract right to 50,000 acre-feet subordinate to all Arizona

Yuma, before the execution of the contract, had an appropriation senior to those agricultural districts under which she had been continuously using "mainstream" water for more than half a century. The city nevertheless, by specific contract, was required to subordinate not only her appropriative priorities but her preference under Arizona law as a domestic user to competing agricultural districts in Arizona which have water contracts with the Secretary even though those districts' contracts say nothing about priority. Whatever may be said for this curious "administrative practice," it is certainly not an example evidencing that (a) silence implies proration, or (b) proration is a better dogma than priority.

There is an additional reason why the Government's suggestion that contractees "presumably" prorate with each other should not be taken seriously. That suggestion is entirely inconsistent with the priorities vigorously advocated by the United States and adopted by the Master for Indian reservations and other federal establishments. Rights for Indian reservations and other federal establishments derive from federal law, precisely like the rights the United States says arise from water delivery contracts. Although the incidents

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rights to divert at Imperial Dam. The notice of Yuma's appropriation is Ariz. Ex. 316A (Tr. 19,980).

The United States reliance upon the Yuma contract is likewise curious in view of the express disclaimer in the contract "that this contract is not intended, nor shall it be construed as affecting adversely any claim or contention in the Colorado River litigation [earlier defined as the pending case of "Arizona v. California, et al., No. 9 Original in the United States Supreme Court"] of any contractor for Lake Mead storage outside of the State of Arizona." Art. 27(2). California offered this city of Yuma contract as evidence that the city of Yuma had diverted and used Colorado River water for over 60 years, under an ancient appropriation, *without* a contract. Calif. Op. Br. plate 3 n.17.

of these federal rights, as adjudicated by the Master, are antithetical to appropriative rights in almost every respect, there is one respect in which these federal rights are identical to appropriative rights: Each bears a priority of the date of its creation, even though not one word was spoken in the creation of such rights about priority. The United States supports priorities for these exclusively federal rights, and it does not suggest that there is a lurking presumption that ratability applies to them.[5]

The presumption from contractual silence is priority, not parity; and this cannot be transmuted into the opposite inference when a parallel is drawn with respect to interstate water rights.

2. *The United States Misconstrues Sections 14 and 18*

To sustain its argument that federal water delivery contracts are the source of water rights, interstate and

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[5]The United States would reach this incomprehensible result: Although the Colorado River Indian Reservation has a water right with priorities of 1865, 1873, 1874, 1876, and 1915 for the respective areas reserved to the Indians on those dates, and Fort Mohave Indian Reservation has a water right with priority dates of 1890 and 1911 on the same basis, the Valley Division of the Yuma Project in Arizona by contrast would be forced to prorate a water shortage with a future Central Arizona Project for which a future similar contract may be written. This is because the Valley Division's water delivery contract written in 1951 fails to specify either priority or proration, and "presumably" (U.S. Op. Br. 30 n.10) therefore the rule of ratability applies. Water rights of the Valley Division initiated by appropriation beginning in 1890 and bought by the United States for the Yuma Project in 1908, another appropriation by the United States in 1905, the construction of project works long before the Project Act was passed, and beneficial use of water throughout this century, all avail the Valley Division nothing. The other projects in the Yuma area whose water contracts specify neither priority nor proration (*id.* at 30) are in the same perilous situation. The United States evidence establishing the appropriative right of the Valley Division is detailed in Calif. Finding 14C:104, p. XIV-25, with record citations.

intrastate, and that those contracts do not embody or recognize state law, the United States is compelled to eliminate the provisions of sections 14 (with its incorporation of section 8 of the Reclamation Act of 1902) and 18 of the Project Act, by limiting the effect of those provisions to matters which are irrelevant to this case.

a. Section 8 of the Reclamation Act of 1902

Despite its recognition that the Project Act is a part of the reclamation laws, including the Reclamation Act of 1902 (U.S. Op. Br. 32-33), the United States attempts to divorce section 8 of the Reclamation Act of 1902 from the Project Act. It contends that section 8, like section 27 of the Federal Power Act, is relevant only insofar as it supplies an analogy useful in construing section 18 of the Project Act (U.S. Op. Br. 40-41).

Section 27 of the Federal Power Act (unlike section 8 of the Reclamation Act of 1902) is framed in terms of a saving clause. It contains no command to the Secretary, but provides:[1]

> "[N]othing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

It might be said of section 27 of the Federal Power Act that "freedom of the States to enact laws does not compel the conclusion that the [United States] . . . is bound by those laws" (U.S. Op. Br. 39),

[1] 41 Stat. 1077 (1920), 16 U.S.C. § 821 (1958).

but this cannot be said of section 8 of the Reclamation Act.

Section 8 of the Reclamation Act of 1902 is not merely a useful tool in construing the provisions of the Project Act, it is incorporated by sections 12 and 14 as an integral part of the Project Act itself. Section 8 does not merely state that Congress does not intend to interfere with state law; it specifically commands the Secretary to proceed in conformity with that law:[2]

> "[N]othing 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 . . .*" (Emphasis added.)

The United States effort to eliminate the command of section 8 by restricting its operation to the "acquisition of rights to use water for a reclamation project" is unsupportable. Nothing in the language of section 8 lends itself to the interpretation urged by the United States. This Court in *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275 (1958), did not hold that state law is made controlling by section 8 *only* where the United States follows state procedure to appropriate water, or where the United States acquires water rights within a state by purchase or in the exercise of its power of eminent domain. The Court had no occasion to pass upon the construction of section 8 here

[2] 32 Stat. 390 (1902), 43 U.S.C. § 383 (1958).

urged by the United States, and it did not do so. The United States itself recognizes, in a footnote, that the *Ivanhoe* case is not here in point. (U.S. Op. Br. 42 n. 19.)

The United States fails to recognize that this Court in *Ickes v. Fox,* 300 U.S. 82 (1937), definitively rejected the United States interpretation of section 8 here urged. The Court held that title to water rights within a reclamation project vests in the project landowners, in accordance with principles of state law, and not in the United States. The Government's attempt, in footnote 19, page 43, to construe that holding to the contrary is also refuted by the interpretation placed on *Ickes v. Fox* by the court of appeals in a subsequent installment of the same litigation:[3]

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

In *Nebraska v. Wyoming,* 325 U.S. 589, 612-16 (1945), the Court confirmed its construction of section 8 by quoting with approval its language in the decision of *Ickes v. Fox.* The Court again made clear that principles of priority of appropriation embodied in

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

state law controlled the title and disposition of water rights and that the Secretary was bound to conform to those principles by the operation of section 8;[4] moreover, these principles were held dispositive of an *interstate* controversy.

The Government argues that this Court's decision in *Nebraska v. Wyoming,* construing and applying section

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[4]Nebraska v. Wyoming, 325 U.S. 589, 614, 615 (1945): "The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use. . . . Indeed § 8 of the Reclamation Act provides as we have seen 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.' "

The Court in Nebraska v. Wyoming made an allocation of the natural flow only and did not make any allocation of the stored water. (325 U.S. at 630, 631.) However, the Court did indicate that the rights of the United States to the stored water were governed by state law (*id.* at 629-30): "The United States claims that it is at least entitled to be recognized as the owner of the storage water with full control over its disposition and use under Wyoming law. That seems to be true under Wyoming law. . . . The decree which is entered will in no way cloud such claim as it has to storage water under Wyoming law; nor will the decree interfere with the ownership and operation by the United States of the various federal storage and power plants, works, and facilities. We repeat that the decree is restricted to an apportionment of the natural flow." The Court later stated (*id.* at 639-40): "Certainly an apportionment of storage water would disrupt the system of water administration which has become established pursuant to mandate of Congress in § 8 of the Reclamation Act that the Secretary of the Interior in the construction of these federal projects should proceed in conformity with state law. In pursuance thereto all of the storage water is disposed of under contracts with project users and Warren Act canals. It appears that under that system of administration of storage water *no State and no water users within a State are entitled to the use of storage facilities or storage water unless they contract for the use. See Wyo Rev Stats (1931), §§ 122-1504, 122-1508, 122-1602.*" (Emphasis added.) *Compare* the emphasized language *with* the last sentence of the first paragraph of § 5 of the Project Act: "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

8, is not here in point. We disagree. The Government identifies the distinction which it perceives as follows (U.S. Op. Br. 43 n.19):

> " 'We intimate no opinion whether a different procedure might have been followed so as to appropriate and reserve to the United States all of these water rights. No such attempt was made. * * * [In this case, it is to be noted, an entirely different procedure has been followed. The United States has *not* followed State prescribed procedures to appropriate the Boulder Canyon Project water supply.] The rights so acquired are as definite and complete as if they were obtained by direct cession from the federal Government. Thus even if we assume that the United States owned the unappropriated rights,[5] they were acquired by the landowners in the precise manner contemplated by Congress.' (325 U.S. 614-615.)" (All bracketed material supplied by the United States.)

The question upon which the Court in *Nebraska v. Wyoming* thus intimated no opinion was the power of Congress to appropriate and reserve to the United States all of these water rights by enacting a statute providing some procedure different from that stated in section 8 of the Reclamation Act. The Court was not adverting to any assumed power of the *Secretary* to acquire title

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[5](Footnote ours.) In Nebraska v. Wyoming, 325 U.S. 589, 611 (1945), the Government had argued that it owned all of the unappropriated water in the river prior to the time it filed appropriations for the North Platte and Kendrick projects; therefore its underlying ownership entitled it to an apportionment free from state control. In the Government's brief in this case, it asserts (U.S. Op. Br. 38 n.15): "We do not argue the question of federal ownership of the rights to use the waters of the Colorado River or the unappropriated rights to use the waters of the tributaries. . . ."

for the United States or to affect the title of water users by his choice of some procedure other than that stated in section 8. Contrary to the United States suggestion, section 8 controls the Secretary; the Secretary does not control the applicability of section 8.[6]

> In *Nebraska v. Wyoming* and here, the water rights "were acquired by the landowners in the precise manner contemplated by Congress." (325 U.S. at 615.)

The precise manner Congress contemplated was the acquisition of water rights in conformity with the principles of state law adopted by section 8 of the Reclamation Act.

b. Section 14 of the Project Act

Section 14 expressly makes the Project Act a part of the reclamation laws. Congress' purpose in integrating the Project Act into the federal reclamation laws was to incorporate the directive found in section 8 of the Reclamation Act of 1902: The Secretary of the Interior shall conform to the laws of the states relating to the control, appropriation, use, and distribution of water used in irrigation. The rights of landowners to receive and use the waters developed by a federal reclamation project, whether confirmed or initiated by

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[6]The contentions of the United States are by no means clear. The Government appears to suggest that so long as the Secretary of the Interior does not choose to file an appropriation on behalf of the United States, § 8 is not applicable to control the incidents of water rights either in contests between water users *inter sese* or between water users and the United States. If this is the Government's contention, it is wrong.

The Secretary's omission to comply with the mandate of § 8 could not, and does not, affect the command of Congress that the Secretary obey § 8. His omission could not, and does not, affect the incidents of water rights "acquired by the landowners in the precise manner contemplated by Congress" either in respect of each other or in respect of their rights against the United States.

federal water delivery contracts, were to be controlled by section 8.[7]

Significantly, the United States fails to mention *United States v. Arizona,* 295 U.S. 174, 183 (1935), where the Court dealt with this very question:

> "Arizona owns the part of the river bed that is east of the thread of the stream. *New Jersey v. Delaware,* 291 U.S. 361, 379 *et seq.* Her jurisdiction in respect of the appropriation, use and distribution of an equitable share of the waters flowing therein is unaffected by the Compact or federal reclamation law."[8]

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[7]Senator Johnson, sponsoring the legislation in the Senate, made clear the effect of § 14 when in February 1927 he addressed the Senate stating, 68 CONG. REC. 4291: "I repeat to you that this is a reclamation measure, made so by section 13 [now 14] of the bill. Adverting, then, to section 8 of the reclamation law, let us see how much there is in this statement that is made about appropriating the water of Arizona and taking the property of that State.

"Section 8 of the reclamation act 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.'

"So, first, our act is a reclamation act.

"Secondly, under the reclamation law we can no more affect the rights of Arizona in the waters that flow through Arizona than we could affect the title of any Arizona resident to any particular property. In passing, I may remark that it is entirely a misnomer to say that Arizona or any other State in the West, after all, has title to water. Under western law, the appropriator of water has a title to the use when the application is beneficially made of the water that he thus appropriates; but to talk of title of the State to water is entirely a misapprehension and misapplication of terms."

[8]The Court's footnote 2, 295 U.S. at 180, said: "By §§ 12 and 14 of the Boulder Canyon Project Act, the Reclamation Law is defined to mean the Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof and supplemental thereto, including the Boulder Canyon Project Act."

c. Section 18 of the Project Act

The Master limits the effect of section 18 to intrastate consequences; the United States argues that section 18 has no consequences.

Section 18 of the Project Act provides (Rep. app. 395):

> "Nothing herein shall be construed as interfering with such rights as the States *now* have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement." (Emphasis added.)

The United States ask the Court to read the word "now" as if Congress had said "used to."[9] Nothing in the history of the statute lends the slightest support to the United States argument.[10]

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[9]The United States seems to read § 18 to permit the states to enact only ineffective legislation (U.S. Op. Br. 39): "Statutory language which merely preserves 'such rights as the States now have' cannot be construed as a grant to the States of any part of the federal government's authority to control the operation of its own projects. Freedom of the States to enact laws does not compel the conclusion that the Secretary of the Interior is bound by those laws." Section 8 says the Secretary *shall* comply with those laws. What more compelling language could have been chosen?

[10]A Government footnote points out that one draft of the third Swing-Johnson bill contained a former § 8(a) which was omitted from the act ultimately passed (U.S. Op. Br. 35-36 n.13). Former § 8(a) provided that appropriations of Colorado River water in connection with the works authorized by the act shall be made in conformity with the laws of those states "which may or shall have approved the Colorado River compact." Former § 8(a) was proposed and omitted because of interbasin considerations; it had nothing at all to do with the question of what law governs intrastate rights within the lower basin.

Former § 8(a) was inserted by the upper basin representatives in an effort to cajole Arizona into ratifying the Compact for the protection of the upper basin states, as upper basin spokesman,

The United States relies (U.S. Op. Br. 35) upon Senator Johnson's remarks when he accepted section 18 in his bill (70 CONG. REC. 593):

> "Mr. President, with the understanding that the verb relates to the present—the rights they now have to do all of the things that subsequently follow—I have no objection to the amendment."

The United States apparently contends that Senator Johnson meant to say that he agreed to the amendment so long as the "verb relates to the past." It would have been fatuous for Senator Johnson to receive assurance that states' rights not yet in existence were unimpaired.

Delph E. Carpenter, very clearly explained. *Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. 113, 184-85 (1926). See also Calif. Op. Br. 179 n.8, 180-81, 178 n.4. Upper basin states obviously had no interest in intra-lower basin allocation of water or the water rights of users in the lower basin *inter sese.*

On March 20, 1928, the Senate Committee on Irrigation and Reclamation, without comment, proposed in its favorable report on the bill a committee amendment to strike former § 8(a) from the fourth Swing-Johnson bill. S. REP. No. 592, 70th Cong., 1st Sess., pt. 1, at 3 (1928); Calif. Ex. 201 (Tr. 7,712), at 10; Calif. Ex. 2001 (Tr. 11,173), at 13. It is not credible that the committee report intended, without one word of explanation, to make the major change in the bill suggested by the United States in the elimination of this language that state law does not govern intrastate rights and priorities, contrary to the views of both of its authors (*supra* pp. 54, 69 note 7). See Trailmobile Co. v. Whirls, 331 U.S. 40, 61 (1947): "[T]he most important committee changes relied upon were made without explanation. The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers."

