No. 8 Original

In the Supreme Court of the United States

OCTOBER TERM, 1961

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

ANSWERING BRIEF OF THE UNITED STATES

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INDEX

Argument—Continued

Argument—Continued

CITATIONS

Cases:

Cases—Continued: Page

Constitution, statutes, and treaties:

Miscellaneous—Continued

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INTRODUCTION

In its brief in support of exceptions to the Special Master's Report, the United States urged acceptance of its position on the few points on which it disagrees with the Special Master's Report. However, in large part we agree with the Special Master's findings and conclusions, and in this brief we shall attempt to support them against the attacks of the States. Although designated as an answering brief, in substance this is our main brief.

QUESTIONS PRESENTED

1. Whether, under the Boulder Canyon Project Act, the United States is authorized to deliver from Lake Mead or the mainstream of the Colorado River below Hoover Dam sufficient water to permit consumptive use of 4,400,000 acre-feet in California, 2,800,000 acre-feet in Arizona, and 300,000 acre-feet in Nevada from

the first 7,500,000 acre-feet available annually, without deducting uses from the tributaries below Lake Mead.

2. Whether the Indian reservations and other federal facilities on the Colorado River have rights to water adequate for their ultimate needs.

INTEREST AND POSITION OF THE UNITED STATES

The controversy among the States of the Lower Basin over the use of the Colorado River has been an impediment to the full development of that area for many years. Efforts to settle the controversy by agreement among the States were unavailing. Settlement by litigation was foreclosed by the indispensability of the United States as a party. *Arizona* v. *California,* 298 U.S. 558. Intervention of the United States makes the present suit, initiated by Arizona in 1952, jurisdictionally possible and thus enables the Court to resolve the important issues involved.

The United States has in the course of the trial of this case necessarily advocated its own claims and rights. It has also sought to aid the Special Master in reaching a solution which would, consistently with the purposes and provisions of the Boulder Canyon Project Act and other applicable federal law, advance the best interests of the Lower Colorado River Basin as a whole and, from that standpoint, accomplish an appropriate distribution of the precious water resources marshaled by the construction of the Boulder Canyon Project. The positions taken by the United States were not taken because of any desire to intrude on the functions of the Special Master or

the Court, but because of our concern that this gigantic federal project be used for the benefit of the entire region it was designed to serve and to achieve reconciliation of conflicting interests within that region.

We believe that a solution which divides the first 7,500,000 acre-feet of consumptive use of mainstream water available annually on a ratable basis in proportions of 4,400,000 to California, 2,800,000 to Arizona, and 300,000 acre-feet to Nevada and permits water in excess of the first 7,500,000 acre-feet per annum to be shared equally by California and Arizona (subject to possible use in Nevada of a small percentage of Arizona's one-half of the surplus) is in accord with the purposes and provisions of the Boulder Canyon Project Act and the contracts made under its authority, and will make possible the optimum development of the entire region so far as the available water resources will permit. This position is, of course, at variance with that taken by California. However, to follow the solution proposed by California would stymie further development in Arizona and Nevada, including the effectuation of present federal projects, and permit California, by default, to exceed the limitation on use in that State which, as a condition precedent to authorization of the Boulder Canyon Project, Congress imposed in anticipation of California's ability to expand its uses of mainstream waters more rapidly than the other States.

Basically the difference in approach between California and the United States is that California treats

this case as a typical problem of allocating the waters of an interstate river between competing States. The United States, on the other hand, views the case as one involving its power and authority to make an appropriate distribution of waters made available by the construction of tremendous federal conservation projects which regulate the river and save its waters for productive uses. The United States believes the distribution made by the Secretary of the Interior and approved by the Special Master in his report[1] falls within the federal power and the terms of the Boulder Canyon Project Act.

STATEMENT

Hoover Dam, the principal feature of the Boulder Canyon Project Act, impounds and regulates substantially all the flow of the Colorado River. Section 1 of the 1928 Act authorizing the Project enumerates the purposes to be served as follows:

> * * * for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking * * *.

The rights in the distribution of water from this Project are the subject of the dispute in this case.

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[1] But note our exceptions to the Report and supporting brief.

1. *Background of case*

The Lower Basin of the Colorado, consisting of parts of California, Nevada, New Mexico, and Utah, and practically all of Arizona, is almost entirely arid country, requiring artificial irrigation for productive use. In its natural state the Colorado was utilized for irrigation by both the Indians and the early settlers. In 1867, the federal government appropriated money for diversions from the river for the use of the Colorado River Indian Reservation. Later, irrigation was commenced in the Palo Verde Valley in California, the Yuma Valley in Arizona, and the Imperial Valley in California. After the passage of the Reclamation Act of 1902, projects were authorized on the Salt River, a tributary of the Colorado, near Phoenix, and on the Colorado itself in the vicinity of Yuma.

The early projects suffered from both flood and famine. The Colorado River Indian Reservation and Palo Verde Valley Projects were suspended because of difficulties with flood waters, and a levee system for the Mohave Valley was destroyed by floods in 1914. The problems with the transport of water to the Imperial Valley were even more spectacular. As a result of the diversion works the river twice broke from its bed and altered its course from its former channel to the Gulf of California to a new course emptying into the Salton Basin, flooding large areas of Mexico and the United States. After considerable time, the breakthroughs were repaired, but difficulties in maintaining the canal were enhanced by the fact that a part of the system passed through Mexico. While not

as spectacular as the damage from floods, the irrigation projects suffered also from acute shortages of water at the times the river was at low stage. During these periods all, or practically all, of the river waters reaching the intake of the Imperial canal were diverted and applied in irrigation of the Valley.

The ensuing studies recommended building an all-American canal and also storage reservoirs to equalize the flow of the river. In 1919 the All-American Canal Board (California Ex. 185) recommended:

> 1. That the all-American canal, or an equivalent high-line canal, from the Laguna Dam [2] into the Imperial Valley be constructed * * *, and that Congress pass such laws as may be necessary to put into effect any plan that may be agreed upon between the Secretary of the Interior and the Imperial Irrigation District.
>
> * * * * *
>
> 7. The United States should undertake the early construction of storage reservoirs on the drainage basin of the Colorado River as a part of a comprehensive plan for the betterment of the water-supply conditions throughout the entire basin of this river. The stored water should be made available for power and irrigation at a fair charge for this service. By storage on a large scale in well-distributed reservoirs the peak of the lower river's flood discharge will be cut down and the menace to the submersible lands along the Colorado

[2] (Footnote added.) Laguna Dam had been constructed by the United States Reclamation Service as the diversion structure for the Yuma Reclamation Project. It is located on the mainstream of the Colorado River about 10 miles northeast of and 13 miles upstream from Yuma, Arizona.

River below the Grand Canyon, and in particular to the delta region and the Imperial Valley, will be reduced.

Pursuant to Congressional direction, the Secretary of the Interior made an investigation, and the resulting Fall-Davis 1922 Report recommended a canal entirely on American soil and a reservoir at or near Boulder Canyon. The report suggests that river regulation and flood control should be the primary object of future development, with irrigation a secondary objective, and development of power as the third.

The report opens with this statement:

> The control of the floods and development of the resources of the Colorado River are peculiarly national problems for several good reasons:
>
> 1. The Colorado River is international.
> 2. The stream and many of its tributaries are interstate.
> 3. It is a navigable river.
> 4. Its waters may be made to serve large areas of public lands naturally desert in character.
> 5. Its problems are of such magnitude as to be beyond the reach of other than national solution.

The needs of flood control and water storage were called "urgent and vital."

Yet there was a serious political obstacle in the path of further development in the Lower Basin. The States in the Upper Colorado Basin were apprehensive that they would be shut out of their share in the water of the river under claims of prior appropria-

tion because of the more rapid development below which the proposals for improvement would accelerate. In order to eliminate this obstacle, Congress authorized the seven States involved to negotiate a compact providing for an equitable division of the water supply of the Colorado River.

2. *The Colorado River Compact*

On November 24, 1922, compact commissioners representing the seven States of the Colorado River Basin and the representative of the United States executed the Colorado River Compact. It was promptly ratified by the legislatures of all of the seven States except Arizona.

The Colorado River Compact did not accomplish a division or apportionment of the waters of the river system between the States of the Basin. Instead, it provided for division of the river basin into an Upper Basin and a Lower Basin, and apportioned "the use of part of the water of the Colorado River System * * * to each of them with the provision that further equitable apportionments may be made" (Article I and Article III). The matter of interstate allocation of the water included in the respective Basin apportionments was left to some other means unspecified in the Compact. The basic division between the Basins (Article III) was:

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

(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.

* * * * *

(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. *The Boulder Canyon Project Act*

In 1928, while the disagreement among the States still persisted, Congress passed the Boulder Canyon Project Act and thereby authorized the construction of an all-American canal and the Boulder and Imperial Dams. By Section 6 of this Act Congress provided:

> * * * The title to said dam, reservoir, plant, and incidental works shall forever remain in the United States, and the United States shall, until otherwise provided by Congress, control, manage, and operate the same * * *.

The same section provided for the uses of the dam as follows:

> First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article

> VIII of said Colorado River compact; and third, for power.

Section 4(a) provided that the Act would not take effect and no authority would be exercised thereunder until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming ratified the Compact, or (2) if any of these States failed to ratify the Compact within six months after passage of the Act, then until the Compact should be ratified by six States, including California, and California should agree to limit its annual consumptive use of water from the Colorado River to

> 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.

Arizona did not ratify within the six-month period. By its so-called Limitation Act, passed March 4, 1929, California agreed to the limitation upon its aggregate annual consumptive use. Since the other six States had ratified the Compact, the Project Act became effective by Presidential proclamation upon June 25, 1929.

Section 5 authorized the Secretary to make distribution of stored water through contracts and stated:

> 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.