Furthermore, the Senate committee hearings, *Hearings on S. 728 and S. 1274 Before the Senate Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 33, 39-40 (1928), suggest that former § 8(a) was dropped from the bill because it was coercive in requiring Arizona to ratify the Compact before she could receive the benefits of stored water. The committee undoubtedly considered that the provisions retained in the bill (present §§ 8(a) and 13(b), (c), and (d)) subjecting the United States and all claiming under it to the Compact would adequately accomplish the purpose of former § 8(a) to protect the upper basin's Compact apportionment against a nonratifying Arizona.

Senator Johnson very obviously intended to preserve for the future all of the rights which the states then had.[11] Statements of Senator Johnson[12] and Senator King,[1] author of section 18,[2] make clear their intention that state law should be preserved and applied prospectively and that nothing in the Project Act should be construed as if the act "otherwise herein provided" (section 14).

Again, the United States ignores the fact that this Court has already construed section 18 in accordance with its plain and explicit terms:[3]

> "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. 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

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[11]Congress had been repeatedly informed about the bases and characteristics of western water rights (Calif. Op. Br. 65-66). Moreover, it must have been aware of the principle, settled for more than 100 years by this Court, that in absence of specific federal legislation, the power of the states to promote, limit, or destroy navigability of the waters within their boundaries is unlimited. *E.g.*, Wilson v. The Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829); Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1866).

[12]68 CONG. REC. 4291 (1927), quoted *supra* note 7.

[1]70 CONG. REC. 169 (1928), quoted *supra* p. 55 note 8.

[2]*Id.* at 593.

[3]Arizona v. California, 283 U.S. 423, 460-62 (1931).

flow within or on its borders. On the contrary, section 18 specifically declares that nothing therein '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 water within their borders, except as modified' by interstate agreement. As Arizona has made no such agreement, the Act leaves its legal rights unimpaired."

This decision has been the consistent basis of administration of the Colorado River by the Secretary of the Interior. In a memorandum adopted by the Commissioner of Reclamation, and which was the basis for withdrawing 1933 regulations offering Arizona a contract, the above passage from the Court's opinion was quoted, somewhat more fully, with this conclusion:[4]

"From this quotation it is apparent that the State of Arizona is entitled to take water from the Colorado River for beneficial use *subject to the rights of prior appropriators.* It appears to me that it is not desirable for the Secretary of the Interior to endeavor to limit or qualify this right except by lawful diversions from the river which may be made by the United States for appropriate use." (Emphasis added.)

In 1937 the Acting Solicitor of the Interior Department analyzed the same decision for Secretary Ickes:[5]

"The decision of the Supreme Court seems to leave Arizona in a position to appropriate any un-

[4]Calif. Ex. 7600 for iden., Tr. 22,760.
[5]Calif. Ex. 7754 for iden., Tr. 22,760.

appropriated water of the Colorado River if it could put such water to beneficial use, and this *without reference to authority given by Congress in the Boulder Canyon project act.*

"It is my opinion that the Secretary of the Interior, in making a contract for repayment of construction costs with landowners on the Gila project, or with an irrigation district comprising a similar area may agree to sell water from Boulder Canyon Reservoir, *but such sale must be subject to prior rights* and to the Colorado River compact." (Emphasis added.)

The authorization for the Gila Project in 1937 subsequently signed by the Secretary and the President did exactly that:[6]

"In all sales of water rights it will be necessary to prescribe that the water supply of the [Gila] project is subject to the Colorado River compact, and to the Boulder Canyon Project Act and to the sales of water under the compact and said act and to the treaty which it is anticipated will be made with Mexico fixing that country's rights in the flow of the Colorado River."

The United States now appears to suggest that if the principles which have been long and consistently recognized are applied to control the title and incidents of water rights of water users *inter sese,* the power of the Secretary effectively to control the dam and reservoir for the purpose of "controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery

[6]Ariz. Ex. 60 (Tr. 269), p. 123.

of the stored waters . . . and for the generation of electrical energy" (Project Act § 1) is somehow impaired. (U.S. Op. Br. 36-40.) The United States fails to explain how appropriation, long recognized as applicable to the Colorado River and other streams on which federal projects are located, will somehow hamper the Secretary in fulfilling the purposes of the act made dominant by section 6. The Secretary has had no uncertainty about the basis of water rights since Mr. Justice Brandeis delivered the opinion of this Court in 1931.

We do not insist upon any doctrinaire distinction between federal and state law. We think that appropriations under state law, which control intrastate rights, applied across state lines as a matter of "federal common law," to use Mr. Justice Brandeis' term,[7] are the basis of water rights within the limitations accepted by agreement of the affected states. But if federal water delivery contracts are the exclusive basis of water rights and if those water rights have the same attributes as rights under federal common law, we do not care whether it is Mr. Justice Brandeis' or the Government's label which is affixed to the result. The Master's denial of interstate priorities is contrary to the rationale of both.

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[7]Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938).

PART THREE

ANSWER TO THE ARIZONA OPENING BRIEF

PART THREE

ANSWER TO THE ARIZONA OPENING BRIEF

§ I. THE SEVERANCE ISSUE: THE LIMITATION ON CALIFORNIA CANNOT REFER TO THE UPPER DIVISION'S AVERAGE ANNUAL DELIVERY OF 7,500,000 ACRE-FEET AT LEE FERRY PROVIDED BY ARTICLE III(d) OF THE COLORADO RIVER COMPACT

Arizona offers a rewritten version of the Colorado River Compact apparently as an alternative basis for the conclusion which the Master reaches by rewriting the words of the limitation. The only merit in Arizona's argument is that it attempts to harmonize the scope of the Compact and the limitation. (See pp. 18-29 *supra.*) This commendable effort fails, however, for a number of reasons given by the Master himself, any one of which is conclusive; Arizona fails even to mention the most important of these—that her proposed construction is physically impossible.

Arizona asserts:

1. The annual beneficial consumptive use of 7,500,000 acre-feet of water apportioned to the lower basin states by Article III(a) of the Colorado River Compact is the same as the average annual flow of 7,500,000 acre-feet at Lee Ferry specified in Article III(d) of the Compact.[1] (Ariz. Op. Br. 62-63, 72-81.)

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[1]Article III(d) provides, Rep. app. 373: "The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact."

2. If this were not the meaning of the Compact as negotiated, it is the meaning that must be given to the Compact because Congress so understood it in giving its constitutionally required consent to the Compact in the Project Act; indeed, Congress accordingly amended or modified the Compact. (Ariz. Op. Br. 67-72.)

Arizona's argument thus rejects the Master's patentable novelty, which divorces the Compact from the limitation, and substitutes one of her own invention disclosed for the first time after 30 years of controversy in so-called "amended" pleadings tendered to the Master at the close of trial (Rep. 136-37).[2]

The fundamental conflict between Arizona and the Master is masked by the variable content Arizona's brief gives to the term "main stream." Sometimes Arizona uses the term in the Master's unique sense to mean only the main Colorado River below Lake Mead (Rep. 183), and sometimes in the dictionary sense to mean the entire main Colorado River from Lee Ferry to the Mexican boundary. In argument that the Colorado River Compact apportions water at Lee Ferry, excluding tributaries, Arizona uses the term in the dictionary sense. Geographically, the two definitions are 275 river miles apart, but in terms of the ultimate decision and the reasoning which produces it, the gap between the two definitions is even greater.

Our answers to Arizona's arguments are simple:

1. The Colorado River Compact does not and cannot mean what Arizona says it means.

2. Congress did not so amend it.

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[2]See Calif. Ex. 7302A for iden. (Tr. 22,384), a comparison of Arizona's original and proposed "amended" Bill of Complaint.

A. Arizona's Proposed Construction of the Colorado River Compact Founders on Both Legal and Physical Impossibility, as the Master Holds (Rep. 142-44)

The apportionment made to the lower basin by Article III(a) of the Colorado River Compact encompasses beneficial consumptive uses throughout the Colorado River system (main stream and tributaries) in the lower basin. Arizona's attempt to write the lower basin tributaries out of the Compact falls before its clear and explicit language, the reports of its negotiators, and the rational character of its literal meaning. But even if Arizona's proposed construction were legally permissible, it is physically impossible.

1. *Arizona's Construction of the Colorado River Compact Is Not Supported by Any Colorable Legal Argument*

a. The language of the Compact

The Master correctly concludes that the "unmistakable language" of the Compact "subjugates both mainstream and tributaries" to its rule (Rep. 143).[3] The

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[3]Here is the language of Article III(a) with the express definitions of "Colorado River System" from Article II(a) and "Lower Basin" from Article II(g) italicized and bracketed after those terms:

"There is hereby apportioned from the Colorado River System [*that portion of the Colorado River and its tributaries within the United States of America*] in perpetuity to the Upper Basin and to the Lower Basin [*those parts of the States of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry*], respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist."

Article III(b) gives the lower basin "the right to increase its

Court has already held that the Compact means what it says, as against an earlier Arizona effort to perpetuate testimony of the Compact negotiators that it means something different. *Arizona v. California,* 292 U.S. 341 (1934) (alternative holding).

Arizona's argument based on the Compact's use in Article III(a) of the phrase, "*from* the Colorado River System," rather than "*of* the Colorado River System" (Ariz. Op. Br. 75) is a sophistry: The words "of" and "from" have identical meanings in this context.[4] "Waters *of* the Colorado River System *not covered by* the terms of this Compact" referred to by Article VI (italicized thus in Ariz. Op. Br. 75) are the system waters "unapportioned by paragraphs (a), (b), and (c)" of Article III which are the subject of further equitable apportionment after October 1, 1963. (See Articles III(f) and III(g) of the Compact.)

b. The reports of the Compact negotiators

The reports of many of the Compact negotiators—Arizona's evidence[5]—make explicitly clear that the

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beneficial consumptive use *of such waters* by one million acre-feet per annum." (Emphasis added.)

[4]"Of" according to Webster's New International Dictionary (2d ed. unabridged) means "from." "From," according to the same source, means "out of." If Article III(a) said "there is hereby apportioned *of* the Colorado River System in perpetuity," it would make neither good sense nor good grammar. Thus, Article III(b) permits the lower basin to increase its beneficial consumptive use "*of* such waters" by one million acre-feet per annum. Articles III(a) and III(b) obviously refer to the same waters. See Arizona v. California, 292 U.S. 341, 358 (1934): "Paragraph (a) apportions waters 'from the Colorado River system,' i.e., the Colorado and its tributaries, and (b) permits an additional use 'of such waters.'" *Accord,* Mr. Hoover's answer to Mr. Hayden's questionnaire, reported to Congress, quoted *infra* p. 81 note 6.

[5]Arizona put these Compact negotiators' reports in evidence at the outset of the trial. Although Arizona did not reproduce them

Compact was intended to encompass lower basin tributaries as well as the main stream.[6] Neither in these

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in the bound volumes of her exhibits which she supplied the Special Master and the Court, California has included all of them in volume 24 of her own set of exhibits supplied to the Court.

[6]The most explicit discussion of the systemwide scope of the Compact is found in Ariz. Ex. 55 (Tr. 260), answers to 26 questions propounded by [then] Representative Carl Hayden of Arizona to Hon. Herbert Hoover, federal representative to and chairman of the commission which negotiated the Compact, questions 4 (A33), 6 (A34), and 8 (A35):

> *"Question 4. Why was the term 'Colorado River system' used in paragraph (a) of Article III, wherein 7,500,000 acre-feet of water is apportioned to the upper and lower basins, respectively?*
>
> "[Answer:] This term is defined in Article II as covering the entire river and its tributaries in the United States. No other term could be used, as the duty of the commission was to divide all the water of the river. It serves to make it clear that this was what the commission intended to do and prevents any State from contending that, since a certain tributary rises and empties within its boundaries and is therefore not an interstate stream, it may use its waters without reference to the terms of the compact. The plan covers all the waters of the river and all its tributaries, and the term referred to leaves that situation beyond doubt."
>
> *"Question 6. Are the 1,000,000 additional acre-feet of water apportioned to the lower basin in paragraph (b) of Article III supposed to be obtained from the Colorado River or solely from the tributaries of that stream within the State of Arizona?*
>
> "[Answer:] The use of the words 'such waters' in this paragraph clearly refers to waters from the Colorado River system, and the extra 1,000,000 acre-feet provided for can therefore be taken from the main river or from any of its tributaries."
>
> *"Question 8. As a matter of fact more than 1,000,000 acre-feet of water from the tributaries of the Colorado below Lee Ferry are now being beneficially used and consumed within the State of Arizona. Will the excess above that amount be accounted for as a part of the 7,500,000 acre-feet first apportioned to the lower basin from the waters of the 'Colorado River system' as provided in paragraph (a) of Article III?*
>
> "[Answer:] By the provisions of paragraphs (a) and (b), Article III, the lower basin is entitled to the use of a total of 8,500,000 acre-feet per annum from the entire Colorado River system, the main river and its tributaries. All use of water in that basin, including the waters of tribu-

reports nor in any other evidence of the intent of the negotiators is there a scintilla of evidence supporting the present Arizona view. Some of these reports were before Congress.[7]

Arizona tries only obliquely to rely upon one Compact negotiator, Frank C. Emerson of Wyoming, to support her novel contention,[8] but her reliance is com-

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taries entering the river below Lee Ferry, must be included within this quantity. The relation is reciprocal. Water used from these tributaries falls within the 8,500,000 acre-feet quota. Water obtained from them does not come within the 75,000,000 acre-feet 10-year period flow delivered at Lee Ferry, but remains available for use over and above that amount."

See also Ariz. Ex. 46 (Tr. 255), at A78, report of Delph E. Carpenter, Compact negotiator for Colorado; Ariz. Ex. 47 (Tr. 256), at A110, report of Stephen B. Davis, Compact negotiator for New Mexico; Ariz. Ex. 49 (Tr. 257), at A69, statement by Richard E. Sloan, legal adviser to Arizona's Compact negotiator; Ariz. Ex. 50 (Tr. 258), at A58, statement by W. S. Norviel, Compact negotiator for Arizona; Ariz. Ex. 51 (Tr. 258), at A127, report of Frank C. Emerson, Compact negotiator for Wyoming; Ariz. Ex. 57 (Tr. 262), at A114, A117, report of R. E. Caldwell, Compact negotiator for Utah.

[7]Carpenter's report (Ariz. Ex. 46, *supra* note 6) appears at 70 CONG. REC. 577-84 (1928). Hoover's answers to Hayden (Ariz. Ex. 55, *supra* note 6) are quoted in full at 64 CONG. REC. 2710-13 (1923) and are repeated in part during the December 1928 debates on the fourth Swing-Johnson bill at 70 CONG. REC. 460 (Senator Hayden quoting question and answer 10 re surplus) and 466 (Senator Johnson quoting question and answer 4 re Colorado River system).

[8]In her discussion of the upper division governors' proposal to divide 7,500,000 acre-feet of flow at Lee Ferry among Arizona, California, and Nevada, Arizona asserts (Ariz. Op. Br. 62-63): "It is . . . plain that the water referred to was that apportioned by Article III(a) of the Compact, for the total quantity dealt with by the Governors aggregated 7,500,000 acre-feet per annum, exactly the same quantity which was apportioned to the Lower Basin by Article III(a).[27]" In support of this statement, Arizona's footnote 27 asserts: "The Governors were contemporaries of the negotiators of the Compact. Indeed, Governor Emerson of Wyoming, who voted for the resolution passed at the Governors' Conference, had been the Compact Commissioner for Wyoming."

The upper division governors' proposal, as the Master points

pletely misplaced. In fact, Governor Emerson made clear during congressional hearings on the Project Act that he considered the "Colorado River system" to include the main Colorado River and *all* tributaries.[9]

c. The rational basis of the Compact's inclusion of all tributaries in the United States

Arizona argues that "the only water available to both the Upper and Lower Basins and to *which both could lay claim* was water rising in the Upper Basin and descending to the Lower." (Ariz. Op. Br. 74.)

Obviously, no one contends that water from lower basin tributaries will flow upstream to the upper basin. This does not mean, however, that a Compact whose purpose was to allocate benefits of the Colorado River system resource should disregard any portion of that

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out, related to the delivery of water to be made under Article III(d) and had nothing to do with the apportionment made by Article III(a) (Rep. 188-89). The Master relates the limitation neither to III(d) nor to III(a), but to a body of water quite different from that described in either of these paragraphs—the water in Lake Mead and below.

[9]Here is what Governor Emerson told the Senate Committee on Irrigation and Reclamation on December 19, 1925. Senator Ashurst of Arizona had been arguing that the Gila River is of no interest to the upper basin since its waters cannot be used there. Said Mr. Emerson (*Hearings Pursuant to S. Res. 320 Before the Senate Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. 765 (1925)): "I am not able to see your argument in regard to the Gila River—I think it is as much a part of the Colorado River system as our [Wyoming's] Green River."

Senator Ashurst was not satisfied, and a little later returned to the fray (*id.* at 767):

"Senator ASHURST. I regret to see so well informed a man as yourself go into the domain of speculation and imagination and think that we are going to injure Colorado by using the waters of the Gila River or injure Wyoming by using the waters of the Gila River. . . .

"Mr. EMERSON. As a witness here before your committee, I shall have to assert again that the Gila River is just as much a tributary of the Colorado River as are the various other small tributaries thereof."

resource. In fact, the Compact was negotiated with the future Mexican Treaty very much in the negotiators' minds,[10] as Article III(c) makes clear.[1] As to Mexico, all of the states are upstream users.

The principle familiar in water law which gives an upstream appropriator an interest in the use of water from a downstream tributary, although the upstream appropriator can never physically use such water, also gives the upper basin an interest in lower basin tributaries. (See Calif. Op. Br. 99-100.) We need only add that every reason to include tributaries in the Compact applies to the limitation. The limitation is expressly for the benefit of the upper as well as the lower states, and was insisted upon by the upper states to fill a void left in protection afforded to the upper basin by the Compact if Arizona failed to ratify it (Rep. 165).

2. *Arizona's Rewritten Compact Cannot Physically Operate*

Arizona says that the III(a) apportionment to the lower basin is only from the main stream at Lee Ferry.[2]

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[10]See Ariz. Ex. 46 (Tr. 255), at A78, A81, report of Delph E. Carpenter, Compact negotiator for Colorado; Ariz. Ex. 49 (Tr. 257), at A70, statement by Richard E. Sloan, legal adviser to Arizona's Compact negotiator; Ariz. Ex. 50 (Tr. 258), at A61-62, statement by W. S. Norviel, Compact negotiator for Arizona; Ariz. Ex. 51 (Tr. 258), at A127, report of Frank C. Emerson, Compact negotiator for Wyoming; Ariz. Ex. 53 (Tr. 259), at A28, report of Herbert Hoover, federal representative to and chairman of the commission which negotiated the Compact; Ariz. Ex. 55 (Tr. 260), at A35, Hoover's answers to Hayden.

[1]The effect of the system concept upon the impact of the Mexican Treaty burden under Article III(c) of the Compact is described at 22-24 *supra*.

[2]Ariz. Op. Br. 80-81: "It is Arizona's position that the terms of the Compact, when considered in relation to the conflict between the two basins, the purposes which the framers sought to achieve and the geographical and physical facts confronting them,

The compact Arizona describes bears little resemblance to the Colorado River Compact which, in Article III(a), apportions the "beneficial consumptive use" of 7,500,000 acre-feet per annum of Colorado River system water. The Master says (Rep. 148-49), and all parties now agree:

> "In the Compact, 'beneficial consumptive use' means consumptive use (as opposed to non-consumptive use, *e.g.* water power) measured by the formula of diversions less return flows, for a beneficial (that is, non-wasteful) purpose. This understanding of the term is reflected in several of the commissioners' reports. (See Ariz. Exs. 46, 52, 54, 57.)"

This definition is indistinguishable from the meaning of "consumptive use," which is the yardstick for the allocation of the recommended decree (Decree art. I(A), Rep. 345), and of "aggregate annual consumptive use (diversions less returns to the river)" which is the measure specified for the limitation on California (Rep. 185-94; Rep. app. 382).[3]

So long as the sun shall shine and water evaporate and transpire, a compact such as Arizona describes could

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lead directly to the conclusion that Article III(a) apportions to the Lower Basin in perpetuity 7,500,000 acre-feet of water per annum from the main stream of the Colorado River at Lee Ferry and that tributary water is not included in this apportionment."

[3]Arizona lists the definition of "consumptive use" as one of six "questions presented" (Ariz. Op. Br. 9), but her argument explicitly states (*id.* at 105): "Arizona agrees with the Master's conclusion that the § 4(a) apportionment, including the California limitation, is to be measured in terms of consumptive use of water, defined as diversions from the river less return flow (Rep. 182-225)."

The only criticism of the Master's definition of "consumptive use" in the recommended decree is our own—its possible ambiguity in failing expressly to include uses of underground water. See Calif. Op. Br. 289-90.

never operate: Because of natural diminutions of supply between Lee Ferry and downstream points of diversion and use, 7,500,000 acre-feet of flow at Lee Ferry could never supply 7,500,000 acre-feet of beneficial consumptive use *(diversions less returns)* below Lee Ferry.[4]

Arizona does not attempt to explain how the impossible could work. Instead, in the following passage of her opening brief, Arizona represents by ". . ." the Master's dispositive refutation of her argument; we restore (with emphasis) the Master's sentence which Arizona omits (Ariz. Op. Br. 79):

> "Article III(d) was incorporated into the Compact to insure the Lower Basin that the apportionment made to it by Article III(a) would be satisfied out of main stream water originating in the Upper Basin and to assure that this apportionment would be met even during those periods when the water supply rising in the Upper Basin was insufficient to fulfill the total apportionment made to both basins by Article III(a).
>
> "In finding this position unacceptable, the Master held:
>
> " 'Since Article III(a) imposes a limit upon appropriation whereas III(d) deals with supply at Lee Ferry, an interpretation which makes these two provisions correlative one to another is inadmissible. *Since a substantial quantity of water is lost through reservoir evaporation and channel losses as it flows from Lee Ferry, the point*

[4]Arizona expressly agrees with the Master "that losses of water which occur *before* diversion are a diminution of available supply under § 4(a) and are not a consumptive use (Rep. 187)." (Ariz. Op. Br. 106; emphasis added.)

where the III(d) obligation is measured, to the diversion points downstream from Hoover Dam, where most of the appropriations are made, 7,-500,000 acre-feet of water at Lee Ferry will supply a considerably smaller amount of appropriations below Hoover Dam.[5] Moreover, III(a) extends to appropriations on Lower Basin tributaries as well as the mainstream. Such appropriations cannot possibly have any relation to the quantative [*sic*] measurement of the flow of water at Lee Ferry.' (Rep. 144)"[6]

B. Congress Did Not Unilaterally Amend the Colorado River Compact

Congress did not purport to enact Arizona's amendment to the Colorado River Compact. No intent can be

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[5](Footnote ours.) Our own water supply studies showed that an average Lee Ferry flow of 8,700,000 acre-feet per year will produce about 6,000,000 acre-feet for consumptive use from Hoover Dam to Mexico. Other water supply studies also produced a large margin between Lee Ferry flow and the quantity available from the main stream for consumptive use in Arizona, California, and Nevada. (See Calif. Op. Br. plate 7.)

[6]We need not speculate how the limitation would operate if the limitation's specification of "paragraph (a)" were read "paragraph (d)." The Master says (Rep. 187):

"The United States at one time urged a different conclusion, namely, that Section 4(a) limits California to a part of the water flowing at Lee Ferry.[48] It would necessarily follow that this water must be segregated for California at Lee Ferry and traced downstream, through Lake Mead, to California's diversion works. This interpretation measures the Section 4(a) limitation, not to a portion of aggregate consumptive use, but to a portion of a body of water 650 miles upstream from some of California's diversion works, and 355 miles upstream from Hoover Dam, the operation of which the Project Act was designed to regulate. Furthermore, it charges California for evaporation and channel losses which occur before the water is diverted from the mainstream for use in California, despite the statutory language which limits California to a quantity determined by the measurement of 'diversions less returns to the river.'"

"[48]The United States, in its Comment on the Draft Report, al-

imputed to Congress to render the Compact internally inconsistent and physically inoperative.

Conclusive internal evidence in the Project Act that Congress attempted no such thing is the express definition in section 4(a) of consumptive use: "diversions less returns to the river." If the water of which California may use 4.4 million acre-feet is from a quantity of 7.5 million acre-feet flowing at Lee Ferry, then one of two mutually exclusive alternatives must be accepted:

(1) Congress erred egregiously when it wrote "diversions less returns to the river" into the limitation. No one contends that it erred, and the Master holds "diversions less returns to the river" means what it says.

(2) There cannot be 4.4 million acre-feet for California and 3.1 million acre-feet for Arizona and Nevada, computed by "diversions less returns to the river," out of 7.5 million acre-feet of water flowing at Lee Ferry.

Furthermore, the Project Act is explicit in repeated recognition that the Colorado River Compact covers both the main stream and the tributaries—sometimes referred to as "the Colorado River,"[7] sometimes "the Colorado River *and* its tributaries,"[8] sometimes "the Colorado River *or* its tributaries,"[9] and sometimes

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though it recognizes that this position is fairly implied from its opening brief, says that it altered its position in its reply brief."

[7]"Colorado River" in § 19 of the Project Act obviously includes tributaries. Congress consents to negotiation of compacts for development of the "Colorado River" among all seven named Colorado basin states, although New Mexico and Wyoming have access only to Colorado River tributaries. See also § 4(a) of the Project Act.

[8]§§ 13(b), 15.

[9]§§ 13(c), 13(d).

"Colorado River system."[10] Each of these expressions in the Project Act means the same thing.

Nothing in the Project Act purports to modify the systemwide scope of the Compact approved in section 13(a) (Rep. app. 392). The legislative history reveals that no such amendment was attempted.

During debates on Senator Hayden's proposed amendment which, with modifications,[1] became the second paragraph of section 4(a), the following colloquy between Senators Johnson and Hayden indicates that Senator Hayden did not intend that his proposed amendment modify (unilaterally) the systemwide scope of the Compact (70 CONG. REC. 466, reproduced in Ariz. Legis. Hist. 116-19):

> [Senator Johnson]: "Let us see what the Colorado River compact relates to. I read first from the purposes of the Colorado River compact, Article 1:
>
> " 'The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River system.'
>
> "Now, what is the Colorado River system? The Colorado River system then, with meticulous care, is described in the compact in Article II:
>
> " 'As used in the compact (a) the term "Colo-

[10] § 16.

[1] The tri-state compact offered by Senator Hayden was accepted into the bill only after his proposal was modified, first, by making California's ratification thereof permissive only and not a mandatory condition to the effectiveness of the act, and second, by making the effectiveness of the tri-state compact dependent upon ratification of the Colorado River Compact by *Arizona,* California, and Nevada. (See *infra* p. 126 note 3 and accompanying text.)

rado River system" means that portion of the Colorado River and its tributaries within the United States of America.'

"Again, sir, we find in Article III the reference to the Mexican situation, and I read it because I have in my hand at the present time the compact itself. We find in paragraph (c) of Article III the following:

" 'If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right in the use of any waters of the Colorado River system, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantity specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the upper basin and the lower basin, and whenever necessary the States of the upper division shall deliver at Lees Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).'

"We find, therefore, that the compact toward which we are all devoting our efforts in order to get everybody satisfied and to unite in agreeing upon it provides for a division of the water of the Colorado River basin, and we find, sir, that in this compact the Colorado River basin embraces not alone the main stream, but embraces the tributaries of the main stream as well.

"Sir, the distinguished Senator from Arizona (Mr. Hayden) read remarks that were made in an-

swer to queries of his in writing of Mr. Herbert Hoover, who is to be inaugurated soon as President of the United States. He laid great stress upon Mr. Hoover's ability. He said Mr. Hoover knew more about the Colorado River and its intricacies and all the technical aspects of it then probably any other one man, and read to his purposes, as was his right, certain questions that he had propounded in writing to Mr. Hoover and answers which Mr. Hoover had in writing made to him.

"But, Mr. President, in reading the queries that thus the Senator put in writing to Mr. Hoover, and which he says were answered so elaborately, so well, so intelligently, and so accurately, the Senator omitted to read one of the very first of the queries that thus he propounded to President-elect Hoover. This is one of the queries that he then propounded to Mr. Hoover that Mr. Hoover in writing answered to him:

" 'Question 4. Why was the term "Colorado River system" used in paragraph (a) of Article III, wherein 7,500,000 acre-feet of water is apportioned to the upper and lower basins respectively?'

"That is the question propounded in writing by the junior Senator from Arizona to Mr. Herbert Hoover, who at that time was the president of the Colorado River Commission, and here is the reply that was made by Mr. Hoover to the distinguished Senator from Arizona:

" 'This term is defined in Article II—'

"I have just read Article II to Senators—
'as covering the entire river and its tributaries in

the United States. No other term could be used, as the duty of the commission was to divide all the water of the river. It serves to make it clear that this was what the commission intended to do and prevents any State from contending that, since a certain tributary rises and empties within its boundaries and is therefore not an interstate stream, it may use its waters without reference to the terms of the compact. The plan covers all the waters of the river and all its tributaries, and the term referred to leaves that situation beyond doubt.'

"What is the Senator asking by this amendment? He is asking, indeed, that we amend the Colorado River compact by the action of the Congress of the United States; and then, followed to its logical conclusion, what must occur? Every State must in like fashion take up the amendment of the Colorado River compact, possibly, and thereafter amend it in conformity with this particular amendment.

"Mr. Hayden. Mr. President, if the Senator from California will be kind enough to yield, I am sure he does not want to overstate my position. *I am not asking that the Colorado River compact be amended in any particular.*

"Mr. Johnson. I am stating the effect of the Senator's amendment.

"Mr. Hayden. I am asking that this effect be secured: That the State of California, which has and will have no interest in the Gila River, waive any claim to the waters of that stream." (Emphasis added.)