Contracts for the delivery of water for use in California have been made between the Secretary of the Interior and Metropolitan Water District of California (Pl. Ex. 38, 39), Imperial Irrigation District (Pl. Ex. 34), Palo Verde Irrigation District (Pl. Ex. 33), the City of San Diego (Pl. Ex. 40, Calif. Ex. 486) and Coachella Valley County Water District (Pl. Ex. 36). In the aggregate they provide for delivery of 5,362,000 acre-feet per annum of "beneficial consumptive use," subject to the availability of the water for use in California, in accordance with the amounts and priorities established by agreement with the State under the so-called "Seven Party Agreement."

Under date of February 9, 1944, a contract was executed between the United States and the State of Arizona for the delivery of stored water for use in Arizona (Pl. Ex. 32; Rept., App. 5). The contract was unconditionally ratified by an Act of the Legislature enacted on February 24, 1944, and approved by the Governor of Arizona the same day. At the same time Arizona also unconditionally ratified the Colorado River Compact. (Sp. Master's Ex. 4 (p. A559).)

The Arizona contract of February 9, 1944, provides:

> 7. (a) Subject to the availability thereof for use in Arizona under the provisions of the Colorado River Compact and the Boulder Canyon Project Act, the United States shall deliver * * * each calendar year from storage in Lake Mead * * * so much water as may be necessary for the beneficial consumptive use for irrigation and domestic uses in Arizona of a maximum of 2,800,000 acre-feet [plus] one-

> half of any excess or surplus waters unapportioned by the Colorado River Compact * * *.

The Arizona contract also stipulated:

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

As provided for in subdivision (l) of Article 7 of the Arizona water delivery contract, the United States has made a number of contracts for the delivery of water to individuals, irrigation districts, corporations and political subdivisions within the State of Arizona. Deliveries have also been made to lands of the United States (Rept. 212–214, 254–300).

On January 3, 1944, the United States contracted with the State of Nevada for the delivery of water from storage in Lake Mead in quantities not to exceed 300,000 acre-feet annually. (Rept. 209.)

4. *Claims of the United States*

Before the Special Master:

(a) The United States sought recognition of its right to use and control the use of the waters of the mainstream for purposes of navigation, river regulation, flood control, and power generation. No quantitative claims for such purposes were asserted.

(b) The United States asserted, as an overriding claim against the entire supply of water, its obliga-

tion and right to deliver water to Mexico according to the terms of the 1944 treaty with that country. The quantity required to satisfy the treaty may vary according to certain circumstances specified in the treaty, but for practical purposes, it is 1,500,000 acre-feet per annum measured in the limitrophe section of the river.

(c) The United States claimed rights to use mainstream waters for irrigation and other uses on the Chemehuevi, Cocopah, Yuma, Colorado River, and Fort Mohave Indian Reservations.

(d) The United States claimed rights to use mainstream waters on the Havasu Lake National Wildlife Refuge, Imperial National Wildlife Refuge, and Cibola Valley Waterfowl Management Area.

(e) The United States claimed rights to use mainstream waters on the Lake Mead National Recreation Area.

(f) The United States claimed rights to divert and deliver mainstream waters for the Yuma Reclamation Project in Arizona and California, the Yuma Auxiliary Reclamation Project in Arizona, the Gila Reclamation Project in Arizona, Boulder City, Nevada, and areas served by the All-American Canal System in Imperial and Coachella Valleys in California.

5. *Report of Special Master and Proposed Decree*

So far as the issues covered by this brief are concerned, the Special Master found that the water to be distributed under the Project Act consisted of the "mainstream" of the Colorado River, which he defined as including Lake Mead and the mainstream

of the Colorado River below Lake Mead, thus excluding the Gila River and other tributaries and leaving out all consideration of Arizona and Nevada uses thereof. The Special Master found that the Act authorized the Secretary of the Interior to contract for distribution of the mainstream water without being bound by considerations of equitable apportionment or prior appropriations, but that his contracts must give recognition to "present perfected rights" and must be made in accord with California's Limitation Act by which it agrees to accept only 4,400,000 acre-feet out of the first 7,500,000 acre-feet available, plus one-half of the surplus or unapportioned waters. The Special Master found that the Secretary of the Interior had validly contracted to deliver, out of the first 7,500,000 acre-feet of mainstream water, 4,400,000 acre-feet to California, 2,800,000 acre-feet to Arizona, and 300,000 acre-feet to Nevada, the surplus to go one half to California and one half to Arizona, subject to Nevada's right to contract for a small share.

The Decree recommended by the Special Master adopts the priorities of use stated in Section 6 of the Boulder Canyon Project Act, the first being the right of the United States to use mainstream waters for river regulation, improvement of navigation and flood control. The recommended Decree further provides that the United States may release water in satisfaction of its obligations to Mexico under the treaty of February 3, 1944, without regard to such priorities. (Rept. 347.)

The Special Master also makes specific provisions within his recommended Decree for the claims of the

United States for use of water on the specified mainstream Indian Reservations, Havasu Lake National Wildlife Refuge, Imperial National Wildlife Refuge, and the Lake Mead National Recreation Area. The Special Master concluded that the uses of the United States within each State are limited by that State's allocation, except to the extent that the uses are protected by Section 6 of the Project Act as "present perfected rights." (Rept. 302.) The United States' claims of right based on reservations of public lands made before the Project Act became effective are accorded this status (Rept. 310).

The Special Master also held that these federal uses are "chargeable to the state within which the water is consumed, and this consumption is included within each state's apportionment" (Rept. 312–313).

5. *Present Claims of the Parties*

Arizona accepts the Special Master's allocation of mainstream water as among the Lower Basin States. It now concedes that one-half of all mainstream water in excess of 7,500,000 acre-feet may be used in California. Arizona continues to dispute the validity of the provisions of her contract insofar as they recognize rights in Nevada, Utah, and New Mexico with respect to excess or surplus waters unapportioned by the Compact. Arizona supports the Special Master's determination that uses from the mainstream or tributaries above Lake Mead are not to be included in her accounting—a ruling to which the United States excepts for reasons stated in its opening brief. Arizona disputes the Special Master's conclusions as to

the reserved rights of the United States for the federal reservations.

California[3] asks that the "safe annual yield"[4] of mainstream water available for use in the Lower Basin be fixed at 5,850,000 acre-feet of beneficial consumptive use (diversions less returns to the River) and that this supply be allocated as follows:

4,600,000 acre-feet for use in California
1,129,500 acre-feet for use in Arizona
120,500 acre-feet for use in Nevada

From the "provisional supply"—water presently available in the Lower Basin on a "safe annual yield" basis but subject ultimately to use in the Upper Basin—California asks that the following allocations be made:

778,000 acre-feet per annum for use in California
80,000 acre-feet per annum for use in Arizona
None for use in Nevada

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[3] Throughout the trial of the case, and in the briefing for the Special Master, California's presentation has involved a number of alternative positions. The quantity of consumptive use of mainstream water to which it claims to be entitled varies according to the particular theory advanced. However, with its proposed findings and conclusions it proposed a form of decree. (Calif. Proposed Findings and Conclusions, Vol. I, pp. Decree-1 to Decree-26.) We have referred to that proposed decree as the best indication of California's basic claim in terms of water quantity.

[4] Defined at I H.(2) of California's proposed decree as "that quantity of Colorado River system water which may reasonably be expected to be permanently available at an equal annual rate for beneficial consumptive use within the lower basin * * * net of all diminutions of supply."

Nevada in effect accepts the Special Master's Report.

The United States agrees with the major part of the Special Master's Report. As pointed out in our exceptions and brief in support thereof, we submit that the contracts between the United States and Arizona and Nevada, which charge their share of the water with uses from the mainstream and tributaries above Lake Mead are valid and that, contrary to the Special Master's ruling, intra-state distribution pursuant to the contracts is not controlled by State law.

SUMMARY OF ARGUMENT

A. The first portion of our argument deals with the interstate allocation of the Colorado River water made available for use by Hoover Dam. Three States in the Lower Basin are so situated that they can make use of this water, namely, California, Arizona, and Nevada. The Special Master upheld the validity of an allocation effected through contracts executed by the Secretary of the Interior pursuant to the Boulder Canyon Project Act granting California 4,400,000 acre-feet, Arizona, 2,800,000 acre-feet, and Nevada 300,000 acre-feet, out of the first 7,500,000 acre-feet available annually, with California and Arizona evenly dividing any surplus or unapportioned water, subject to Nevada's right to contract for a small part thereof.

Congress has the constitutional power under the Commerce Clause, the General Welfare Clause, and the Property Clause to govern the distribution of the waters of the Colorado River which it has brought under control through the construction of Hoover

Dam and related facilities. By the Boulder Canyon Project Act Congress authorized the Secretary of the Interior to distribute the stored water among the States by contract. One of the limitations on the Secretary in making these contracts was that uses in California must comply with a limitation which it was required to accept as a condition for the effectiveness of the Act. This limitation provided that California's use of water from the Colorado River should not exceed 4,400,000 acre-feet of the water "apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact," plus "one-half of any excess or surplus waters unapportioned by said compact." This Section of the Act is properly construed to refer solely to waters of the mainstream of the Colorado River. The allocation permitted by the Act has no reference to the Gila River. This appears not only from the provisions of the Act itself but also from consideration of its legislative history, which demonstrates that Congress had in mind only the water which would be delivered from the Upper Basin to the Lower Basin at Lee Ferry and which could be impounded by Hoover Dam. Arizona's use of the Gila was not included.

The contracts executed by the Secretary of the Interior with Arizona and Nevada and with the several users in California comply with the provisions of the Project Act in this respect. California asserts that these contracts and the decision of the Special Master do not provide the necessary protection for existing uses in California. Insofar as these uses constitute

"present perfected rights," the Secretary of the Interior is required to satisfy them, as the Special Master held. But this is the limit of the obligation placed upon the Secretary by the Project Act to recognize claims of appropriative rights under State law. He is not required otherwise to give priority to California uses on any principle of prior appropriation or equitable apportionment.

The decree proposed by the Special Master would terminate the dispute among the Lower Basin States by affirming the apportionment made by the Secretary of the Interior under authority of Congress. California's assertions that the decree will result in disaster for the Metropolitan Water District are based on the assumption that the Upper Basin States will utilize their entire allotment in the near future. The right of the Upper Basin to all the water apportioned by the compact is not to be questioned but, as a practical matter, it is at best uncertain when Upper Basin developments will reach this point. It would be undesirable to abandon needed development in Arizona and Nevada in order to protect against possible future shortages which by reason of scientific discoveries or other factors may never occur.

B. The second portion of our argument deals with the right of the United States to utilize the impounded waters on federal reservations, including Indian reservations. This right is supported by the power of the United States delegated to the Secretary of the Interior to make an appropriate distribution of waters which are the product of a federal conservation project. The same reasoning which supports

the allocation of the water between the States supports the use of it on federal reservations.

In the alternative, regardless of such power, the United States has a proprietary interest in the use of the waters of the Colorado River and its tributaries appurtenant to its reservations which supports its right to deliver water to them in the quantity necessary to fulfill the purposes for which the reservations were established. The proprietary rights of the United States to the use of waters on the public domain apply to both navigable and non-navigable streams and, at least with respect to the use of the waters reserved for federal establishments from navigable waters, there has not been any surrender of that right. When the United States established the reservations here involved, it withheld from any other use sufficient water to accomplish their purposes. The right to use that water in this way is a "present perfected right" under the terms of the Boulder Canyon Project Act. The principles of equitable apportionment are not applicable to satisfaction of this claim against the water, and it is required to be recognized by the Secretary of the Interior.

The rights of the United States to water for use on these federal establishments, including the Indian reservations, must be safeguarded whatever apportionment is decreed among the States. The Special Master took account of these rights in the apportionment that he approved. It is the position of the United States that, regardless of the interstate division, these rights are entitled to be fulfilled.

ARGUMENT

I

THE WATERS OF THE BOULDER CANYON PROJECT ARE LAWFULLY ALLOCATED BY THE PROJECT ACT AND THE CONTRACTS MADE THEREUNDER BY THE SECRETARY OF THE INTERIOR

The Report of the Special Master is predicated upon this central thesis. By act of Congress and the exercise by the Secretary of the Interior of powers delegated to him by Congress, the United States has allocated the mainstream waters of the Colorado River impounded and controlled by the Hoover Dam and related works. This federal allocation is binding and supersedes all rights which might otherwise be claimed in the natural flow of the River by a State on behalf of its citizens under the law of prior appropriation or equitable apportionment.

In this portion of our brief we show that the central thesis of the Report is essentially correct. We submit first that Congress has the power, under the Constitution, to allocate among the citizens of different States waters which have been brought under control as a federal project by the expenditure of federal funds, notwithstanding State laws of prior appropriation or interstate doctrines of equitable apportionment. If Congress has exercised this power over the waters of the Colorado River, the elaborate arguments of California based upon prior appropriation and equitable apportionment are irrelevant to the disposition of this controversy.

We then go on to show that this federal power has in fact been validly exercised. Section 5 of the Boulder Canyon Project Act authorizes the Secretary of the Interior to make an allocation of the waters of the Colorado River subject to control by Hoover Dam and, contrary to California's view, does not require charging to Arizona any use of the waters of the Gila River. The Secretary of the Interior made such an allocation under Section 5 by entering into contracts with the States and individual users. The contracts permit the satisfaction of "present perfected rights" as required by Section 6 and are also valid and binding in all other respects.

It follows that the Special Master correctly based his recommendations for a decree upon the allocation made by the Secretary and, in our submission, these aspects of the recommendation should be approved by the Court.

A. CONGRESS HAS THE CONSTITUTIONAL AUTHORITY TO AUTHORIZE A FEDERAL ALLOCATION OF THE WATERS OF THE COLORADO RIVER

Congress has Constitutional power to regulate the navigable waters of the United States for the purposes of flood control, navigation, power production, and watershed and river development. *Oklahoma* v. *Atkinson Co.,* 313 U.S. 508; *Arizona* v. *California,* 283 U.S. 423; *United States* v. *Appalachian Power Co.,* 311 U.S. 77. Congress may also promote the general welfare through large scale projects for reclamation, irrigation and other internal improvement, *United States* v. *Gerlach Live Stock Co.,* 339 U.S. 725; *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275,

and dispose of and make all needful rules and regulations respecting property belonging to the United States. Constitution, Art. IV, Sec. 3, Cl. 2; *Ivanhoe Irrigation District* v. *McCracken, supra; United States* v. *Grand River Dam Authority,* 363 U.S. 229; *Winters* v. *United States,* 207 U.S. 564; *Federal Power Commission* v. *Oregon,* 349 U.S. 435; *United States* v. *Rio Grande Irrigation Co.,* 174 U.S. 690.

The Colorado River is a navigable stream. The Boulder Canyon Project Act authorized the construction and operation of the entire project, including Hoover Dam, Imperial Dam and the All-American Canal System,[5] for the purpose of controlling floods, improving navigation, delivering impounded waters for reclamation of public lands and other beneficial uses, and generating electric energy as a means of making the project financially self-supporting. The enactment of this legislation, therefore, was indisputably within the power of Congress. *Arizona* v. *California,* 283 U.S. 423.

The project involves the storage and disposition of waters amounting to substantially the entire flow of the Colorado River below Lee Ferry. In every real sense the availability of waters for use downstream results from the project and is controlled by its manager, the Secretary of the Interior. Accordingly, Section 5 of the Project Act, as we demonstrate below, authorized the Secretary to determine the disposition of the waters by contract. Section 5 also provides—

[5] And see, 49 Stat. 1039; 61 Stat. 628; 68 Stat. 1045; H. Doc. 415, 80th Cong., 1st Sess.; the Mexican Water Treaty, 59 Stat. 1219.

> 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.

These arrangements for the allocation of the Colorado River waters controlled by Hoover Dam plainly constitute reasonable conditions and limitations on the use of federal funds, federal property and federal privileges. *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275. Referring to earlier precedents the Court said (p. 295)—

> The lesson of these cases is that the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and other over-all objectives thereof. * * *

A federal allocation of the waters of a project built and managed by the United States pursuant to the exercise of Congressional power excludes all inconsistent claims. "* * * a State cannot compel use of federal property on terms other than those prescribed or authorized by Congress * * *. Article VI of the Constitution, of course, forbids state encroachment on the supremacy of federal legislative action." *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275, 295.

The principles of priority of appropriation and equitable apportionment are irrelevant, therefore, once it is shown that Congress has made or authorized a federal allocation. Recognition of this proposition removes the underpinning from California's attack upon the decree recommended by the Special Master,

for the essence of California's claim is that the principles of prior appropriation and equitable apportionment, when applied to the waters of the Colorado River, give her a right to a water supply adequate to permit full utilization of the capacities of her present projects, which should not be at the hazard of sharing shortages in the total main stream supply with future projects in Arizona and Nevada.

There is no merit in California's claim that her citizens could acquire "prior rights" (Calif. Opening Br., p. 37) in the navigable waters of the Colorado River before the United States exercised its powers over the stream. Any claimed rights recognized under State law were subject to, and could be displaced by, the exercise of the superior federal authority. In *United States* v. *Appalachian Power Co.,* 311 U.S. 377, 423, although the respondent had "as complete a right * * * as can be obtained under state law", the Court nevertheless held the right subject to federal control because "the state and respondent, alike * * * hold the waters and the lands under them subject to the power of Congress to control the waters for the purpose of commerce." The principle is well established by both prior and subsequent decisions. *E.g., United States* v. *Chandler-Dunbar Co.,* 229 U.S. 53, 69 ("that the running water in a great navigable stream is capable of private ownership is inconceivable"); *United States* v. *Willow River Power Co.,* 324 U.S. 499, 510; *United States* v. *Twin City Power Co.,* 350 U.S. 222, 228; *Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320, 334.

604608—61——3

Such cases as *Wilson* v. *Black-bird Creek Marsh Co.*, 2 Pet. 245, and *Gilman* v. *Philadelphia*, 3 Wall. 713, relied on by California, are immaterial because they hold at most that the States have implied power to act with respect to purely local facilities in the absence of Congressional legislation. Nor is the point affected by *Federal Power Commission* v. *Niagara Mohawk Corp.*, 347 U.S. 239, and *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, which hold only that the destruction of uses recognized by State authority is compensable if Congress has indicated an intent to provide compensation. The only prior state-recognized rights in the waters of the Colorado River provided for by the Project Act are the "present perfected rights" protected under Section 6 and, as we show below, the contracts negotiated by the Secretary of the Interior and the decree recommended by the Special Master accord these rights their full statutory protection. In any event, the issue of compensation is not involved in the present controversy. Cf. *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 296–297.

The principles underlying the *Chandler-Dunbar* case and later authorities dealing with claims for compensation are equally applicable to any argument that the federal allocation invades state sovereignty. As the Court said of a similar contention in *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508, 534—

> * * * the suggestion that this project interferes with the state's own program for water development and conservation is likewise of no avail. That program must bow before the "superior power" of Congress. * * *

B. SECTION 5 OF THE PROJECT ACT AUTHORIZES AN ALLOCATION OF THE MAINSTREAM WATERS OF THE COLORADO RIVER

1. *Section 5 authorizes the Secretary of the Interior to make an allocation.*

Section 5 of the Project Act authorizes the Secretary under such general regulations as he may prescribe—

> to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon * * *.

Section 5 then specifies the purposes for which water may be delivered and prescribes in considerable detail both the conditions under which contracts may be let for the use of water for generating electric energy and also the terms that shall be included in contracts for the sale of electric energy. Section 5 also stipulates—

> No person shall have or be entitled to have the use for any purpose of the waters stored as aforesaid except by contract made as herein stated.

These plain words make it too clear for argument that Section 5 authorizes the Secretary to apportion the consumptive use of the waters impounded and controlled by the Boulder Canyon Project. A contract, to be valid, would have to conform to the requirements of the other sections of the Project Act, but any contracts which satisfied those requirements would constitute binding allocations and no person could have any rights to the water of the lower Colorado River except as provided by a contract with the

Secretary.[6] We explored this at greater length at pages 24–34 of our brief in this Court in support of our exceptions to the Special Master's Report.