Earlier, in the hearings on the third Swing-Johnson bill, during discussion of the provisions of what is now section 13(c), the following exchange took place among Representative Hayden of Arizona, Representative Swing of California (author of the bill), and Delph E. Carpenter (Colorado's Compact negotiator and spokesman for the upper basin interests):[2]

> "Mr. Hayden. What is intended by specifically mentioning the 'tributaries.' Is this another attack upon the much abused Gila?
>
> "Mr. Carpenter. As a matter of fact the Gila is much misrepresented.
>
> "Mr. Swing. I might add parenthetically that there would be no river except for the tributaties. The tributaries make the river.
>
> "Mr. Carpenter. I accept the suggestion of Representative Swing. Tributaries include every branch. The inclusion of the words 'and tributaries' would make the act effective off the main stem of the river. The words, 'and the tributaries' may be something of surplusage. The use of the word 'river' probably includes its tributaries. But lest some hyper-technical person (at a future date) bobs up and says that the tributaries are not affected, we have included the words 'and the tributaries.'
>
> ". . . .
>
> "I am utterly unable to comprehend the peculiar viewpoint of the people of the State of Arizona in that respect. More than 12,000,000 acre-feet of

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[2] *Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. 208-10 (1926).

water of the Colorado River falls upon the soil of the State of Colorado and the principal tributaries have their origin wholly in that State. A large percentage of the water of the Colorado River falls wholly on the soil of Wyoming. Most of the tributaries of the Green have their origin in that State and in the State of Utah. So we might take each one of these States. The river is made up of the water contributed to it by its branches or tributaries and the tributaries flowing through Arizona are no whit different than the tributaries that flow out of Colorado, Wyoming or Utah. I have heard it said that the Gila River is an Arizona stream because it rises in Arizona and yet geographic boundaries and all other sources of information show that the Gila rises in New Mexico. It is primarily a New Mexico river from the standpoint of origin. My recollection is that the Little Colorado also rises in New Mexico.

"Mr. Hayden. Some of its tributaries do.

"Mr. Carpenter. Yes; so that the Gila River is not exclusively an Arizona stream even in the matter of origin. Secondly, the Gila and every other river mentioned contributes, if uninterrupted, its water supply to the main river above the largest diversion canal in America—the Imperial Valley Canal heading now below Yuma. Gila water is of importance to the Imperial Valley Canal. The canal naturally looks to the more stable flow from the main river, but I am informed that Gila water is frequently diverted, and it has been my privilege to see water coming from the Gila River and flowing into the Colorado and down into the Imperial

Valley Canal. That water is just as wet and just as serviceable as the water from the Green River in Utah. The waters of the Gila River are waters of the Colorado River just as much as the waters of the Green River. So that when you look at these facts squarely you are brought to the proposition that there is not a single tributary of the entire Colorado River that does not enter the river above Yuma, and the greatest diverter from this river, or from any river in America, or the world, is the canal of the Imperial Valley, located below Yuma.

"Now the thought is advanced that, because the Imperial Valley people eventually propose to move their heading up to Laguna Dam, therefore the Gila is not a tributary and its waters are not involved. But a canal for the irrigation of lands in Mexico would head below the mouth of the Gila. The whole theory of the Laguna Dam connection is founded upon an all-American canal.

"I will not go into the matter of international relations, because that is for the Department of State, and the Senate; but, even if the Imperial Valley people were to move their headgate up to Laguna Dam and at a point above the mouth of the Gila, and even though there were no Mexican lands, you could yet divert the water. The old and present Imperial canal would remain. Nevertheless, the rule is well fixed that he who changes his point of diversion up stream can not do so to the injury of other appropriators. If the Imperial Valley people see fit to move up stream, and the rights of the States were not fixed by compact,

which they most assuredly should do at an early date; if those rights were still as they are in a chaotic condition, bristling with opportunities for interstate conflict, the Gila River would still be charged against the Imperial Valley in any suit against the upper States, and the Gila would still be a tributary of the Colorado so far as the Imperial Valley is concerned, even if that diversion were voluntarily moved by the Imperial Valley people up to the Laguna Dam, because in moving that dam, the Imperial Valley people well know that they do so at their peril and the peril of loss of the Gila water. I have gone into this matter because there seems to be an idea or a dream that the Gila is not a tributary—an idea that because the all-American Canal will ultimately hook up with the Laguna Dam that therefore the Gila is a river unto itself. Secondly, I can but feel, as an observer, that the rights of New Mexico have not been duly considered by Arizona in the matter of the Gila. They are allowing development on that river to become a potential source of future litigation. I think that answers the question."

C. Arizona's Legislative History Cannot Support Her Construction of the Limitation

On the basis of extracts from legislative history, Arizona contends that Congress intended the words "waters apportioned by paragraph (a) of Article III of the Colorado River compact" to mean 7.5 million acre-feet of average annual flow at Lee Ferry. Arizona apparently contends that the Master's interpretation of the limita-

tion, rewriting the first two references to the Compact,[2a] nevertheless substantially effectuates Congress' intent as reflected in the legislative history Arizona quotes. This is the same legislative history which Arizona says effected an amendment to the Colorado River Compact to exclude the tributaries in the lower basin from the Colorado River system. Arizona misreads the Compact, the legislative history, and the Master's Report.

Arizona's legislative history argument rests on this sequence of events (Ariz. Op. Br. 62-65): In 1927, the governors of all seven Colorado River basin states met in Denver, Colorado, in an attempt to secure seven-state ratification of the Colorado River Compact. As a result of this conference, the governors of the four upper division states (Colorado, New Mexico, Utah, and Wyoming) made a proposal which clearly was limited to the III(d) *flow* at Lee Ferry.[3] Arizona concludes (Ariz. Op. Br. 63):

> "Congress was well aware of the resolution adopted at the Governors' Conference, and in fact

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[2a]The third and final reference to the Compact—"such uses always to be subject to the terms of said compact"—the Master has not suggested rewriting.

[3]Ariz. Legis. Hist. 158: "The governors of the States of the upper division of the Colorado River System suggest the following as a fair apportionment of water between the states of the lower division subject and subordinate to the provisions of the Colorado River Compact in so far as such provisions affect the rights of the upper basin states:

"1. Of the average annual *delivery of water* to be provided by the states of the upper division *at Lees Ferry,* under the terms of the Colorado River Compact

(a) To the State of Nevada, 300,000 acre-feet.

(b) To the State of Arizona, 3,000,000 acre-feet.

(c) To the State of California, 4,200,000 acre-feet." (Emphasis added.)

Article III(d), Rep. app. 373, provides: "The States of the

> the division of water among the Lower Basin states recommended by the Governors of the Upper Division states was the starting point for the compromise finally worked out in the Senate and incorporated in § 4(a) of the Project Act."

The Master explains very clearly why this Arizona legislative history does not support his conclusions. The Master would divide the first 7.5 million acre-feet of water which the Secretary of the Interior makes available for consumptive use from Lake Mead and the main Colorado River below. As we have seen (*supra* pp. 85-87), 7.5 million acre-feet of flow at Lee Ferry (which the upper division governors proposed to divide) cannot physically supply 7.5 million acre-feet of water for consumptive use from Lake Mead and below or from anywhere else below Lee Ferry.

For that very reason, Arizona's legislative history cannot be relevant to any construction of the limitation, which is in terms of consumptive use, defined as diversions less returns to the river.[4]

The Master states that "Congress never clearly understood" that the governors' recommendation related to their Article III(d) obligation. Senator Pittman "did not adopt, or perhaps failed to grasp, that portion of the governors' resolution which expressly found the source of the allocated waters in the Article III(d) obligation of the Upper Division" so that he described the governors' proposal "in apparent misunderstanding

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Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact."

[4]Rep. app. 382; see Ariz. Op. Br. 105.

of the governors' recommendation." Finally, the Master concludes that "all subsequent discussion in the Senate flowed in the same channel." (Rep. 189-90.) If Arizona is right that the governors' proposal is the correct basis for the construction of section 4(a) of the Project Act, the construction proposed in the Master's Report, by his own analysis, is wrong.

Furthermore, the recommendation of the upper division governors did not exempt any lower basin tributaries from the Mexican Treaty burden.[5] The upper states representatives explained to Congress during the hearings on the fourth Swing-Johnson bill their opposition to Arizona's attempt to exempt her tributaries from the treaty burden. For example, Governor Dern of Utah explained:[6]

> "The conference at Denver for the most part was devoted to a question of dividing the waters of the river. . . . There was one point in connection with the tributaries that the governors repeatedly threw out; but Arizona always came back with that proposal for reconsideration. We have not been able to accept the viewpoint of Arizona regarding that point. She maintained that the tributaries of the

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[5]Paragraph 1 of the upper division governors' recommendation divided the Lee Ferry flow among Arizona, California, and Nevada (*supra* p. 97 note 3). Paragraph 2 also apportioned 1 million acre-feet to Arizona from lower basin tributaries and provided that "said 1,000,000 acre-feet shall not be subject to diminution by reason of any treaty with the United States of Mexico, except in such proportion as the said 1,000,000 acre-feet shall bear to the entire apportionment in [paragraphs] 1 and 2 [of the governors' recommendation] of 8,500,000 acre-feet." Ariz. Legis. Hist. 158. Nothing in the governors' recommendation purported to amend the Colorado River Compact.

[6]*Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 264-65 (1928).

> Colorado River in Arizona are distinct from the main river. We take the opposite view of it. We say that, under the compact, the tributaries of the Colorado River in all the States are parts of the Colorado system. We are bound by that rule in the upper basin, and the lower basin should be governed by the same principle."

Francis C. Wilson, representative of Governor Dillon of New Mexico, gave the same explanation:[7]

> "Now, as to this 3,000,000 acre-feet [recommended by the governors as Arizona's share of the III(d) delivery], they [Arizona] said that they were not satisfied but they would accept it, placing upon it certain conditions. We met those conditions in the main, but the condition which they attached, that their tributaries should be released from the burden of the Mexican allocation which might be arrived at by treaty; that their tributaries should be free from that burden, we could not consent to, because in the compact there is no such distinction; the entire system, divided as I have read it to you, is subject to that burden when the United States reaches the point of determining by treaty with Mexico what Mexico's allotment or allocation should be."

This aspect of Arizona's opening brief also demonstrates the impossibility of using the legislative history to overturn the express command of section 4(a) of the Project Act. (See Calif. Op. Br. 110-24.) Arizona has filed with the Court a 159-page printed document entitled "Arizona's Legislative History of Sections 4(a),

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[7] *Id.* at 292.

5 (1st Paragraph), and 8 of the Boulder Canyon Project Act," and her opening brief is replete with extensive citations to and quotations from that compilation.

On the basis of this same legislative history compilation, Arizona for the last four years has consistently maintained that the limitation's express reference to the Colorado River Compact means Compact. We agree. Her quarrel with California turned upon her construction of the Colorado River Compact. The same history cannot now support her contention that the Master is correct in severing the Compact from the limitation.

On the basis of this same legislative history compilation, Arizona has derived support for her shifting and contradictory interpretations of the meaning of "excess or surplus waters unapportioned" by the Compact. On the same history, she now takes, simultaneously, two inconsistent positions about the meaning of those terms: They mean (1) all waters in the main stream (Lee Ferry and below), and (2) all waters in the "mainstream" (Lake Mead and below)—a reversal in both instances of her still earlier positions that some "excess or surplus" could be found on lower basin tributaries. She has also reversed her earlier position that California could not share in the increase in use specified in Article III(b), which she sometimes said could not be found in main stream, but only in the lower basin tributaries.

Here is a chronicle of Arizona's uses of the same legislative history compilation:

On August 5, 1957, Arizona filed with the Special Master the first edition of the same compilation of legislative history. This history was then offered in support of two documents Arizona filed simultaneously, entitled

(1) "Amended and Supplemental Statement of Position"[8] and (2) "Memorandum on the *Decisive* Application of the *Compact* and Project Act." (Emphasis added.) Arizona's 1957 position, which she asserted on the basis of this legislative history, was in part:

(1) Section 4(a) of the Project Act and the California Limitation Act incorporate provisions of the Colorado River Compact by reference.[9]

(2) The "excess or surplus waters unapportioned" by the Compact are on lower basin tributaries, at least in part.[10]

(3) California is precluded from participating in the increase in use permitted to the lower basin by Article III(b), which increase in use (from lower basin tribu-

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[8]Amended and Supplemental Statement of Position by Complainant, State of Arizona (filed with Special Master, Aug. 5, 1957). This statement was marked for identification as Calif. Ex. 7300 (Tr. 22,382, 22,384). We reproduce it in the appendix to this brief.

In her amended and supplemental statement, Arizona asserted (p. 1): "Arizona considers its Statement of Position heretofore filed herein and certain legal conclusions and arguments set forth in its various pleadings filed herein unsound and not supported in the law in relation to the proper interpretation of Sections 4(a), 5 and 8 of the Project Act and Articles III and VIII of the Compact."

[9]*Id.* pt. II, at 2-4, which presents interpretations of various provisions of the Colorado River Compact. *E.g.*, par. e, p. 3, gives Arizona's definition of Article III(b) waters under the Compact, and par. f, p. 3, states that "California by reason of her Self Limitation Act is barred from any claim on *this* lower basin water." (Emphasis added.)

See also title of "Memorandum on the *Decisive* Application of the *Compact* and Project Act" accompanying Arizona's amended statement of position. (Emphasis added.)

[10]Amended statement of position, *supra* note 8, at 4, par. g: "Any water used by Arizona from the Gila River or other Arizona tributaries above said perfected rights and Article III(b) water (if such, by stretch of the imagination there be) would be surplus or excess waters and not subject to a charge against water allotted Arizona from the main stream of the River."

Arizona did not discuss where any other "excess or surplus" may be found, if at all.

taries) is not "excess or surplus unapportioned" by the Compact.[11]

On August 13, 1958, Arizona tendered to the Special Master amended pleadings accompanied by a motion for leave to file those pleadings. From April through June 1959, Arizona filed with the Special Master proposed findings of fact and conclusions of law and supporting briefs asserting the same position proposed in her tendered amended pleadings. Arizona's 1958-1959 position which she asserted on the basis of this legislative history was in part:

(1) Section 4(a) of the Project Act and the California Limitation Act incorporate provisions of the Colorado River Compact by reference.[1]

(2) The "excess or surplus waters unapportioned" by the Compact are in the main stream (Lee Ferry and below) only.[2]

(3) California is precluded from participating in the increase in use permitted to the lower basin by Article III(b), which increase in use (from the main stream only) is not "excess or surplus unapportioned" by the Compact.[3]

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[11] *Id.* at 3, par. f. *Id.* at 3, par. e: "Article III(b) permits the lower basin users to *increase* their beneficial consumptive use by 1,000,000 acre-feet yearly (over and above perfected rights existing on the effective date of the Compact) on lower basin tributaries."

[1] Ariz. Op. Br. 52 (April 1, 1959); *accord,* p. 44; see also p. 20, noting importance of settling "precisely what water was apportioned by the Compact, i.e., what water is referred to by Section 4(a)."

[2] See Ariz. Proposed Amended Bill of Complaint, par. XXII(3) (Calif. Ex. 7302-A for iden., Tr. 22,383-84, at 14-15), referring to Arizona's claim to half "of the water of the main stream which is excess or surplus above the aggregate of the amounts apportioned by Article III of the Compact." She necessarily assumed that such excess or surplus as may exist is main stream water in the lower basin over and above the 8.5 million of III(a) and (b).

[3] Ariz. Op. Br. 29, 33-34, 45, 52 (April 1, 1959).

Finally, on May 22, 1961, Arizona filed with this Court a printed version of the same legislative history compilation accompanying her opening brief purportedly directed to sustaining the Master's proposed decision either on his rationale or on alternative premises now argued by Arizona.