It may be urged to the contrary that the allocation of the waters of the Colorado River among the citizens of several different States was too controversial and important a problem for Congress to delegate the determination to the Secretary of the Interior. But the Project Act does not leave the Secretary at large. The first paragraph of Section 4(a) places specific limits upon the aggregate annual consumptive use for which water may be delivered to users in California. The limitation necessarily implies that the remainder is to go to Arizona and Nevada since Utah and New Mexico have no access to the mainstream. Furthermore, the second paragraph of Section 4(a) indicates the kind of apportionment which the Congress would deem proper by granting Congressional consent in advance to a proposed interstate compact between California, Nevada, and Arizona. While this paragraph never became operative because the tri-state compact was never negotiated, it supplied guidance for the Secretary's exercise of discretion by indicating the kind of division which Congress considered equitable.

2. *The allocation authorized by Section 5 and the provisions of the California Limitation Act apply only to mainstream waters.*

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[6] Section 6 directs the Secretary to respect "present perfected rights." The meaning of this provision is discussed at pp. 49–50, *infra.*

Section 5 of the Project Act requires, *inter alia,* that contracts made by the Secretary "shall conform to paragraph (a) of Section 4 of this Act." The critical passage in Section 4(a) provides that California's

> aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River * * * 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 * * *.

The contracts made by the Secretary of the Interior allocate only water from Lake Mead and from the mainstream below Hoover Dam, except that, to protect against upstream use decreasing project water, the contracts require Arizona and Nevada to deduct from their allotments for uses above Lake Mead whether from the mainstream or from tributaries. We submit that this limitation was authorized by the Project Act and that the Special Master erred in refusing to accept it. See our Brief in Support of Exceptions pp. 7–21. This issue does not affect the present point which relates to Lake Mead and waters below Hoover Dam. The contracts rest upon the proposition that the quoted passage from the Project Act and the corresponding language of the California Limitation Act refer only to mainstream waters, with the result that California is limited to—

> (i) four million four hundred thousand acre-feet annually out of the first seven million five hundred thousand acre-feet of mainstream

> water available to the Lower Basin States, plus—
>
> (ii) one-half of the mainstream water in excess of seven million five hundred thousand acre-feet.

Since the Master's Report adopts this first interpretation and the recommended decree rests upon it, we deem it important to show that the interpretation is correct.

It is plain that the critical passage in Section 4(a) cannot be read literally. Indeed, as the Special Master observed, no one argues for a completely literal interpretation.[7] California proposes a second construc-

[7] The interpretation of Section 4(a) submitted by the United States and approved by the Special Master would not depart from the literal meaning of the words if Arizona's contention that Article III (a) and (b) of the Compact apportions only mainstream water were ultimately upheld. But notwithstanding the Master's observations respecting the meaning of various Compact provisions (Rept. 138–151), many of the questions presented by the conflicting contentions of California and Arizona respecting Compact interpretations are questions in which the Upper Basin States have a substantial interest and which cannot be finally answered in their absence. Among these, in addition to those on which the Master has expressed his opinion, is the question whether "beneficial consumptive use" is to be measured for Compact accounting purposes at site of use or by depletion of flow at some downstream point. Another is whether uses by the United States on its Indian reservations are chargeable to either basin for purposes of interbasin accounting. (See Article VII of the Compact.) Still another is whether reservoir losses of water in storage for use in either basin are chargeable for purposes of interbasin accounting. As observed by the Special Master with respect to the Upper Basin's delivery obligation under Article III(c) of the Compact (Rept. 145), these are all questions which "ought not to be

tion. It construes the Compact as an apportionment of all the waters in the Colorado Basin and, reading the first phrase in the critical passage literally, contends that "waters apportioned to the lower basin States by paragraph (a) of Article III of the * * * compact" means the first 7,500,000 acre-feet of annual consumptive uses of Colorado River system water in the Lower Basin, including all uses from the Gila River and other tributaries. Since California calculates the present average annual consumptive uses on the tributaries at approximately 1,950,000 acre-feet and treats them as apportioned by Article (a), it argues that the waters in the mainstream "apportioned to the lower basin States by paragraph (a) of Article III of the * * * compact" do not exceed 5,550,000 acre-feet of consumptive use annually.[8] Of this water, says California, the limitation of use in California only precludes use of any part over 4,400,000 acre-feet. All waters in the mainstream in excess of those required for consumptive use of 5,550,000 acre-feet are, according to California's contention, "excess or surplus waters unapportioned by"

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answered in the absence of the states of the Upper Basin" and which need not "be answered in order to dispose of this litigation affecting only Lower Basin interests." Here it is necessary to determine only what Congress meant by the language in question. Whether or not such meaning accords with the meaning of the Compact provisions referred to need not be determined in this case.

[8] The figure is obtained by subtracting the 1,950,000 acre-feet of consumptive use on the tributaries from the total figure of 7,500,000.

the Compact.[9] But California is unwilling to read the second phrase in the critical passage literally. A literal construction of "one-half of any excess or surplus waters unapportioned by said compact" would exclude California from any share of the next 1,000,000 acre-feet of consumptive use annually because this water is apportioned by Article III(b).[10]

Arizona offers still another interpretation. It argues that by the first phrase, "waters apportioned to the lower basin States by paragraph (a) of Article III of the * * * compact," Congress meant the first 7,500,000 acre-feet of annual consumptive uses in the Lower Basin States *from the mainstream.* Therefore, says Arizona, by consenting to the Compact with this understanding of the meaning of Article III, Congress modified the Compact even if Article III were otherwise construable as effecting

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[9] Since use in California is limited to "*not more than one-half* of any excess or surplus waters unapportioned by" the Compact, we are unable to state the argument on which California urged the Special Master to recommend a decree which would allocate the consumptive use of mainstream waters in excess of 4,400,000 acre-feet in proportions of

978,000 acre-feet to California
152,000 acre-feet to Arizona
28,000 acre-feet to Nevada

[10] In view of Arizona's present concession (Opening Br. 82) that the phrase "excess or surplus waters unapportioned" by the Compact includes all mainstream water above the first 7,500,000 acre-feet available for use in the Lower Basin States in any one year, there would appear to be no further need to review the legislative history which supports the Special Master's rejection of the argument which would have excluded California from sharing in the Article III(b) water.

an apportionment of system, as distinguished from mainstream, waters. Alternatively, Arizona argues that the Compact apportionment for use in the Lower Basin refers only to the use of waters in the mainstream and is exclusive of Lower Basin tributary uses. Under either of these alternative arguments, consumptive uses in California out of the first 7,500,000 acre-feet of mainstream waters available annually in the Lower Basin would be limited to 4,400,000 acre-feet, with the remaining 3,100,000 acre-feet available for use in Arizona and Nevada.

The choice between the conflicting interpretations depends upon the true Congressional intent in the enactment of Section 4(a). Even if Congress used the words "apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact" or the words "excess or surplus waters unapportioned by said compact" in a sense entirely different from the Compact use, it is the understanding and purpose of Congress that is important here. The meaning of the negotiators of the Compact need not be resolved in this case, because the case is controlled by the meaning which Congress attributed to the words. An analysis of Section 4(a) itself, including the relationship of its two main paragraphs, and its legislative history demonstrate that Congress intended the reference to waters apportioned by the Compact to mean the first 7,500,000 acre-feet of annual consumptive use from the mainstream available in the Lower Basin.

(a) *The statutory provisions*

The Boulder Canyon Project as a whole deals with the portion of the Colorado waters delivered from the Upper Basin to the Lower at Lee Ferry and otherwise reaching the mainstream below that point. The purpose of the project was to build a reservoir of sufficient size to control the waters of the river above the dam, so as to eliminate the devastating floods and reduce the shortages in order that all of the mainstream waters available could be devoted to beneficial uses, including delivery through the new All-American Canal. No part of the project touched the Gila River[11] or the other downstream tributaries. The waters which the Secretary would control would be essentially mainstream waters. It is reasonable to suppose, therefore, that Congress, in preparing this statute, was thinking of the waters of the Colorado River itself, *i.e.*, the mainstream waters, not the waters of the river system or the entire Lower Basin.

The words of Section 4(a) themselves bear out this inference. The provision in question limits the aggregate annual consumptive use in California "of water of and from the Colorado River." It is to the "Colorado River," and not to the river system or Lower Basin, that the limitation explicitly refers.

The second paragraph of Section 4(a), in which Congress gave advance consent to a prospective tri-state compact, shows that the first paragraph refers

[11] The Gila actually joins the Colorado at a point below the present diversion point for the All-American Canal so that, in any event, any water which might join the mainstream from the Gila would not be available for that project.

only to mainstream waters. Arizona, California, and Nevada were authorized to enter into an agreement which would provide that of the 7,500,000 acre-feet apportioned to the Lower Basin by paragraph (a) of Article III of the Colorado River compact there should be apportioned to Nevada 300,000 acre-feet and to Arizona 2,800,000 acre-feet of annual consumptive use, with Arizona to have the exclusive use of the Gila River within that State. Since California was to receive 4,400,000 acre-feet under the first paragraph, the authorized compact would divide among these three States all the water to which Congress referred at the start of the second paragraph in the phrase—

> 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact * * *.

To interpret this phrase literally to mean the first 7,500,000 acre-feet out of all the waters of the Lower Basin, including the tributaries, would attribute to Congress an intent to authorize California, Nevada, and Arizona to divide this water among themselves and thereby entirely exclude New Mexico and Utah from Lower Basin tributary waters which were being consumed in those States at the time the Project Act was enacted. The only reasonable inference is that Congress used the phrase as a way of referring to 7,500,000 acre-feet of water *out of the mainstream*. This is the water which the draftsman, rightly or wrongly, supposed Article III(a) to apportion.[12]

[12] See p. 30, *supra*, especially note 7.