Arizona's 1961 alternative position which she asserts on the basis of this legislative history is in part:

(1) Section 4(a) of the Project Act and the California Limitation Act incorporate provisions of the Colorado River Compact by reference.[4]

(2) The "excess or surplus waters unapportioned" by the Compact are in the main stream (Lee Ferry and below) only.[5]

(3) Apparently California may share in the increase in use permitted to the lower basin by Article III(b), which increase in use (from the main stream only) is treated by the Project Act, but not by the Compact, as "excess or surplus waters unapportioned."[6]

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[4]Ariz. Op. Br. 73 (May 22, 1961).

[5]*Id.* at 74, 76, 82.

[6]Although Arizona still contends that III(b) waters are "apportioned" by the Compact (*id.* at 81), she now asserts (*id.* at 82):

"Before the Special Master, Arizona argued that Congress properly regarded the water dealt with by Article III(b) as water 'apportioned' by the Compact and that, when Congress by § 4(a), divided 'excess or surplus waters unapportioned by said compact' equally between Arizona and California, it did not intend to include in the surplus 'unapportioned' waters the water which had been apportioned by Article III(b); hence that § 4(a) of the Project Act excluded California from the consumptive use of Article III(b) water. However, after further reflection, we are persuaded by the Special Master's reasoning that Arizona's original position is untenable (see Rep. 194-200).

"Therefore we now concede that the phrase, 'excess or surplus waters unapportioned by said compact,' as used in § 4(a), includes consumptive use of all main stream water above the first 7.5 million acre-feet available for use by the Lower Basin states in any one year."

Arizona's 1961 position which she asserts on the basis of this legislative history in support of the Master's rationale is in part:

(1) Section 4(a) of the Project Act and the California Limitation Act do not refer to the Colorado River Compact which is thus irrelevant in this suit.[7]

(2) The "excess or surplus waters unapportioned" by the Compact are in the "mainstream" (Lake Mead and below) only.[8]

(3) California may share in the increase in use permitted to the lower basin by Article III(b), which increase in use (from the main stream only) is treated by the Project Act, but not by the Compact, as "excess or surplus waters unapportioned."[9]

The results of Arizona's reliance upon her legislative history compilation may be summarized as follows:

(1) Project Act section 4(a) and the California Limitation Act incorporate Compact provisions by reference, a position which Arizona consistently maintained in 1957-1959, prior to the Master's Report and to which she still adheres in 1961, at least alternatively.

(2) "Excess or surplus waters unapportioned" by the Compact can variously be found

(a) Partly on lower basin tributaries (1957)

(b) Wholly on the main stream (*Lee Ferry and below*) (1958-1959, and sometimes in 1961)

(c) Wholly on the "mainstream" (*Lake Mead and below*) (sometimes in 1961)

(3) Participation by California in the increase in use provided in Article III(b) is

(a) Not permitted (1957, and 1958-1959)

(b) Permitted (1961)

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[7] *Id.* at 26-27, 67.

[8] *Id.* at 58.

[9] *Id.* at 26, 81-82.

We think that Arizona's use of this legislative history compilation proves the danger of attempting to construe the Project Act and the California Limitation Act without a firm anchor in the words of the statute.

The Master's conclusion and the Arizona argument that Congress amended the Compact seem to be based on a common premise: Congress failed to understand the defined terms of the Compact. Arizona's solution is to change "paragraph (a)" in the limitation to read "paragraph (d)." The Master, recognizing this impossibility, excises the entire reference to the Compact and writes a limitation that does not refer to the Compact. In either case the effort to rewrite an act of Congress and an act of the California Legislature on the basis of what Congress might have said had it understood the Compact differently is unjustified and dangerous.[10]

§ II. THE PRIORITY ISSUE: ARIZONA'S ARGUMENTS TO SUPPLANT PRIORITY PRINCIPLES ON THE MAIN COLORADO RIVER WITH PRORATION ARE UNSUPPORTABLE

A. Principles of Equitable Apportionment Have Not Been Abrogated by the Boulder Canyon Project Act, by the Construction of Storage Reservoirs Which Regulate the Natural Flow, or by the Colorado River Compact

1. *Boulder Canyon Project Act*

We shall not duplicate here the argument in our opening brief that the Project Act preserves equitable ap-

[10] "It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written." United States v. Great Northern Ry., 343 U.S. 562, 575 (1952). See also United States v. Calamaro, 354 U.S. 351, 357 (1957); Crooks v. Harrelson, 282 U.S. 55, 59-60 (1930), commenting on Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).

portionment and priority principles (within the quantitative ceiling on California established by the limitation) and that the Master's conclusion abrogating those principles on the "mainstream" is unsound (Calif. Op. Br. Part Three). We answer the arguments Arizona now advances to buttress the Master's conclusions.

Obviously, sections 5 and 6 of the Project Act could not and did not abrogate equitable apportionment and priority principles in Arizona's "main stream," which extends from Lee Ferry to the Mexican boundary.[1] Section 5, insofar as relevant here, deals with contracts for the storage and delivery of waters impounded by Hoover Dam in Lake Mead; section 6 deals with the priorities for the operation of Hoover Dam and Lake Mead. By their terms, neither section 5 nor section 6 relates to water or rights to the water in the 275-mile reach between Lee Ferry and Lake Mead before that water reaches the reservoir. Control of this section, in any event, is dependent upon principles of equitable apportionment.

Nor do Arizona's arguments support the abrogation of those principles in the Master's "mainstream," Lake Mead to the Mexican boundary. Arizona herself disagrees with the Master's conclusions whenever the competing rights are those of the United States: Part II of her opening brief denies the Government's constitutional power to reserve navigable waters for federal

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[1]Arizona contends, in effect, that the 7,500,000 acre-feet of "Article III(a) waters" specified in the Compact, in the limitation accepted by California, and in the abortive tri-state compact set forth in the second paragraph of § 4(a) all refer to 7,500,000 acre-feet per annum of water of the main Colorado River at Lee Ferry. (See Ariz. Op. Br. 61-81.)

purposes within a state[2] and asserts that those federal rights should be measured by principles of equitable apportionment.[3]

a. Legislative history of section 5

Arizona argues that the background of section 5 shows a clear congressional intent *not* to recognize appropriative rights as the basis of any claim to water stored in Lake Mead.[3a]

Arizona's conclusion is not supported by the legislative history. (See Calif. Op. Br. 175-82.) The changes in the provisions of section 5 which Arizona describes (*supra* note 3a) were proposed by the upper basin representatives.[4] Obviously, the upper basin had

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[2]Ariz. Op. Br. 121: "After Arizona was admitted to statehood, the United States had no power to reserve water of the main stream of the Colorado River for the use of federal establishments within Arizona."

[3]*Id.* at 181: "Should the Court find there was no reservation of water for use on Indian Reservations, or, should the Court find such a reservation of water but reject Indian needs as the test of the quantity reserved, the amount of water to which the Reservations are entitled should be determined in accordance with principles of equitable apportionment."

[3a]Ariz. Op. Br. 42-43: "As introduced in the 69th Congress, § 5 of the third Swing-Johnson bill provided in part that 'contracts respecting water for domestic uses may be for permanent service but subject to rights of prior appropriators.' However, the clause subjecting contracts to prior appropriative rights was deleted in committee, the permissive provision, 'may be for permanent service', was stricken and the mandatory provision, 'shall be for permanent service', was substituted. At the same time that Congress deleted the provisions recognizing rights of prior appropriators, it added the following requirement:

> " '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.'

Congress, by refusing recognition to appropriative rights and by denying any right to the use of water except by contract, evidenced a clear intent that appropriative rights should not be recognized as the basis of any claim to water stored in Lake Mead."

[4]Calif. Ex. 1801 (Tr. 12,234), a committee print of the third Swing-Johnson bill showing the source of proposed amendments, pp. 1, 7.

no interest in the rights of the lower basin states *inter sese* to the waters available for use in that basin consonant with the Colorado River Compact;[5] the purpose of the amendment was to protect the upper basin apportionment under the Colorado River Compact. Delph E. Carpenter, Colorado's Compact Commissioner, acting as the upper basin spokesman[6] to explain these upper basin amendments to the House Committee on Irrigation and Reclamation, made it abundantly clear that the last sentence of the first paragraph of section 5,[7] relied on by Arizona, "has nothing to do with the interstate relations between Arizona and California."[8]

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[5]*Cf.* Ariz. Ex. 2 (Tr. 216), the Upper Colorado River Basin Compact, 63 Stat. 31 (1949), which makes an interstate allocation within the upper basin—without representation of lower basin interests.

[6]See *Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess., pt. 1, at 82, and pt. 2, at 120 (1926).

[7]The upper basin amendment accepted as the last sentence of the first paragraph of § 5 provides, Rep. app. 385: "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."

[8]*Hearings on H.R. 6251 and H.R. 9826, supra* note 6, pt. 2, at 163; quoted in context in Calif. Op. Br. 178-79, and in Calif. Ex. 1802 (Tr. 12,236), at 2:

"Mr. CARPENTER. 'Except by contract made as herein stated' means this: If the flow of the Colorado River is controlled and regulated by the construction of the Black Canyon Dam, and any person in the State of Arizona attempt to take any water out of the stream which has been discharged from the reservoir and is being carried in the stream bed, as a natural conduit, for delivery to lower users, this law would be brought into effect and he would be prevented from using any of that water independent of the Colorado River compact but unincumbered by any other condition for the benefit of California and Nevada. In other words, the compact does not disturb the rights between Arizona, California, and Nevada, *inter sese,* as to their portion of the water.

"Mr. SWING. 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

The same views were later expressed by Mr. Swing, the House author of the bill.[9]

b. Section 6

Arizona says (Ariz. Op. Br. 41-42):

> "If the Secretary in managing the reservoir and dam were compelled to meet the demands of appropriative rights in point of time and quantity, it would be impossible for him to comply with the mandate of the Project Act that 'the dam and reservoir . . . be used: First, for river regulation, improvement of navigation and flood control; second, for irrigation and domestic uses *and satis-*

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secure water on the same terms as is afforded to Nevada and California.

"Mr. HAYDEN. How tight would you tie Arizona?

"Mr. CARPENTER. The thought of this amendment is that any water stored in this reservoir under the terms of the compact, when released from storage shall be burdened by the compact wherever it goes. As far as water is concerned, existing claims of the lower States are protected by the compact. *Water must pass through this reservoir to take care of the present existing lower claims.*

"As to future development from the main river, we insist that water stored in this structure by the United States be stored and released upon the express condition that the persons who receive the water shall respect and do so under the compact. *It has nothing to do with the interstate relations between Arizona and California.*" (Emphasis supplied.)

Section 8(a) of the Project Act, Rep. app. 389 (§ 8(c) of the draft Mr. Carpenter was discussing), provides:

"The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried, and/or distributed by the . . . works herein authorized, shall observe and be subject to and controlled by said Colorado River compact . . . and all permits, licenses, and contracts shall so provide."

[9] *Hearings on H.R. 9826 Before the House Committee on Rules,* 69th Cong., 2d Sess., pt. 3, at 116 (1927), quoted *supra* p. 54; and *Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess., pt. 1, at 57 (1928), reproduced in Calif. Ex. 1804 (Tr. 12,237), at 3-4.

faction of present perfected rights in pursuance of Article VIII of said Colorado River compact;[1] and third, for power.' "

Arizona refutes her own argument. Arizona agrees with the Master that section 18 of the Project Act requires "that state law shall govern intrastate water rights and priorities." (Ariz. Op. Br. 99.) If Arizona were correct about the physical difficulties in observing priorities, it would be impossible for the Secretary of the Interior to honor intrastate priorities. The practical problems of adhering to a priority schedule in releasing water from Lake Mead, Lake Mohave, and Havasu Lake are identical whether two users whose respective priorities must be observed are on the same side of the river or on opposite sides.

Pursuant to section 6 of the Project Act, navigation, flood control, and river regulation are paramount rights to the use of the dam and reservoir as against irrigation and domestic uses, which are junior. The prior satisfaction of paramount or senior rights, of course, affects the supply of water which will be available to satisfy the rights of junior users, but fluctuations in water supply do not destroy the rights depending upon that supply. In other words, once these senior obligations have been satisfied, there is no incompatibility in supplying irrigation and domestic users *inter sese* in relative order of interstate (as well as intrastate) priorities. Thus, water may be released in the month of January to satisfy a paramount obligation such as flood control; to the extent that it is not required for consumptive use at that time, it would waste to the sea.

[1](Footnote ours.) In Arizona's quotation the italicized words are represented by ellipsis.

None of that water would be available in the irrigation season in July for a lower priority irrigation use. But once the paramount rights have been satisfied in January, then supplying water for irrigation and domestic uses from the remaining water made available in July, in relative order of priority, does not interfere with operation of the dam and reservoir specified in section 6 of the Project Act.

This practice can be demonstrated from experience on many projects. Here, for example, is the act authorizing the Central Valley Project in California:[2]

> "That the entire Central Valley project, California, heretofore authorized and established . . . is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for the reclamation of arid and semiarid lands . . . *Provided further,* That . . . provisions of the reclamation law . . . shall govern the repayment of expenditures . . . and the Secretary of the Interior may enter into repayment contracts . . . with State agencies, authorities, associations . . . including all agencies with which contracts are authorized under the reclamation law, and may acquire by proceedings in eminent domain, or otherwise, all lands . . . water rights, and other property necessary for said purposes: *And provided further, That the said dam and reservoirs shall be used, first, for river regulation, improve-*

[2]Rivers and Harbors Act of 1937, § 2, 50 Stat. 850.

ment of navigation, and flood control; second, for irrigation and domestic uses; and, third, for power." (Emphasis added.)

Arizona argues that "present perfected rights" recognized by section 6 of the Project Act have no intra-lower basin consequences.[3] If her contention is correct, then the italicized language of the above quoted act authorizing the Central Valley Project is identical in its operation to that of the corresponding language of section 6 of the Project Act in the present litigation.[4] This Court definitively construed that language in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 734 (1950):

> "We cannot disagree with claimants' contention that in undertaking these Friant [referring to a unit of the Central Valley] projects and implementing the work as carried forward by the Reclamation Bureau, Congress proceeded on the basis of full recognition of water rights having valid existence under state law. By its command that the provisions of the reclamation law should govern the construction, operation, and maintenance of the several construction projects, Congress directed the Secretary of the Interior to proceed in conformity with state laws, giving full recognition to every right vested under those laws.[7] Cf. Nebraska v. Wyoming, 295 U.S. 40, 43; California Oregon Power Co. v. Beaver Portland Cement Co. 295 U.S. 142, 164; Nebraska v. Wyoming, 325 U.S. 589, 614; Silas Mason Co. v. Tax Com. 302 U.S. 186."

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[3]Ariz. Op. Br. 47-52, 56. Nevada makes the same contention. Nev. Op. Br. 57-58.

[4]The Central Valley Project legislation does not, of course, refer to the Colorado River Compact.

The Court's footnote 7 quotes section 8 of the Reclamation Act of 1902, and adds:

> "To the extent that it is applicable [*i.e.*, to the 17 western states] this clearly leaves it to the State to say what rights of an appropriator or riparian owner may subsist along with any federal right."

c. Sections 14 and 18

Arizona's opening brief is noteworthy for its failure to treat Project Act sections 14[5] and 18 in the discussion of the purported abrogation of equitable apportionment and priority principles.[6] Both sections preserve those principles[7] and conclusively refute Arizona's contentions to the contrary. (See Calif. Op. Br. 139-58.)

d. Administrative construction

Arizona says (Ariz. Op. Br. 46):

> "The evidence is uncontradicted that, since construction of Hoover Dam, the reservoir and dam have been operated consistently without regard to claimed appropriative rights (Tr. 828-29). The record is clear that no water users in California or

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[5]Section 14 of the Project Act, Rep. app. 394, expressly makes that act a supplement to the "reclamation law" which law "shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided." Section 12, Rep. app. 392, defines "reclamation law" to mean the Reclamation Act of 1902 and acts amendatory thereof and supplementary thereto. Section 8 of the Reclamation Act of 1902 is thus incorporated into the Project Act.