The first of the critical phrases in the first paragraph of Section 4(a) is substantially the same as the phrase in the second paragraph, *viz.*—

> apportioned to the Lower Basin States by paragraph (a) of Article III of the Colorado River compact * * *.

It is impossible to believe that this phrase does not refer to the same waters as those described in the second paragraph, even though the number of acre-feet is not mentioned. Therefore, in the first paragraph Congress must have used the phrase "waters apportioned to the Lower Basin States by paragraph (a) of Article III of the Colorado River compact" as a way of referring to 7,500,000 acre-feet of water out of the mainstream.

The inference is confirmed by item (3) in the second paragraph of Section 4(a), which authorizes the three States to give Arizona the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of Arizona. Congress obviously believed that the division of 4,400,000 acre-feet to California, 300,000 acre-feet to Nevada, and 2,800,000 acre-feet to Arizona would complete the disposition of the water which the Upper Basin undertook to deliver to the Lower Basin by Article III(d). The allocation of the Gila River to Arizona was therefore additional. The only interpretation which permits the Gila water to be treated as additional, in accordance with the obvious intent, is to read the 7,500,000 acre-feet as referring to the mainstream. Senator Johnson recognized this during the debates upon the second

paragraph of Section 4(a), when he said (Calif. Compilation, p. 175)—

> When Arizona says that she has but 2,800,000 acre-feet of water, to that must be added the Gila River with its 3,500,000 acre-feet.

The second paragraph of Section 4(a) also provides that the tri-state compact authorized by Congress may divide between Arizona and California all the "waters unapportioned by the Colorado River compact." If this reference were to be taken literally and if the Compact were to be construed, in the manner for which California contends, as an apportionment of all the water in the system, then the proposed tri-state compact authorized by Congress would be inconsistent with the Compact, for Article III(f) of the Compact reserved the future division of waters "unapportioned" by the Compact to a new agreement between the States of the Upper and Lower Basins. Again, inconsistency and resulting unfairness can be avoided only by understanding that Section 4(a) refers to 7,500,000 acre-feet of mainstream waters.

The relationship between the first and second paragraphs of Section 4(a) was appreciated during the debate upon the Project Act. The second paragraph is the result of an amendment offered by Senator Hayden which he described as "a mere corollary to the amendment" which was adopted as the first paragraph of Section 4(a) (Arizona Compilation of Legislative History, p. 65).

(b) *The Legislative History.*

The legislative history of Section 4(a) of the Project Acts supports our conclusion that Congress intended to limit the annual consumptive use in California to 4,400,000 acre-feet of the first 7,500,000 acre-feet of mainstream waters available for use in the Lower Basin. In debates of such duration, participated in by many individuals, representing competing interests, it is inevitable that many arguments were advanced and statements of intention made which confuse the picture. The Special Master reviews some of this contradictory matter (Rept. 189–194) and California makes the most of it (Calif. Opening Br., pp. 110–124). Since all the materials are before the Court, we shall content ourselves with a review of the salient features of the debate which we believe require our conclusion.

Before examining the debates, it is important to understand the situation facing Congress when the Project Act was under consideration. The Colorado River Compact had not been ratified by all the signatory States as required by Article XI. Arizona was unwilling to ratify. Arizona may well have feared that California, which was growing far more rapidly, would gobble up the largest part of the 7,500,000 acre-feet which the Compact proposed to apportion to the Lower Basin. Although the development of Arizona had lagged behind that of California, it was fairly to be anticipated that Arizona's use of water would develop more rapidly than the Upper Basin States' and therefore, in the absence of the Compact, Arizona would be able to establish a basis for making

a claim for appropriative rights having priority over uses in the Upper Basin. The representatives of the Upper Basin States were therefore reluctant to enact legislation that would facilitate increased use of waters in the Lower Basin before something was done to protect the interests of the Upper Basin.

The best way out of the impasse would be for Arizona, California, and Nevada to negotiate an interstate compact dividing the river below Lee Ferry. Obviously the Upper Basin had no interest, either direct or indirect, in the division between the Lower Basin States of the water from the mainstream *and tributaries;* once Arizona's interest in the mainstream was secured, her opposition to the Compact would relax. After a conference in Denver, Colorado, in the summer and autumn of 1927, the Governors of the four Upper Basin States recommended "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:

> 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." [Arizona Compilation, pp. 33 and 34, and p. 105; emphasis added.]

While this recommendation was followed by recommendations that the waters of Lower Basin tributaries be apportioned to the States in which those tributaries flowed (Arizona Compilation, pp. 35 and 105), the factor of most significance here is that this

starting point for the ultimate figure of 4,400,000 acre-feet of Article III(a) water for use in California was expressly related to the average annual delivery of 7,500,000 acre-feet at Lee Ferry under the terms of the Colorado River Compact.

These recommendations played an important part in the evolution of present Section 4(a). Their substance was introduced in a committee amendment to Section 5 of S. 728, reported on March 20, 1928, by the Senate Committee on Irrigation and Reclamation in S. Report No. 592, 70th Congress, 1st Session, which was "designed to give further assurances to the various states, *particularly those in the Upper Basin*, against any undue advantages or rights to California." (Calif. Compilation of Legislative History, p. 6.) This amendment would have provided that contracts under Section 5 should not "provide for an aggregate annual consumptive use in California of more than 4,600,000 acre-feet of the water allocated to the Lower Basin by the Colorado River compact * * * and one-half of the unallocated, excess and/or surplus water: * * *." (Calif. Ex. 2001.)

This amendment was offered in Committee by Senator Kendrick of Wyoming "for the purpose of protecting the water rights of the four upper States" against the possibility that otherwise "California would only be restricted by *the 7,500,000 acre-feet that went down*" and, if Arizona stayed out of the Compact, "she would have her legal right to appropriate as much water as she could put to beneficial use." Such might have been the result "unless there was an agreement as to exactly how much water should go to

the lower States out of *the 7,500,000 acre-feet that went down to them.*" See also the explanation by Senator Pittman during the debate on the Bratton amendment to the Phipps amendment, which was approved and became the first paragraph of Section 4(a). (Arizona Compilation, p. 59; Calif. Compilation, pp. 107 and 108.)

While the 4,600,000 acre-foot limitation proposed in the committee amendment to Section 5 was the quantity demanded by California's representatives at the Denver conference, rather than the quantity recommended by the Upper Basin Governors as a compromise (see discussions by Senator Hayden, Arizona Compilation, p. 38, and Senator Pittman, California Compilation, p. 109), it is obvious that the water which was considered available for possible use by California and which was in the Committee's contemplation in proposing the limitation as to both "allocated" and "unallocated, excess and/or surplus water" was water in the mainstream, just at is was in the contemplation of the Upper Basin Governors.

The compromise recommended by the Governors' Conference was placed before the Senate in full by Senator Hayden early in the debate on the proposed Hayden amendment to Section 4(a) of the pending bill.[13] The Phipps amendment was later substituted

[13] The recommendation of the Governor's conference was frequently referred to on other occasions during the debates on the various amendments of which the first paragraph of Section 4(a) was the fruition. See the remarks of Senator Pittman of Nevada (Arizona Compilation, pp. 13 and 14, p. 60), Senator Hayden of Arizona (Arizona Compilation, pp. 33 and 34), Senator King of Utah and Senator Bratton of New Mexico (Arizona Compilation, p. 47).

604608—61——4

(Arizona Compilation, pp. 13 and 14). The Phipps amendment fixed the limitation at 4,600,000 acre-feet. The dispute over whether the limitation upon California should be 4,200,000 acre-feet or 4,600,000 acre-feet continued, but everyone agreed that the total amount to be apportioned was the 7,500,000 average annual flow to come down the mainstream to the Lower Basin. The dispute was resolved by the Bratton amendment which substituted the compromise figure of 4,400,000 acre-feet for the 4,600,000 acre-feet proposed by Senator Phipps. With minor changes the Phipps amendment became the first paragraph of Section 4(a). The Hayden amendment, with minor alterations, became the second paragraph.

Throughout the debate Senators spoke as if the universe to be divided was the mainstream waters. Senator Pittman repeatedly referred to the 7,500,000 acre-feet that "went down" to the Lower Basin. (Arizona Compilation, p. 59; Calif. Compilation, pp. 107–108.) An amendment to Section 5 proposed by Senator Waterman of Colorado during the first Session of the 70th Congress, but not debated or voted upon (Calif. Compilation, p. 14), would have required California to agree to furnish, from her 4,600,000 acre-feet and one-half of the unallocated water, any water required by Arizona "out of the main stream" in excess of 2,900,000 acre-feet per annum plus one-half the unallocated water, "so that in no event shall there ever be demanded or required, *out of the main stream of the Colorado River,* by the States of Arizona, California, and Nevada * * * any water in excess of the amount apportioned to

them by Article III of the Colorado River compact, to be delivered to them * * * at Lee Ferry * * * or elsewhere." (Emphasis added.)

In discussing Arizona's contention for 4,200,000 acre-feet, Senator Pittman on December 7, 1928, said: "Arizona, as I understand, will ratify the agreement whenever there shall be a provision in the bill or a separate agreement between Nevada and Arizona and California *dividing the water let down to the three lower States. Of the 7,500,000 acre-feet of water let down that river* they have gotten together within 400,000 acre-feet. They have got to get together, and if they do not get together Congress should bring them together." (Arizona Compilation, p. 44; emphasis added.)