[6]Contrast Arizona's argument in the section of her brief devoted to federal reserved rights (Ariz. Op. Br. 144): "Section 8 of the Reclamation Act also prescribes that 'beneficial use shall be the basis, the measure, and the limit of the right'. This requirement cannot be reconciled with the concept that a water right may be acquired by reservation without any physical application of water to a beneficial use."

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

elsewhere have demanded the release of water in accordance with and in satisfaction of asserted appropriative rights.

"This practical construction reflects a realization on the part of all concerned that since enactment of the Project Act rights to stored water have as their basis the Act and the water delivery contracts, if made pursuant thereto, rather than any prior appropriations of water."

There is no evidence that Hoover Dam and Lake Mead have been operated without regard to appropriative rights, nor may any such inference be drawn from the evidence. Consequently, there is no practical construction that all rights to "mainstream" waters rest upon water delivery contracts or that none of the rights to those waters rest upon prior appropriations. Only in the event of a shortage to supply all claimed rights does any water rights question have to be answered, and there has never been any such shortage on the main Colorado River in the lower basin. The Master accurately points out (Rep. 320):

"[I]t is clear that up to the present time, no existing mainstream project has been refused water, the delivery of which it has demanded."

He might have added that no one, with or without a contract, has ever been prohibited from diverting and using "mainstream" water.

No water users have demanded the release of water in accordance with and in satisfaction of "present perfected rights," and the Master holds that these rights must be satisfied with their priorities (Rep. 311-12). The reason again is that there has never been any short-

age of water to supply these "present perfected rights" or any other rights served by the Government's main stream reservoirs.

If any significance can be attributed to the fact that all main stream contractees have always received a full supply for their needs, the proper inference is the one drawn by the court in *United States v. Tilley.*[8] That case involved a Warren Act contract executed by the Secretary of the Interior on the North Platte project. The contract contained an express provision (article XI) such as Arizona would apparently read into our contracts:[9]

> "The delivery of the water supply provided for in this contract will be accepted by the Company as in full satisfaction of all its rights to the water of the North Platte River, both natural flow and surplus storage from the Pathfinder Reservoir and other Reservoirs of the Reclamation Service constructed in connection with the North Platte Project."

The United States sought an injunction against Nebraska officers and against an irrigation district, successor to the contracting company, and a decree that the appropriative right of the district to natural flow waters had been transferred to and vested in the United States by reason of the cited provision. The court of appeals, affirming the district court, held that the contract applied only to supplemental storage water and that the contract did not transfer the irrigation district's natural flow appropriative right to the United States. The

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[8]124 F.2d 850 (8th Cir. 1941), *cert. denied,* 316 U.S. 691 (1942).

[9]124 F.2d at 854.

court relied *inter alia* on the negotiations surrounding the drafting of the contract,[10] other provisions of the contract, [11] and the administrative and practical construction by the Secretary and the district with respect to deliveries under the contract:[12]

> "A further reason why we think the contention of the United States can not reasonably be adopted here is found in the subsequent actions of the parties under the contract, through a long period of years, which seem to us to evidence a recognition and acceptance of the construction for which the District is contending. From 1912 to 1936, when the present controversy first arose, the District . . . had regularly used the natural flow appropriation as it saw fit, and had merely called upon the United States for a release of storage waters as an auxiliary supply, when there was a shortage in the amount fixed by the contract schedule. At

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[10] *Id.* at 854-55. Compare the Secretary's assurance to attorneys for the Palo Verde Irrigation District in California on July 21, 1930, during the negotiations for the California water delivery contracts, that "those possessed of prior rights to the unregulated flow of the river will be privileged to continue the enjoyment of those rights without interference by storage in the Boulder Canyon reservoir." Calif. Ex. 351 (Tr. 9,929), at 2, discussed in Calif. Op. Br. 172-73.

[11] The Tilley contract expressly provided for delivery by the United States of an amount of water which *"with all the water the Company may be entitled to by reason of any appropriations* and all water to which the lands of said Irrigation District are entitled" would aggregate a specified quantity. 124 F.2d at 854. Compare the language in the Palo Verde contract, representative of the language in each of the California contracts, executed after the assurances to the district noted in note 10 *supra*, by which the Secretary agrees to deliver from Lake Mead "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 thereafter specified. Art. 6 (Rep. app. 424); see Calif. Op. Br. 171-72.

[12] 124 F.2d at 855.

no time during this period is the United States shown to have disputed the District's right to use the natural flow waters as such, or in an amount up to the limit of its claimed appropriative rights in such waters. The District has acted on the theory and construction that Article XI merely fixed or limited the scope of the obligation of the United States; that its effect was simply to prevent the District from calling upon the United States for water, if the available natural flow under its appropriative rights equaled or exceeded the contract schedule; and that when the District had received the amount of water prescribed by the contract, during the period specified, no matter from what source it was derived, the obligation of the United States was thereby satisfied, under the provisions of Article XI. These actions of the parties over a period of almost twenty-five years are strongly indicative of a mutual interpretation, which necessarily is entitled to weight here in settling a subsequent dispute as to the intended meaning of the contract provision."

The foregoing analysis is equally applicable to deliveries under the Project Act contracts, and refutes Arizona's contention that deliveries from Lake Mead cannot be considered to have been made in satisfaction of natural flow priorities.

2. *Reservoirs Which Regulate the Natural Flow*

Arizona says (Ariz. Op. Br. 51):

"Since an appropriative right is fixed and measured in relationship to the supply available from the natural flow of the stream, once the natural

flow is destroyed no standard survives by which to determine the users who may take or how much each may divert."

Arizona later concludes (Ariz. Op. Br. 52):

"The conclusion, therefore, is clear that users in the Lower Basin surrendered their claimed prior appropriative rights in the natural flow of the river (which was silt-laden, given to violent floods and prone to seasonal fluctuations in supply) in exchange for rights to receive from storage a guaranteed average supply of desilted water from a flood-controlled river."

It is undeniably true that flow below a reservoir is interrupted and its regimen changed as soon as a storage reservoir comes into operation, but the same waters, modified in their seasonal or annual occurrence, are brought down by gravity as before. Western streams not now regulated by reservoirs are few in number, and soon will be even fewer. However, the regulation of the natural flow does not destroy preexisting rights which could be enjoyed from the natural flow without the regulation and conservation benefits of a later constructed dam and reservoir; that is, the right to demand quantities of water to the extent that reasonable use could be made of them at the time when they would have been available absent the reservoir. If this is prevented by the reservoir operation, for delivery of the water to another user, there is a taking of the natural flow right which is either subject to injunction or, failing that remedy, is compensable. See *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 737 (1950):

"[W]e need not ponder whether, by virtue of a highly fictional navigation purpose, the Government

could destroy the flow of a navigable stream and carry away its waters for sale to private interests without compensation to those deprived of them. We have never held that or anything like it, and we need not here pass on any question of constitutional power . . . ."

A typical example in the lower Colorado River basin, in evidence in this case, is the operation of the Salt River Project on the Salt River (a Gila tributary) in Arizona. In a physical sense, natural flow (except on the occasions that the reservoir was full and spilling) has not reached that project's diversion works since 1909, when Roosevelt Dam was closed. The natural flow rights are nevertheless recognized and preserved. The project operation is described in *Adams v. Salt River Valley Water Users' Ass'n,* 53 Ariz. 374, 89 P. 2d 1060 (1939).[13] Water is supplied to the project from three sources: (a) natural flow of the river; (b) stored flood waters, unavailable for use before Roosevelt and the other project dams were built; and (c) pumped percolating ground water (not subject to appropriation in Arizona). Different water users in the project, depending on their locations and the constructed works, receive water of each category in different proportions. The aggregate quantity of project water from the three sources varies proportionately from time to time, as do proportionate components of the water supplied to each user. Nevertheless, a water user with

[13]The Kent decree of 1910, described in the opinion, is Ariz. Ex. 101 (Tr. 380). The trial court's opinion in the *Adams* case is Calif. Ex. 1842 for identification (Tr. 12,234). Contracts between the United States and the Water Users' Association are Calif. Exs. 3 and 4 (Tr. 1,816). Arizona's witness McMullin testified about the project's operation in serving natural flow rights. Tr. 2,164-67.

rights in natural flow receives his full requirement according to quantity and priority, whether his water is physically supplied from natural flow, stored water, or pumped percolating ground water. His rights attach to whatever water he receives from the substituted sources.

In *Nebraska v. Wyoming,* 325 U.S. 589 (1945), this Court equitably apportioned the natural flow of the North Platte River. The Court pointed out that "priority of appropriation is the guiding principle" in an equitable apportionment (*id.* at 618). Yet, the Pathfinder reservoir with "a capacity of . . . 79 per cent of the average annual run-off of the North Platte River at that point" had been completed in 1913 (*id.* at 594-95). If Arizona were correct in her contention, the Court's 1945 decree in that suit was a physical impossibility.

3. *Colorado River Compact*

Arizona says (Ariz. Op. Br. 50):

> "Instead of preserving appropriative rights of main stream users, the Compact contemplated that those rights, if any, would be extinguished once storage was provided 'within or for the benefit of the Lower Basin.'"

The Master provides a conclusive answer to Arizona's contention (Rep. 316):

> "The Compact does not govern the relations, *inter sese,* of the states having Lower Basin interests. Therefore, it could not have displaced the principles of equitable apportionment as decisive of the question of rights in Lower Basin tributary supply."

The Master's premise (developed at length at Rep. 139-41) establishes equally well that the *Compact* could not have displaced the principles of equitable apportionment in the main stream supply for the same reasons that it could not do so with respect to the tributary supply in the lower basin.

The Compact words which Arizona quotes ("within or for the benefit of the Lower Basin") are from Article VIII of the Compact. Arizona's argument based on the language of Article VIII—that the Compact contemplated extinguishment of the appropriative rights of main stream users when storage was provided—conflicts directly with her assertion that Article VIII of the Compact "regarding satisfaction of perfected rights is limited to rights basin versus basin and does not apply to intrabasin rights (Rep. 141)" (Ariz. Op. Br. 50).[14]

In the following quotation of Article VIII we italicize the words which also refute the Arizona contention:

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

[14] *Cf.* Arizona's contentions in her Amended and Supplemental Statement of Position, dated Aug. 5, 1957 (reproduced as an appendix to this brief), pars. II(a) and (c).

Article VIII speaks of rights of "appropriators." "Attach to and be satisfied from" is strange language to use if the intended meaning were "wiped out." Furthermore, the Article III(a) apportionment, like California's limitation, includes "all water necessary for the supply of any rights which may now exist." What "rights," if the Compact or limitation contemplated their extinguishment?

Article VI of the Compact also refutes Arizona's contention. After describing negotiation as a means for settling controversies in a number of situations, the final paragraph of Article VI provides:

> "Nothing herein contained shall prevent the adjustment of any such claim or controversy [between any two or more signatory states] *by any present method* or by direct future legislative action of the interested States." (Emphasis added.)

The "present method" contemplated by the Compact clearly refers to an equitable apportionment suit in the original jurisdiction of this Court.

Even if the language and the purpose of the Compact permitted the construction proposed by Arizona, that construction would have to be rejected as completely irrational. The Compact could not have been intended to extinguish the "appropriative rights of main stream users" without substituting any alternative basis for water rights.

B. Even if Priorities Derived From Appropriations Made Under State Law Are Disregarded, Nevertheless Equivalent Priority Principles Control Competing Rights of Holders of Federal Water Delivery Contracts

Arizona advances elaborate arguments to support the major premises and conclusions of the Master's Report

with which she says she agrees. In striking contrast, she confines her discussion of one essential element of the Master's "mainstream" allocation—the substitution among contractees of parity for priority—to one cryptic comment (Ariz. Op. Br. 105):

> "We further agree that, in the event there is in any year less than 7,500,000 acre-feet of main stream water available for use by Arizona, California and Nevada, California's entitlement under its contract is 4.4/7.5 of the quantity available (Rep. 306)."

The reasons for this vacuum are not hard to find: Arizona cannot agree with the Master's rationale, but is unable to discover independently any alternative basis for proration among contractees.[1]

First, Arizona disagrees with the protection which the Master accords to "present perfected rights" within the "mainstream." (Ariz. Op. Br. 46-56.) Yet, the Master relies upon that very protection (Rep. 234-35), improperly we say (Calif. Op. Br. 217-21), as a major element of his argument to abrogate all other priorities and establish proration. Arizona apparently realizes that she cannot have it both ways.

Second, Arizona has said that "we certainly disagree with the Special Master's statement that 'the Compact treats the Upper and Lower Basins on a parity one to the other in regard to the division of water . . .' (Rep. 235)" (Ariz. Exceptions, p. 2 n.1). Yet the quoted statement of the Master with which Arizona disagrees is another basis for the Master's proration con-

[1]Even if water delivery contracts somehow replace equitable apportionment, there remains the issue of relative priorities among contractees.

clusion. We agree with Arizona that the Master's premise is faulty.

Third, the Master has rejected Arizona's contention that section 5 of the Project Act contains a mandatory direction to the Secretary of the Interior that his water delivery contracts make the allocation which Arizona perceives in section 4(a) of the Project Act (Rep. 162-63, 202); Arizona reiterates her contention (Ariz. Op. Br. 83-99). Arizona bases her argument on the language of section 5 which requires that the Secretary's water delivery contracts "shall conform to paragraph (a) of section 4 of this Act" and contends that thereby "Congress prescribed specific standards which the Secretary was to follow—the formula for the apportionment of water approved by Congress in § 4(a)." (Ariz. Op. Br. 84.) Arizona quotes extensively from portions of the Senate debates on the fourth Swing-Johnson bill (Ariz. Op. Br. 90-99) to support her contention that the language "can relate only to the division of water set out in § 4(a)" (*id.* at 98) and must be so interpreted to save what Arizona contends is otherwise an unconstitutional delegation of legislative functions by section 5. (*Id.* at 88-89.)

If Arizona were correct, California would bear only 50 per cent of any "mainstream" shortage under clause (4) of the second paragraph of section 4(a),[2] not 44/75 (or 58⅔ per cent) as under the Master's formula.

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[2]Clause (4) provides "that the waters of the Gila River and its tributaries, except return flow after the same enters the Colorado River, shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico but if, as provided in paragraph (c) of Article III of the Colorado River compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined

Arizona indeed perceives the constitutional infirmity in the "contractual allocation scheme" described by the Master. The Master's "contractual allocation scheme" is unconstitutional, unless the Project Act explicitly directed it or provided adequate standards by which the Secretary would be guided in creating it. Arizona's proposed solution is to convert Congress' invitation for a tri-state compact in the second paragraph of section 4(a) into a mandatory apportionment by statute to which the Secretary must conform.

The Master rejected Arizona's solution for two irrefutable reasons: The proposal requires the Court both to rewrite the language of the second paragraph of section 4(a) and to ignore the history of that section (Rep. 162-63). The second paragraph of section 4(a) was included in the Project Act only after explicit agreement that "this amendment shall not be construed hereafter by any of the parties to it or any of the States as being the expression of the will or the demand or the request of the Congress of the United States."[3] Its language,

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by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River, one-half of any deficiency which must be supplied to Mexico by the lower basin . . . ."