On December 8, 1928, Senator Bratton was explaining a proposed amendment to Section 4(a) which would have limited California to 4,400,000 acre-feet of III(a) water, 500,000 acre-feet of III(b) water, and one-half of the excess or surplus waters unapportioned by the Compact. (Arizona Compilation, pp. 46–47.) The following colloquy occurred:

> MR. KING. I will ask the Senator if it is not a fact that at the time when the governors' conference considered the matter and recommended a settlement upon a basis of 4,200,000 acre-feet to California there had not been fully discussed and fully appreciated the fact *that there was probably a million acre-feet subject to capture* which, under the compact, was allocated to Arizona and to California, so that if 4,200,000 acre-feet were awarded out of the 7,500,000 there would be an additional 500,000 acre-feet out of this 1,100,000 acre-feet which,

> under the compact, was to be allocated to the two States, so California in the aggregate would get 4,700,000 acre-feet? [Emphasis added.]
>
> MR. BRATTON. That is true if the estimated surplus actually exists. At the same time, Arizona would get her 3,000,000 acre-feet agreed to by the governors as her just share of the allocated water, plus 500,000 acre-feet, being one-half of the unallocated surplus, so that while California would get 4,700,000 acre-feet Arizona would get 3,500,000 acre-feet. The surplus to which the Senator from Utah refers would be equally divided between Arizona and California. Neither State would get an advantage by reason of the division of the surplus. [Arizona Compilation, p. 47.]

The existence of the estimated surplus could be doubtful only if the area of discourse was limited to the mainstream waters of the Colorado River. In that event the proposed figures would exhaust the 7,500,000 acre-foot annual average of which the Lower Basin was alone assured. If the subject of the discussion also included the 3,500,000 acre-feet then supposed to be available in the Gila River (see Senator Johnson's statement, *supra,* p. 37), no one could have doubted for a moment the existence of a surplus in excess of the 7,500,000 acre-feet.

The subject matter of the discussion was again made clear by Senator Phipps on May 2, 1928, in response to a comment by Senator Johnson of California:

> MR. PHIPPS.
>
> * * * * *

> The Senator from California referred to the limit of 4,600,000 acre-feet of water written in this bill as the maximum amount which California might use per annum out of the stream. I think in that statement he was disregarding the fact that California would be entitled to at least her one-half of the surplus or additional waters *which are known to pass through the stream annually,* to the extent, it is estimated, of at least 1,000,000 acre-feet. [Calif. Compilation, p. 12; emphasis added.]

And after the Bratton amendment to the Phipps amendment to Section 4(a) had been approved but before final adoption of the Phipps amendment, Senator Pittman said:

> The Senate has already determined upon the division of water between those States. How? It has been determined how much water California may use, and the rest of it is subject to use by Nevada and Arizona. Nevada has already admitted that it can use only an insignificant quantity, 300,000 acre-feet. That leaves the rest of it to Arizona. As the bill now stands it is just as much divided as if they had mentioned Arizona and Nevada and the amounts they are to get * * *. [Arizona Compilation, p. 80.]
>
> As I understand this amendment, *Arizona today has practically allocated to it 2,800,000 acre-feet of water in the main Colorado River.* It is there for their use * * *. [Arizona Compilation, p. 82.]
>
> We have already decided as to the division of the water, and we say that if the States wish they

> can enter into a subsidiary agreement confirming that. * * * [Arizona Compilation, p. 85]

As the Special Master states (Rept. 180), "every expression of intent made by any Senator who had anything to do with the legislation" indicates that Congress was thinking only of mainstream waters when it placed limitations upon California and divided the surplus by the first paragraph of Section 4(a).

It follows that the allocation which the Secretary is authorized to make by Section 5 is an allocation of mainstream water which limits California to (i) 4,400,000 acre-feet of the first 7,500,000 acre-feet annually available in the mainstream and (ii) one-half of any surplus of mainstream waters in excess of 7,500,000 acre-feet.

C. THE CONTRACTS EXECUTED BY THE SECRETARY OF THE INTERIOR MAKE A VALID ALLOCATION OF THE MAINSTREAM WATERS

1. *The contracts constitute interstate allocations.* Since California's access to the Colorado River is restricted to the mainstream, it is obvious that contracts for delivery of water to users in California have no bearing on the controversy as to whether the allocations made by the Secretary are limited to mainstream waters. The only issue with respect to them is whether they conform to the Limitation Act and recognize present perfected rights.

Nevada has no access to tributaries entering the river below Lake Mead, and we have discussed in our opening brief (pp. 7–21) our reason for urging that uses from the tributaries entering above Lake Mead should be deducted from Nevada's share.

However, Arizona does have access to the lower tributaries, principally the Gila, and if the Project Act were properly interpreted to cover allocations of water from those sources, the Secretary of the Interior would have to consider uses on the tributaries in making his contract with Arizona. In 1944, the Secretary of the Interior entered into a contract with Arizona providing for the delivery from storage in Lake Mead of so much water as may be necessary for beneficial consumptive use in Arizona of a maximum of 2,800,000 acre-feet, taking into account the extent to which consumptive uses of water above Lake Mead diminish the flow into the reservoir. While the 1944 contract does not specifically refer to the Gila River, it in effect excludes water used from it because of its omission to provide for any reduction on account of such use.[14] It is our understanding that this contract with Arizona does not by itself authorize the actual delivery of water in compliance with Section 5 of the Project Act, since that Section requires that the contracts be entered into with the actual

[14] The "General Regulations for the Storage of Water in Boulder Canyon Reservoir and the Delivery Thereof in Arizona" issued by the Secretary of the Interior on February 7, 1933 (Pl. Ex. 28) provided for the delivery from storage in Lake Mead of "so much available water as may be necessary to enable the beneficial consumptive use in Arizona of not to exceed [2,800,000] acre-feet annually by all diversions affected from the Colorado River and its tributaries below Lee Ferry (but in addition to all uses from waters of the Gila River and its tributaries) * * *." These regulations were withdrawn when Arizona did not accept the proposed contract within a few months after their issuance.

users of the water. Rather, this contract is in the nature of a commitment by the Secretary to enter into contracts with users in Arizona up to the limit of 2,800,000 acre-feet. In this sense it is an allocation by the Secretary of that amount of water for future contractual use.

The important thing is that the Secretary's contract to deliver 2,800,000 acre-feet to Arizona, when added to the 300,000 acre-feet included in the Nevada contract and the 4,400,000 acre-feet permitted to California under its Limitation Act and the contracts made with users there, totals 7,500,000 acre-feet, the amount of mainstream water initially available for apportionment. Since all of these undertakings involve mainstream use, these contracts in fact exclude tributary use below Lake Mead from the Secretary's calculations.

It is true that in the contracts with Arizona and Nevada the Secretary has disclaimed any intention to resolve the dispute among the States respecting the meaning of the Project Act and the Colorado River Compact. It is also true that the contracts are specifically made subject to the availability, legally and physically, of water to fulfill the Secretary's obligations. As we interpret the Project Act, these contracts are in full conformity with the requirements of Section 4(a). What the Secretary said in order to preserve any prior rights of the States, is less important than what he did. And he did make an apportionment under the authority delegated to him by the Project Act. Therefore, the Special Master was entirely justified in finding, as he did, that the

allotments of project water to the contending States were validly made by the terms of the Project Act and the contracts executed thereunder.

2. *The contracts conform to the requirements of Section 6 for the satisfaction of present perfected rights.*

Section 6 of the Project Act requires that stored water be used for the "satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact." California raises the question whether it is necessary for the Secretary of the Interior to protect all existing California projects as "present perfected rights" by limiting allocations for future uses in other States.

In our Brief in Support of Exceptions to the Special Master's Report and Recommended Decree, pp. 24–47, we have demonstrated that neither Section 14 nor Section 18 of the Project Act makes State laws of prior appropriation applicable to the distribution of the water supply of the Boulder Canyon Project. In the same context we have demonstrated that there is nothing in federal reclamation law or in 59 years of administration of that law to support the California contention that State laws relating to the appropriation, control, and distribution of water govern the administration of the water supplies of federal reclamation projects. We refer to, but do not repeat here, the arguments presented in that brief.

It is apparent that by the use of the term "present perfected rights" Congress meant to state the full extent of the obligation of the Secretary of the Interior to recognize priorities established through ap-

propriation and use. By not accepting the usual language of "prior appropriation", or making reference to State law as such, Congress showed that it intended to accomplish a different result than would have been achieved by adopting those criteria. Under the law generally applied in the States recognizing prior appropriation, a landowner may establish a right to water superior to subsequent claims by filing a notice and diligently proceeding to construct a project to put the water to use. His right to the full amount of water which the project could ultimately use relates back to the time he makes the initial appropriation, even though he does not get the water until the completion of the project. By using the term "present perfected" Congress indicated that the projects it intended to recognize must not only have been initiated, but have been carried through to completion before the effective date of the Project Act. Thus, the Special Master concluded that a "present perfected right" is one "acquired in compliance with the formalities of state law" and constituting "an actual diversion and beneficial use of a specific quantity of water applied to a defined area of land or to a particular domestic or industrial use." (Rept. 308.)[15]

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[15] We are not concerned here with reserved rights of the United States, which differ from appropriative rights in that they are not dependent upon affirmative action to bring them into existence. The water rights already exist and are reserved for a particular use by reason of an express or implied reservation. The Special Master quite properly found that the federal reserved rights should also be considered "present perfected rights" under the Act. See *infra*, pp. 65–66, 89–90.

But it is unnecessary to determine whether all or part of California's projects are to be considered "present perfected rights" within the meaning of the Project Act. California cannot complain that these rights are not given sufficient recognition because in its Limitation Act it specifically accepted, as the Project Act required, the 4,400,000 acre-foot allocation, plus one half of the surplus, in satisfaction of "any rights that may now exist." So long as California gets its 4,400,000 acre-feet, plus one-half of the surplus over 7,500,000 acre-feet, it cannot complain that its rights are not being fully met.

The priorities as between users in California are established by the Seven-Party Agreement which accords with the recommendation of the Chief of the Division of Water Resources of the State of California. Therefore, California's only claim that its present perfected rights are being interfered with must be based on the theory that when the water available to it falls below 4,400,000 acre-feet, all of its uses must be met in full before any new uses in other States can be recognized. It is not conceivable that Congress had any such intention in the use of the phrase. Since the contracts with California users do give full recognition to the State's own agreement as to priority, California is in no position to complain with regard to recognition of perfected rights.

It should also be noted that the decree recommended by the Special Master in paragraph II(B)(5) gives ample protection to all present perfected rights as between States. Under this provision, if the amount of water available in a State's allotment proves to be insufficient to satisfy its present perfected rights, it

is entitled to draw from the allotments to the other two States to make up the deficiency. In California's case this right is limited by its own Limitation Act setting a ceiling of 4,400,000 acre-feet even with respect to its perfected rights. Therefore, under the contracts, as interpreted by the decree, California's rights in this respect are fully protected.

D. THE ALLOCATION MADE IN THE CONTRACTS EXECUTED BY THE SECRETARY OF THE INTERIOR SUPPORTS THOSE PORTIONS OF THE DECREE RELATING TO THE INTERSTATE DIVISION OF MAINSTREAM WATERS

The decree proposed by the Special Master, if adopted, would terminate the dispute among the Lower Basin States by affirming and enforcing the interstate allocations made by the Secretary of the Interior through his contracts under the Project Act.

Specifically, the decree by Section II(B) would affirm by order of this Court the apportionment from the first 7,500,000 acre-feet available in the mainstream of the Colorado River of 2,800,000 acre-feet for use in Arizona, 4,400,000 acre-feet for use in California, and 300,000 acre-feet for use in Nevada. Further, it would provide for suitable allocations if surplus water is available.

The decree orders a pro rata reduction of these quantities if insufficient water is available to meet the full allotments. Although it might have been argued that the Secretary of the Interior is authorized by the Project Act to determine how deficiencies should be met, just as he is authorized to make the allotments in the first place, the pro rata reduction of allotments in the case of deficiencies has been the practice gen-

erally followed by the Secretary of the Interior for 59 years in his administration of reclamation projects. It is reasonable to construe these contracts in the light of this history.

California argues that the allocations approved by the Special Master are "based on error", the consequence of which can only be described by the word "disaster". (California Opening Br., p. 50.) California amplifies this conclusion by a prediction of the effect of the decree on the future operation of the Metropolitan Water District, which pumps Colorado River water over the mountains to the South Coastal Plain in California. (California Opening Br., pp. 266–277.) The very foundation of California's argument is that the Upper Basin States will in the near future utilize the entire 7,500,000 acre-feet allotted to them by the Compact. Surely the Upper Basin has every right to do so, and presumably the development of the country will be advanced by this area's putting to productive use its fair share of the water of the Colorado River. But even the California argument does not predict this result before 1990 (California Opening Br., p. 261), and the Bureau of Reclamation is much more conservative as to the time when the Upper Basin will achieve use of its full apportionment. (Tr. 21343–21344; S. Doc. 101, 85th Cong., 2d Sess., p. 13.) The dangers depicted by California must be discounted on the basis of remoteness. In the intervening years there may well be many advances in science leading to better conservation and more efficient storage, transportation, and use of water. Other

sources of water may be developed, such as saline conversion plants. California would go too far in mortgaging the present to protect the remote future, perhaps because it is Arizona's present that will be sacrificed as security for California's future. We agree with the Special Master's conclusion (Rept. 102):

> * * * the record in this case gives no indication that the "chaotic disaster" which California fears will, or is likely to, materialize. Her dire predictions appear to be unfounded.

II

THE SPECIAL MASTER'S RECOMMENDED ALLOCATIONS OF WATER FOR USE ON FEDERAL RESERVATIONS SUFFICIENT IN AMOUNT TO ACCOMPLISH THE PURPOSES OF THE RESERVATIONS ARE CORRECT

The United States entered this litigation partly because the case involves the disposition of water controlled by the Secretary of the Interior under the Boulder Canyon Project Act and the contracts executed under Section 5. The United States is also interested as the guardian of Indian Tribes and as the proprietor of Indian and other federal reservations. We deal with the latter interests in this portion of our brief.

Under the decree recommended by the Special Master the Secretary is authorized to release water in specified quantities for the benefit of five Indian reservations, two national wildlife refuges, and a national recreation area. The decree also secures the right of the United States to divert water from the

mainstream of the Gila and San Francisco Rivers in quantities necessary to fulfill the purposes of the Gila National Forest with a priority as of the dates of the establishment of each forest area. We excepted to a small part of this portion of the decree (see United States Brief in Support of Exceptions, pp. 51 to 53), but are satisfied that in other respects the decree adequately protects the claims of the United States for Indian and other federal reservations.

The portions of the decree relating to Indian and other reservations may be supported upon either of two independently sufficient lines of reason. If, as we sought to demonstrate in Point I, the Secretary of the Interior is authorized to allocate the waters of the mainstream of the Colorado River for use by citizens of the lower basin, then the Secretary necessarily has the same power to use, or to reserve the use of, a portion of those waters for the lands of the United States. The only restriction upon his discretion in this regard is the duty under Section 6 to protect "present perfected rights."

The rights of the United States to waters for these federal establishments also stem from its property rights in the waters of the Colorado River and its tributaries. Ownership of the right to use these waters on the public domain was acquired by the United States through the original treaties of cession with Mexico. These property rights were not abandoned upon opening the public domain, nor were they surrendered to California, Nevada and Arizona upon

their admision to statehood. When the reservations were established, the United States reserved the rights to use adjacent waters on the reservations in quantities sufficient to satisfy their ultimate needs.

The logic of this line of argument, which we develop at pages 61 to 93 below, would seem to require an allocation to the United States for the satisfaction of these rights separate from the allocations to Arizona, California and Nevada. Before the Special Master the United States did indeed, at one time, make this contention. We do not press the point here because the recommended decree appears sufficient for all practical purposes to protect the federal establishments. It treats the rights appurtenant to Indian reservations as "present perfected rights" under Section 6 of the Project Act, and therefore, accords them their appropriate priorities along with other "present perfected rights" in time of shortage, when present perfected rights can be satisfied only through use of waters otherwise allocated to another State. Rights reserved for reservations established subsequent to the Project Act are recognized as having priorities, intrastate, as of the respective dates of establishment of the reservations.

We wish to emphasize, however, that the property rights of the United States to use of the waters of the Colorado River and its tributaries on behalf of federal establishments are entitled to recognition, with the priorities the Report accords them, under the reasoning just outlined regardless of whether the in-

terstate allocation be made upon the central thesis adopted by the Special Master or upon the theory advocated by California or, indeed, upon any other theory. Yet there is no inconsistency between the Master's thesis concerning the effect of the Project Act and recognition of the property rights to the use of water of the United States by virtue of implied reservations. The rights of the United States appurtenant to the reservations are "present perfected rights" within the meaning of Section 6 and the Secretary is therefore not only entitled, but obliged, to deliver the necessary water. The nub of the matter is that the rights of the United States appurtenant to the federal establishments are to be safeguarded whatever disposition is made of other issues.

Arizona's Opening Brief is divided into two parts. Part I, relating to the "controversy among Arizona, California and Nevada," generally supports the Special Master's Report, upholding the power of the United States to construct and operate the Boulder Canyon Project and to make a "statutory [interstate] apportionment" of the waters controlled by the project. This has been done, Arizona asserts, in exercise of the United States' "dominion and plenary power over navigable waters of the United States." (Arizona Opening Brief, pp. 24, 30.) Part II relates to a different subject. Here, Arizona assesses the "claims of the United States to water." In doing so, counsel appear to forget all that is asserted

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in the 100 pages of Part I in an effort to show that the United States is without power to use its navigable waters on federal establishments.[16]

The inconsistency between the two arguments is apparent, and we urge that the principal arguments in Part I are right and those in Part II are wrong.

A. UNDER THE PROJECT ACT THE SECRETARY OF THE INTERIOR HAS THE SAME POWER TO ALLOCATE WATER FOR USE ON FEDERAL ESTABLISHMENTS AS HE HAS TO ALLOCATE WATER TO OTHER USERS

The same principles which support the power of the United States to construct and operate the Boulder Canyon Project and to contract for the delivery of stored waters to others support its power to use the water itself and to reserve it for use on Indian and other reservations. In a prior portion of this brief, we have argued that this power exists under the Commerce Clause, the General Welfare Clause and the Property Clause. (*Supra,* pp. 22–26, *et seq.*) Decisions of this Court with respect to comparable projects sustain that power. See, *e.g., Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275. In fact, in the original litigation as to this very project, though

[16] At p. 283 of its opening brief, California notes its disagreement with, but does not argue, the Master's recommendations respecting the reserved rights of the United States. Because Arizona vigorously disputes those recommendations as to the reservations in Arizona, we refer in this part of the brief especially to the reservations located there. The arguments made, of course, equally support the United States' reserved rights to use water on the several reservation areas in California.

the opinion was carefully limited, the decision goes far toward sustaining the power here in question. *Arizona* v. *California,* 283 U.S. 423. Since the Secretary of the Interior has the power to contract for the delivery of stored water "for irrigation and domestic uses," it seems clear that he derives power from the same sources to use mainstream water for similar purposes on federal lands.

Under these circumstances, there is no foundation for Arizona's attack upon the United States' power to use a part of the mainstream waters for its own purposes, including the sustenance of its Indian wards. Surely, if Congress has the power to provide by statute for a contract system to govern allocation of the waters of the Colorado River, it likewise has the power to provide for the use of those waters on federal lands. Just as surely, if Congress by its direction for the "satisfaction of present perfected rights" can breathe life into claims of appropriative rights under state law to use the navigable waters of the Colorado River, *supra,* pp. 49 to 52,[17] it can by the same method cure any asserted defects in the United States' claims of reserved rights to use those waters on federal establishments.

Congress has expressly indicated its intention to exercise its powers so that the Project waters are

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[17] In its opening brief, p. 34, Arizona says: "Congress in the exercise of this power and dominion [under the Commerce Clause of the Constitution] may abolish, limit or preserve, as it deems fit, pre-existing rights to the use of navigable water."

available for use on lands of the United States. One of the purposes expressly enumerated in Section 1 of the Project Act is "providing for storage and for the delivery of the stored waters * * * for reclamation of public lands and other beneficial uses * * *."[18] In addition to the reclamation of "public lands," the reclamation of Indian reservations is specifically referred to in Section 2 of the Act of August 30, 1935, 49 Stat. 1039, by which Parker and Headgate Rock Dams were authorized.