[3]This was the statement by Senator Johnson, 70 CONG. REC. 472 (1928), to which Senator Pittman replied, "Exactly, not. . . . It is not the request of Congress." *Ibid.* No Senator voiced any objection. Senator Johnson then accepted the amendment, which was then adopted without a roll call vote. See Ariz. Legis. Hist. 132.

Arizona inaccurately states on page 98 of her opening brief that "Senator Johnson of California agreed to accept the Hayden amendment [the second paragraph of § 4(a)] as long as it was understood that California was not being coerced into entering into a compact." In fact, the quotation in our text above shows that Senator Johnson accepted the amendment on a completely different understanding which conclusively disproves Arizona's contention. Although her opening brief quoted copiously from

which merely authorizes a tri-state compact, aptly reflects this result.

The legislative history also demonstrates that Congress could not have intended the language to have the constitutional significance Arizona suggests: The "conform to" provision in section 5 was offered before the language of the second paragraph of section 4(a) was offered; the genesis of each was unrelated to the other.[4]

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the legislative history, Arizona does not quote the exact language of Senator Johnson, set forth above in our text.

The Master correctly answers Arizona (Rep. 163): "But the second paragraph of Section 4(a) *is plain in that it* merely *authorizes* a tri-state compact for the division of water; it does not compel it; nor does it condition approval of the Colorado River Compact upon acceptance of the proposed tri-state compact. *Indeed, the second paragraph was specifically amended on the floor of the Senate to make the suggested division permissive rather than mandatory.* The suggested compact which Congress was willing to approve in advance is of no compelling force or effect since no such compact has ever been agreed to. In so far as Section 5 refers to the second paragraph of Section 4(a) it is for the purpose of requiring the Secretary to respect the compact if ratified by the states. See also Section 8(b). Arizona's contention in this respect must therefore be rejected." (First and last emphasis added.)

Arizona purports to quote the Master's argument (Ariz. Op. Br. 87-88); our emphasis adds what Arizona omits: (1) The Master states that the second paragraph "is plain" in merely authorizing a tri-state compact; (2) the Master points out that the legislative history, which Arizona's quotation represents by ellipsis, supports this plain meaning.

[4]The phrase "shall conform to paragraph (a) of section 4 of this Act" first appears in an amendment proposed by Senator Phipps of Colorado on May 19, 1928, but never offered. This amendment (Calif. Ex. 2004 (Tr. 11,173)) proposed to put a limitation provision in § 4(a) and add to §5 the phrase "and shall conform to paragraph (a) of section 4 of this Act." On May 25, 1928, Senator Phipps' colleague from Colorado, Representative Taylor, added the "shall conform" language to § 5 of H.R. 5773 (Calif. Ex. 2005 (Tr. 11,173), p. 8), the House version of the bill, as a "clarifying amendment." 69 CONG. REC. 9988. Section 4(a) of H.R. 5773 provided only for a six-state ratification of the Colorado River Compact. (Calif. Ex. 2005 (Tr. 11,173), p. 6.)

H.R. 5773 passed the House and was transmitted to the Senate where, on December 5, 1928, for parliamentary reasons H.R. 5773 was substituted for S. 728 and the text of S. 728 then substituted

The constitutional dilemma that Arizona futilely attempts to resolve was not created by Congress, but by the Master's effort to change an authorization to deliver water from Lake Mead into a delegation of authority to make an interstate allocation of waters of the Colorado River in the lower basin, and his eradication of the interstate effect of sections 14 and 18 of the Project Act and section 8 of the Reclamation Act of 1902.

We say that the Project Act is constitutional as it is written. The section 5 authorization to the Secretary to execute contracts "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" (the normal sort of contract with water users, familiar in the reclamation law) cannot be tortured into a direction to the Secretary to effectuate an interstate compact, which none of the states entered, by means of a contract with a state inferentially determining the rights of other states not parties thereto. Moreover, the Secretary was adequately guided by Congress in sections 14 and 18 to perform the task which Congress in fact delegated: The execution of service contracts with actual water users for the orderly administration and financing of the project serving the same purposes and

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for that of H.R. 5773. 70 CONG. REC. 67-68. On December 11, 1928, Senator Phipps reoffered an amendment providing (1) a limitation on California, (2) addition to § 5 of the language "and shall conform to paragraph (a) of section 4 of this Act," and (3) an embargo on Federal Power Commission licenses on the Colorado River system until the act became effective. 70 CONG. REC. 324, 382. After some parliamentary maneuvers, Senator Hayden's tri-state compact authorization was subsequently added to the Phipps amendment, 70 CONG. REC. 472 (1928).

Significantly, Senator Hayden's original amendment to § 4(a), which included a limitation on California, and a second unnumbered, unlettered paragraph, embodying his tri-state compact, did not include any amendment to § 5 requiring contracts to conform to any paragraph of § 4. Calif. Ex. 2011 (Tr. 11,173).

having the same effect as such contracts have served on reclamation projects throughout the West since 1902.[5]

§ III. OTHER MATTERS

A. The Prohibition Which Arizona Proposes on the Use of Otherwise Unused Water Is Unreasonable

Arizona renews a proposal rejected by the Special Master whereby the Secretary of the Interior would be prohibited from releasing and California would be prohibited from using water not usable in another state (Ariz. Op. Br. 106-08). This is inherently unreasonable. (See Rep. 314.)

The Secretary now has authority, and the Master's recommended decree would leave him that authority, to store or release water in the exercise of the discretion he must have if the project purposes enumerated in section 6 of the Project Act are to be served. Under the Arizona amendment to the recommended decree, however, if flood control conditions required the release of water from Lake Mead, the Secretary might be forced to compel the waste of that water to the ocean rather than to permit its use by a state thereby exceeding its allocation.

No law, no decree, no statute, no compact, no contract has ever—to our knowledge—compelled such a wasteful result.

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[5]Calif. Op. Br. 175-77. Water delivery contracts written with Arizona and California water users decades before the Project Act was passed satisfy the requirements of § 5 of the Project Act. Rep. 212, 218. Calif. Op. Br. 153-57 and *supra* pp. 59-60.

B. On Each of the Three Major Issues Identified in Her Bill of Complaint Which Initiated This Suit, Arizona Has Now Reversed Her Pleaded Position and Agrees With the Pleaded and Present Position of the California Defendants

1. *The III (b) Issue*

Arizona in 1952 identified the issue and her position as follows (Ariz. Bill of Complaint, par. XXII(1), p. 25):

> "(1) Is the water referred to and affected by Article III(b) of the Colorado River Compact apportioned or unapportioned water? The complainant says that it is apportioned water and hence the Project Act and the California Limitation Act, which limits California's rights to 4,400,000 acre-feet annually of water apportioned by Article III (a) plus not more than one-half of the surplus unapportioned by that Compact, preclude California from any rights to water covered by Article III (b). Complainant further says that its position in this regard is sustained by the decision of this Court in the case of *Arizona v. California,* 292 U.S. 341."

Our answer to Arizona asserted that the limitation does not preclude California from sharing in the Article III(b) waters (Calif. Answer, par. 27(d), p. 27), a position we have consistently maintained.

Arizona now in effect concedes that the limitation does not preclude California from sharing in the Article III(b) waters (Ariz. Op. Br. 82).

2. *The Beneficial Consumptive Use Issue*

Arizona in 1952 pleaded (Ariz. Bill of Complaint, par. XXII(2), pp. 25-26):

"(2) How is beneficial consumptive use to be measured? Article III of the Compact does not apportion water. Rather it apportions the beneficial consumptive use of water. The Compact contains no definition of beneficial consumptive use and does not establish any method of measuring beneficial consumptive use. Arizona says that beneficial consumptive use is measured in terms of main stream depletion, that is, the quantity of water which constitutes the depletion of the stream by the activities of man. Water salvaged by man is not chargeable as a beneficial consumptive use. The point is most pertinent when applied to the use of waters of the Gila River, a tributary of the Colorado River. In a state of nature the Gila River was a losing stream with large quantities of water lost to the stream before its confluence with the Colorado River. Arizona has salvaged this water by putting it to beneficial consumptive use before it is lost and is chargeable only with the depletion of the stream at the state line. The amount of water involved in the controversy over the method of measurement of beneficial consumptive use exceeds 1,000,000 acre-feet annually."

California answered that the term "beneficial consumptive use" in the Compact means "diversions less returns to the river," the same meaning which the California limitation expressly gives to "aggregate annual consumptive use (diversions less returns to the river)" (Calif. Answer, par. 8, pp. 11-12), a position we have consistently maintained.

Arizona now "agrees with the Master's conclusion that the § 4(a) apportionment, including the California

limitation, is to be measured in terms of consumptive use of water, defined as diversions from the river less return flow (Rep. 182-225)" (Ariz. Op. Br. 105). Consequently, Arizona would appear to agree that the term "beneficial consumptive use" in the Compact (which is expressly referenced in the second paragraph of section 4(a)) also means diversions less returns to the river. *Cf.* Ariz. Ans. Br. 60-61 (June 1, 1959).

3. *The Reservoir Evaporation Issue*

In 1952 Arizona pleaded (Ariz. Bill of Complaint, par. XXII(3), p. 26):

> "(3) How are evaporation losses from Lower Basin main stream storage reservoirs to be charged? Such reservoir losses amount to over 700,000 acre-feet of water annually. Arizona says that such losses of water should be apportioned among the users of water from the main stream storage reservoirs in the Lower Basin in the same proportion as the consumptive use of each is to the total consumptive use of such storage water in the Lower Basin."

California answered that the quantities specified in the limitation are not to be reduced by reservoir losses occurring prior to delivery at points of diversion in California (Calif. Answer, par. 27(f), pp. 27-28), a position we have consistently maintained.

Arizona now concurs "with the Master's holding that the delivery obligations under the Secretary of the Interior's water delivery contracts are to be measured, as provided in those contracts, at the points of diversion (Rep. 186)" (Ariz. Op. Br. 105). Arizona does not oppose the Master's direction "that each user of water

shall be charged only for the amount of water actually diverted and which does not return to the main stream and that losses of water which occur before diversion are a diminution of available supply under § 4(a) and are not a consumptive use (Rep. 187)" (Ariz. Op. Br. 105-06).[6]

[6]Arizona does propose one modification not relevant in the context: Users should be charged for water ordered but not, in fact, diverted and used. Ariz. Op. Br. 106.

PART FOUR

ANSWER TO THE NEVADA OPENING BRIEF

PART FOUR

ANSWER TO THE NEVADA OPENING BRIEF

§ I. THE SEVERANCE ISSUE: THE PREMISES ADVANCED BY NEVADA REBUT THE MASTER'S CONCLUSION THAT THE LIMITATION CAN BE DIVORCED FROM THE SYSTEMWIDE SCOPE OF THE COLORADO RIVER COMPACT

The Master's construction of the limitation, as severed from the Compact, is precluded by these two sound premises advanced by Nevada: First, Articles III(a) and III(b) of the Colorado River Compact "make an apportionment of the amount of water that could be applied to beneficial consumptive use in each [of] the Upper and Lower Basins . . . out of the entire Colorado River System" (Nev. Op. Br. 36).[1] Second, the Compact and the Project Act, parts of an "intermingled, interrelated and correlated body of statutory law . . . must always be construed together and are, in effect, one overall statutory enactment" (Nev. Op. Br. 35-36).

The inevitable conclusion from these premises is that the limitation proposed in section 4(a) of the Project Act must be construed consistently with the meaning of the Compact which encompasses all Colorado River system waters in the lower basin. Nevada's premises are thus irreconcilable with her support of the Master's decision.

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[1] *Accord,* Nev. Finding V, p. 10: "That the Compact provides (Art. II(a)) that 'the term Colorado River System means that portion of the Colorado River and its tributaries within the United States of America.' It provides that the water apportioned by Articles III(a) and III(b) are waters from 'the Colorado River System.' "

§ II. THE PRIORITY ISSUE: NEVADA'S ARGUMENT FOR EQUITABLE APPORTIONMENT CANNOT SUSTAIN THE MASTER'S ABROGATION OF "MAINSTREAM" PRIORITIES

Under the topic heading that "the recommended decree is in reality an equitable apportionment of Colorado River water" (Nev. Op. Br. 49), Nevada asserts (p. 51):

> "Assuredly, if the Special Master's determination, that this is a purely statutory allocation suit,[2] is in error, then the only other alternative would be to treat it as an action for equitable apportionment. Viewed in that light the Master's proposed decree, is entirely correct and proper, fully supported by the evidence and a proper exercise of the judicial authority."

The Master's Report itself demonstrates that principles of equitable apportionment cannot sustain the "mainstream" allocation proposed in his Report.

The Master's Report marshals the relevant authorities to establish that priority of appropriation is "the guiding principle of equitable apportionment in the arid regions of the United States" and that "the Court, in an equitable apportionment suit, has never reduced junior upstream existing uses by rigid application of priority of appropriation" (Rep. 326).

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[2](Footnote ours.) Nevada states that "Arizona and the United States urged a theory substantially like that adopted by the Special Master" (p. 49) which Nevada (quoting Rep. 100) describes (p. 50) as a "statutory" allocation or apportionment. The "contractual allocation scheme" (Rep. 232) proposed by the Master must, however, be distinguished from the *mandatory* statutory allocation urged by Arizona (Ariz. Op. Br. 83-98), which the Master rejects (Rep. 162-63).

It is equally clear that this Court will not "earmark" or reserve water for future appropriation and use. In *Arizona v. California,* 283 U.S. 423, 463-64 (1931), this Court declared:

> "There is no occasion for determining now Arizona's rights to interstate or local waters which have not yet been, and which may never be, appropriated. . . . This court cannot issue declaratory decrees."

The Master's Report makes quite clear that the proposed "mainstream" allocation is not based on priority of appropriation (except insofar as the Master finds a statutory directive in section 6 of the Project Act to preserve the priorities of "present perfected rights") or protection of existing uses. The recommended decree quite clearly reserves large blocks of "mainstream" water for Arizona and for Nevada over and above the uses or the requirements of their existing projects diverting from that resource.

On the other hand, the Master's equitable apportionment of Gila River system waters between Arizona and New Mexico does take into account both priority of appropriation and protection of existing uses (Rep. 325-31). Furthermore, the Master refuses to reserve water for any of the party states from other lower basin tributaries on which he concedes equitable apportionment principles still apply—both as against "mainstream" states and as against other tributary states (Rep. 316-24).

Nevada says that in any equitable apportionment of waters stored in Lake Mead the water delivery contracts executed by the Secretary of the Interior "would be as much evidence of the rights of the parties to the

mainstream water as any other water right they might present, whether State appropriations, actual use or whatever." (Nev. Op. Br. 51.) However, this principle, even if fully acceptable, would not sustain the Master's "mainstream" allocation for three reasons: First, principles of priority, the fundamental ingredient of equitable apportionment—not proration—govern rights created, recognized, or confirmed by water delivery contracts. (See Calif. Op. Br. 150-52, 169-75; see also our response to U.S. Op. Br. *supra* pp. 36-46.) Second, priorities attach not to "contracts with the respective States," but to "definitive contracts for the delivery of specified quantities for specific projects." (See U.S. Op. Br. 16-17, discussed *supra* pp. 37, 42.) Nevada goes part of the way in recognizing that the "historical pattern" followed under the reclamation laws with respect to water delivery contracts "has, of course, been one in which the Secretary has contracted for the delivery of specific quantities of water to the various entities who would be entitled to divert and use them." (Nev. Op. Br. 41.) However, Nevada does not explain her apparent assumption that priorities do not attach to such contracts.[3] In any event, there are no "definitive" contracts with users in Nevada. Third, section 8 of the Reclamation Act (incorporated by section 14 of the Project Act) declares that "beneficial use shall be the basis, the measure, and the limit of the right."[4]

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[3] *Cf.* Nevada's discussion of the legislative history of the § 4(a) limitation on California: Nevada asserts that the Senators "unquestionably believed that they were taking effective action on the amount of water which California would have as a *prior right* and thus guarantee the allocation of the balance available to the other two States." Nev. Op. Br. 42. (Emphasis added.)

[4] 32 Stat. 390 (1902), 43 U.S.C. § 372 (1958).

One other aspect of Nevada's argument should be briefly noted here. Nevada argues that her allocation under the decree should be insured against reduction below a minimum of 250,000 acre-feet per annum.[5] This anomalous inversion of the priority principle is necessary, says Nevada, because (Nev. Op. Br. 56-57):

> "Nevada users of mainstream water are, and will be of the type which it is necessary to maintain, i.e., municipal, domestic or industrial. In other words, there will not be uses, such as irrigation uses, which can be temporarily suspended without disaster. Uses such as domestic and municipal cannot be arbitrarily cut off, or even heavily reduced, for a period of time, as can agricultural uses."

However, the same equitable considerations which would call for protection of *future proposed uses* in Nevada for domestic, industrial, and municipal purposes

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[5]There is no rational basis for Nevada's figure. If Nevada wants to insure the protection of "'existing present diversions" (Nev. Op. Br. 100) for domestic, municipal, and industrial purposes, it would seem that her minimum should be only 24,370 acre-feet (pp. 100-01: 8,810 + 15,560). (For purposes of this discussion, "domestic" is taken to include "industrial" in accordance with the definition in Article II(h) of the Compact, Rep. app. 372.) On the other hand, if the object is to protect Nevada's claimed ultimate net consumptive use requirements for the stated purposes, it seems that the claimed minimum should be 402,700 acre-feet per annum (Nev. Op. Br. 103: 305,700 + 97,000). Since this is more than the recommended allocation to Nevada, logic would seem to require that Nevada's entire allocation be claimed as a minimum.

California proposed that Nevada be awarded the beneficial consumptive use of 171,500 acre-feet per annum from both Lake Mead and Nevada's tributaries, all from safe annual yield. Calif. Conclusion 12E:201, table 3, p. XII-26. Such an allocation would give proper weight to the factors significant in equitable apportionment, would protect existing uses in Nevada, and would assure a full supply to all appropriators who are proceeding diligently to completion of their existing projects. See Calif. Op. Br. 18-19; Calif. Findings and Conclusions, Part XV.

apply, a fortiori, to similar *presently existing uses* by the completed Colorado River Aqueduct (serving the southern California coastal basin) whose curtailment is a virtual certainty under the recommended decree endorsed by Nevada (Calif. Op. Br. 260-61, 272-76, and table 6).

§ III. OTHER MATTERS: THE AVAILABILITY OF ALTERNATIVE SOURCES OF WATER SUPPLY IS BOTH LEGALLY IRRELEVANT AND FACTUALLY WRONG

Nevada vigorously contends that she alone depends solely upon Colorado River system waters to supply that portion of Nevada within the Colorado River basin, while Arizona and California both have alternative sources of supply available (Nev. Op. Br. 13, 24, 32). Nevada apparently contends that the portions of southern California which are dependent upon Colorado River water can, in the event of shortage, call upon surplus waters from northern California through the Feather River Project[6] and upon desalinized salt water to replace part or all of our Colorado River supply (pp. 32-34).

Alternative sources of water supply are immaterial and irrelevant to the allocation of the Colorado River supply. The issue, if any, concerning alternative sources has not been litigated; the Special Master repeatedly excluded all evidence thereon.

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[6]The 1.75 billion dollar Feather River Project, approved by voters of California in November 1960, will divert surplus waters in northern California to areas of deficiency in various parts of the state including counties in the San Francisco Bay area, the San Joaquin Valley, and the southern coastal basin. See CAL. WATER CODE §§ 12930-42. Design of the project is now under way.

The Master correctly excluded (Tr. 5,948) Arizona's offer of evidence concerning alternative sources of supply in California,[7] and stated (Tr. 5,945):

> "[I]f we admit it [evidence on California's Feather River Project], manifestly it means that we are going to try the entire water problem of each of the States party to the suit. That is going to be a very extensive operation."

Later, the Master gave the same answer to Nevada's offer of such evidence (Tr. 17,212):

> "I think studying the Colorado River is a big enough task for all of us without also studying the entire California Watershed and all its rivers."[8]

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[7]It is true that volumes 1 and 2 of Bulletin No. 2, published in June 1956 by the California Water Resources Board, were received in evidence (Ariz. Exs. 89 and 89-A, Tr. 354, 1,012) but not on the issue of alternate sources of supply and the Feather River Project. Instead, this bulletin dealt with water needs and methods of use, as its title ("Water Utilization and Requirements of California") suggests and as the context in which it was received makes clear.

The issue before the Special Master was the admissibility of evidence generally tending to show recent growth of Arizona and increased water needs, Tr. 1,001 (Mr. Kiendl), and specifically our objection to the following question put to Arizona witness Leggett, Tr. 1,000:

"Q During the ten years following the end of World War II has the population of the State of Arizona increased substantially?"

The Special Master overruled our objection, primarily because of the character of the parties to this litigation, Tr. 1,011-11A; we immediately withdrew any objections to Bulletin No. 2, in view of that ruling, Tr. 1,012, and it was received in evidence. *Ibid.*

Its reception was no precedent for admission of exhibits relating to the California Feather River Project, and the Special Master correctly rejected this argument when made by Arizona (Tr. 5,941-48) and later repeated by Nevada (Tr. 17,210-17).

[8]Near the close of the trial, Nevada reoffered three exhibits relating to the Feather River Project, Tr. 22,384-85, and filed a written argument in support thereof. Memorandum on Nevada's Proof on California Water Plan (Aug. 28, 1958). She advanced

The time and effort required to try the Colorado River problem now before this Court (Rep. 1-6) underscore the wisdom of the Special Master's ruling.

Nevada's contention was rejected, and no specific exception has been made to that decision. If the issue of alternative sources of supply is to be litigated, a new reference is necessary for this "very extensive operation." It cannot be tried on an *ex parte* presentation in briefs by Nevada.

If the matter were tried, the evidence would prove: First, the Feather River Project, which will transport surplus waters from northern California to many areas of deficiency in this state, is now designed to meet the requirements until about 1990 of the southern California coastal basin after Metropolitan Water District's full contract quantity from the Colorado River has been put to use—not to replace that Colorado River supply. Second, economically feasible salt water conversion on a large enough scale to be significant here is now impossible, and future advances in technology are highly speculative.[9] Thus, neither northern California's

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the same contention which she now advocates when the case was being argued before the Special Master: Nev. Finding XXVII, p. 61; Nev. Brief Re Findings and Conclusions, pp. 126-28; Calif. Response to Nevada, pp. 53-56; see also Nev. Comments on Draft Report (June 6, 1960), p. 6: "Nevada has no recourse to retirement of irrigation or desalting of ocean waters to preserve development, once effected."

[9]If Nevada's salt water predictions are as optimistic as her population forecasts, both should be taken with a large grain of salt. Nevada's prediction for the population of Clark County is a case in point. In 1957, Nevada's evidence predicted that this population would increase from 115,000 in 1957 (Nev. Ex. 801 (Tr. 16,790), table 2, col. 6, and table 3, col. 2) to 150,000 in 1960 (*id.* graphs 2 and 3), an increase of 35,000. In fact, the population increased by only 12,000 (Nev. Op. Br. 14, giving a 1960 figure of 127,016), falling short of the projected estimate by about 66%. If within the short space of three years Nevada's

streams nor the Pacific Ocean constitutes an alternative source to replace our Colorado River supply.

CONCLUSION

For these reasons the California defendants urge that their exceptions which they have jointly made to the Report of the Special Master should be approved by this Court, and that the decree to be entered in this case should be in conformity with those exceptions and the views presented in this brief and the California defendants' Opening Brief.

August 14, 1961

Respectfully submitted,

[Signatures follow on next page.]

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estimate of growth is in error by nearly two thirds, one must treat her predictions of other things to come in the more distant future as extremely doubtful at best.

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APPENDIX

CALIFORNIA DEFENDANTS

Exhibit No. 7300
Identification: Aug. 28, 1958. Admitted:.....
Tr. 22,382,
22,384

"Amended and Supplemental Statement of Position by Complainant, State of Arizona," Filed With Special Master, August 5, 1957

APPENDIX

CALIFORNIA DEFENDANTS

Exhibit No. 7300

Identification: Aug. 28, 1958. Admitted:.....

Tr. 22,382,
22,384

"AMENDED AND SUPPLEMENTAL STATEMENT OF POSITION BY COMPLAINANT, STATE OF ARIZONA," FILED WITH SPECIAL MASTER, AUGUST 5, 1957

(Bracketed numbers show page numbers in original.)

[1]

Arizona considers its Statement of Position heretofore filed herein and certain legal conclusions and arguments set forth in its various pleadings filed herein unsound and not supported in the law in relation to the proper interpretation of Sections 4(a), 5 and 8 of the Project Act and Articles III and VIII of the Compact. Without attempting either a formal revision of all of its pleadings at this point in this proceeding or to set forth other than generally what Arizona considers to be the proper, logical and legal construction and effect of the Colorado River Compact and the Boulder Canyon Project, Arizona states the following:

I.

We are filing herewith an extensive memorandum on the application of the Compact and Project Act, setting forth our comments and arguments as to the proper interpretations of Sections 4(a), 5 and 8 of the Project Act. We are also filing herewith a legislative history of those sections. Section 5 requires that no water use may be made of stored water except by con-

tract and requires that all contracts conform to Section 4(a). Section 4(a) directs that Arizona shall receive 2,800,000 acre-feet and Nevada 300,000 acre-feet in full measure from storage in Lake Mead and that California shall receive the balance remaining of the 7,500,000 acre-feet to be supplied annually by the upper basin; it also requires that the Gila shall be recognized as completely legally utilized by Arizona and that its uses and water supply shall not be considered by the Secretary in contracting for water from storage, thereby excluding it from consideration when surplus water computations and contracts were under consideration.

Since the Memorandum filed amplifies the foregoing we will not further elaborate on the position therein stated.

[2]

II.

With reference to Articles VIII and III of the Compact, Arizona states:

a. Article VIII of the Compact treats of "perfected rights" existing as of its effective date generally; and then of perfected rights so existing of lower basin users *as against upper basin users only.*

b. Lower basin users of water diverted from tributaries of the Colorado River in the lower basin, since the streams from which such uses were made did not receive any waters from the upper basin, of necessity could not have any claims against upper basin users nor could their claims attach to or be satisfied out of any storage of the main stream of the River in or for the benefit of the lower basin; and for like physical

reasons, the claims and rights of such lower basin tributary users could not be satisfied from water delivered at Lee Ferry by the upper basin, i.e., Article III (a) water.

c. The perfected rights of lower basin users, diverting their water from lower basin tributaries of the River, were unimpaired by the Compact in all particulars and respects. Lower basin users who had then perfected claims against upper basin users, i.e., users of water diverted from the main stream of the river and hence of water which was supplied from the upper basin were required to satisfy such then perfected rights from storage when provided in or for the benefit of the lower basin.

d. The apportionment of water found in Article III (a) of the Compact is a basin versus basin apportionment; it evidences the understanding of the lower basin users as to how much water they had the right to receive annually on the average out of the river supply which arose in the upper basin and the understanding of the upper basin users as to how much the upper basin was required to deliver on the average annually to

[3]

the lower basin. It served as a ceiling on the rights which the lower basin users might obtain by putting upper basin water to beneficial use and as a floor below which the upper basin might not go in refusing to release water to the lower basin. Out of this supply the lower basin users having a legal claim upon waters arising in the upper basin then existing or thereafter arising or perfected must satisfy all of their legal claims against the upper basin and its water users for a dependable, firm water use.

e. Article III(b) permits the lower basin users to *increase* their beneficial consumptive use by 1,000,000 acre-feet yearly (over and above perfected rights existing on the effective date of the Compact) on lower basin tributaries. Since the limit or ceiling on the water supply which the upper basin was *legally obligated* to supply to the lower basin was 7,500,000 acre-feet per year, or 75,000,000 acre-feet per ten year segments of time, delivered at Lee Ferry, this additional 1,000,000 acre-feet must arise in the lower basin since, as a matter of fundamental water law, a user cannot perfect a right to a beneficial use in water as to which the user has no legal right to require that it be made available. If the lower basin user had no right to demand delivery or release of the water he could not perfect a right to its use. The "increase" referred to is over and above the perfected uses on the tributaries of the lower basin preserved unimpaired by Article VIII.

f. California by reason of her Self Limitation Act is barred from any claim on this lower basin water.

g. Arizona would therefore be entitled under the Compact to have its title quieted to the rights on the Gila and other lower basin tributaries in Arizona perfected on the effective date of the Compact, plus 2,800,000 acre-feet of water from the main stream of the Colorado

[4]

River, plus an additional 1,000,000 acre-feet of waters arising in the lower basin as presently beneficially used by Arizona or as may be needed to offset reservoir or channel losses charged to Arizona. Any water used by Arizona from Gila River or other Arizona tributaries above said perfected rights and Article III(b) water

(if such, by stretch of the imagination there be) would be surplus or excess waters and not subject to a charge against water allotted Arizona from the main stream of the River.

In any event, no uses by Arizona from the Gila River or other Arizona tributaries are chargeable against Arizona's share of the main stream Colorado River water.

h. Sections 4(a), 5 and 8 of the Project Act reflect the recognition by Congress that Arizona by virtue of perfected rights preserved by Article VIII of the Compact and beneficial use authorized by Article III(b) of the Compact had completely utilized the water of the Gila and its tributaries. Section 5 requires that no water use may be made of stored water except by contract and requires that all contracts conform to Section 4(a). Section 4(a) directs that Arizona shall receive 2,800,000 acre-feet and Nevada 300,000 acre-feet in full measure from storage in Lake Mead and that California shall receive the balance remaining of the 7,-500,000 acre-feet to be supplied annually by the upper basin; it also requires that the Gila shall be recognized as completely legally utilized by Arizona and that its uses and water supply shall not be considered by the Secretary in contracting for water from storage, thereby excluding it from consideration when surplus water computations and contracts were under consideration.

The position and proof of the United States, the states of Utah, New Mexico and Nevada is as yet undeveloped and therefore the full issues as between said parties and Arizona are presently uncertain.

[5]

By reason thereof and since the amendments, supple-

ments and changes to Arizona's position above set forth are in the nature of changes as to legal position and contentions rather than factual matters, Arizona does not attempt at this time a partial amendment of its pleadings but such amendment will be proffered when the proof has been completed so that piecemeal change and amendment may be avoided.

This Amended and Supplemental Statement is filed at this time so that all parties hereto may be advised that Arizona withdraws from the legal positions heretofore taken in its pleadings, insofar as they are inconsistent with the position herein indicated, as legally unsound.

DATED: August 5, 1957.

Respectfully submitted,

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(End of Calif. Ex. 7300 for iden.)