Under these statutory provisions, it is plain that the Secretary of the Interior has full authority to release project waters for use on the mainstream Indian reservations and other lands of the United States.

At page 312 of the Report, fn. 3a, the Special Master observes: "Of course the Secretary need not contract with himself, and hence no contracts are required for Indian Reservations and similar federal establishments." Indeed, the Arizona 1944 contract, subdivision (1) of Article 7, in addition to providing for deliveries to individuals, irrigation districts, corporations or political subdivisions under contract with the Secretary of the Interior, specifically provides that deliveries of water may be made under the contract "to lands of the United States within Arizona."

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[18] See, also, the discussion, *infra*, pp. 89–90, respecting the inclusion of federal reserved rights in the Section 6 requirement for "satisfaction of present perfected rights."

B. THE UNITED STATES HAS RESERVED, FROM ITS ORIGINAL PROPRIETARY RIGHTS, THE RIGHT TO USE SUFFICIENT QUANTITIES OF THE APPURTENANT WATERS TO SATISFY THE ULTIMATE NEEDS OF INDIAN RESERVATIONS AND TO ACCOMPLISH THE PURPOSE OF OTHER FEDERAL RESERVATIONS. THESE RESERVED RIGHTS ARE "PRESENT PERFECTED RIGHTS" FOR WHICH WATER MUST BE MADE AVAILABLE UNDER THE PROJECT ACT

1. *Ownership of rights to use waters of the Colorado River and its tributaries on the public domain was acquired by the United States through treaties with Mexico.*

The territory comprising the Lower Colorado River basin was acquired by the United States through treaties with Mexico. The major portion of the territory was ceded in 1848 by the Treaty of Guadalupe Hidalgo. 9 Stat. 922. A small portion south of the Gila River in Arizona was acquired by the Gadsden Purchase in 1854. 10 Stat. 1031. When the United States acquired this territory by cession from Mexico, it became the owner not only of the land itself, but of all rights pertaining thereto as well, except for those lands and appurtenant rights granted to individuals by the previous sovereign. *Borax Consolidated, Ltd.* v. *Los Angeles,* 296 U.S. 10, 15–16; *Knight* v. *United States Land Ass'n,* 142 U.S. 161, 183–184. The right to use the appurtenant waters was one of the whole bundle of rights so acquired.[19]

[19] When the United States became owner of the lands in this territory, there was no other government or person with authority to assert any right to use the water on the lands except those individuals holding rights previously granted by the Spanish or Mexican governments. There was no authority in others to assert title because the doctrine of appropri-

The federal proprietorship has long been recognized. Kinney, one of the leading authorities on water rights, stated in 1912:

> The Government is still the owner of the surplus of the waters flowing upon the public domain, or rather the owner of all the waters flowing thereon remaining after deducting the rights to the use of the same which have vested in and accrued in some legal way to individuals and companies. * * * [Kinney, *Irrigation and Water Rights,* Vol. 1, 2d ed., pp. 692–693.]

And, as recently as 1960, this Court in *United States* v. *Grand River Dam Authority,* 363 U.S. 229, in denying the Authority's assertion that it had compensable rights to use the waters of the Grand River under an act of the Oklahoma Legislature, declared at p. 235:

> Moreover, no water rights condemned under this Act are shown to have passed to Oklahoma and from Oklahoma to respondent. Yet the Federal Government was the initial proprietor in these western lands and any claim by a State or by others must derive from this federal title. See *United States* v. *Gerlach Live Stock Co.,* 339 U.S. 725, 747; *Federal Power Commission* v. *Oregon,* 349 U.S. 435. * * *

See also *Lux* v. *Haggin,* 69 Cal. 255, 338–339; *United States* v. *Gerlach Live Stock Co.,* 339 U.S. 725, 746–

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ation was not yet adopted by the United States and, as the Court said in *Atchison* v. *Peterson,* 20 Wall. 507, 512: "* * * the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship * * *."

747; *California Oregon Power Co.* v. *Beaver Portland Cement Co.,* 295 U.S. 142, 162; *United States* v. *Rio Grande Dam and Irrigation Company,* 174 U.S. 690, 703.

The federal proprietorship of the rights to the use of waters in the territory acquired from Mexico is the predicate of the Desert Land Act of 1877, and its precursor Acts of 1866 and 1870. In this legislation Congress provided for the acquisition from the United States of rights to use the surplus unappropriated non-navigable waters on the public lands in certain States by appropriation in accordance with local laws and customs. *California Oregon Power Co.* v. *Beaver Portland Cement Co.,* 295 U.S. 142. As the Court explained in *Federal Power Commission* v. *Oregon,* 349 U.S. 435, 447–448:

> The purpose of the Acts of 1866 and 1870 was governmental recognition and sanction of *possessory rights* on public lands asserted under local laws and customs. *Jennison* v. *Kirk,* 98 U.S. 453. The Desert Land Act severed, for *purposes of private acquisition,* soil and water rights on public lands, and provided that *such water rights* were to be acquired in the manner provided by the law of the State of location. *California Oregon Power Co.* v. *Beaver Portland Cement Co.,* 295 U.S. 142. See also, *Nebraska* v. *Wyoming,* 385 U.S. 589, 611–616. [Emphasis added.]

The decision of this Court involving the reservation of rights to the use of water for Indian reservations is founded upon the federal ownership of the usufruct of the unappropriated waters upon the pub-

lic domain in the public land States. In *Winters* v. *United States,* 207 U.S. 564, 577, the Court said:

> The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. * * *

If the government had not already owned the water rights, it could not have reserved them. Reservation of the right to use the water upon the reserved land, like severance of the land and the water thereon for purposes of private acquisition, is legally dependent upon ownership of the interest reserved. See also group of Ninth Circuit cases cited *infra,* p. 66. The settlement of Indians upon the reservations would have been impractical had it not been possible for the United States as owner of the reservation lands to assure the use of the appurtenant waters so that the Indians for whom the reservations were established could obtain a sustenance.

2. *The United States has never surrendered its proprietary right to use the waters of the Colorado River appurtenant to its reservations.*

The rights of the United States to use the waters on the public domain, being property rights, may be acquired by others only as authorized by Congress. Constitution, Art. IV, Sec. 3; *Utah Power & Light Co.* v. *United States,* 243 U.S. 389; *Van Brocklin* v. *Tennessee,* 117 U.S. 151, 168; *United States* v. *California,* 332 U.S. 19, 27. As observed above, the Desert Land Act is such an authorization with respect to *non-navigable* waters on the *public* lands in certain States. But this Act is not applicable with respect

to waters upon *reserved* lands (*Federal Power Commission* v. *Oregon,* 349 U.S. 435, 448), and by its express terms it does not authorize the appropriation of rights to use *navigable* waters anywhere. Nor is there any other federal statute which has transferred these proprietary rights from the United States. Arizona claims that its admission to the Union had that result, but we shall deal with that assertion below. See *infra,* pp. 84–89.

3. *The establishment of the Indian and other federal reservations here involved has resulted in the reservation of the appurtenant water rights necessary to accomplish the purposes of the reservations.*

(a) *The United States may apply its retained rights to the use of the water to the purposes of the reservations.*

The establishment of a federal reservation of lands out of the public domain also reserves, contemporaneously, the right to use the appurtenant waters for the purposes of the reservation. Thereafter the resulting federal right to use the appurtenant waters is not subject to defeasance through appropriation by others, even if the waters were previously subject to private acquisition under the Desert Land Act. In *Winters* v. *United States,* 207 U.S. 564, this Court held that the very establishment of an Indian reservation out of public lands itself implied a Congressional intention also to reserve the use of all appurtenant waters necessary for the fulfillment of the purposes for which the lands were reserved. The implication was found in the circumstances surrounding the establishment

of the Indian reservation, with principal emphasis upon the geographical fact that without the use of the waters on the reservation the lands would be worthless and incapable of supporting the Indians. Sources of water supply on lands reserved out of the public domain cannot be appropriated under the Desert Land Act even when there is no indication of the intention with which the reservation was established, because the Act is expressly restricted to "sources of water supply upon the public lands * * *" and reservations are not "public lands." *Federal Power Commission* v. *Oregon,* 349 U.S. 435, 448; see also *United States* v. *Winters,* 143 Fed. 740 (C.A. 9), affirmed, 207 U.S. 564; *Conrad Investment Co.* v. *United States,* 161 Fed. 829 (C.A. 9); *United States* v. *McIntire,* 101 F. 2d 650 (C.A. 9); *United States* v. *Walker River Irrigation District,* 104 F. 2d 334 (C.A. 9); *United States* v. *Ahtanum Irrigation District,* 236 F. 2d 321 (C.A. 9), certiorari denied, 352 U.S. 988.

The application of these principles to the present case is not affected by the navigability of the waters. The only real difference in this respect between navigable and non-navigable waters may be that as to the former there is no need for reservation to preserve the rights against appropriation by others because there is no statute which provides for their transfer or appropriation. As noted above, the Desert Land Act by its express terms applies only with respect to non-navigable waters on the public lands. Its precursor Acts of 1866 and 1870 have been similarly construed by this Court. *California Oregon Power Co.* v. *Beaver Portland Cement Co.,* 295 U.S. 142;

United States v. *Rio Grande Irrigation Co.*, 174 U.S. 690.[20]

But the fact that the United States has not generally authorized the acquisition by others of rights to use the navigable waters *vis-à-vis* the United States does not mean the United States itself is precluded from using such waters for its own purposes. Neither does it mean that the United States is precluded from establishing along a navigable stream a reservation of federal lands for federal purposes requiring the use of such waters. It simply means that no claim of privately owned appropriative right to use such waters to which Congress has not given its consent can be asserted against use by the United States on a reservation, regardless of whether the private claim of right was initiated before or after the date of establishment of the reservation. The same considerations which establish the power of the United States to reserve rights to use non-navigable waters compel this conclusion with respect to navigable waters. The use of navigable waters for the benefit

[20] In the *Rio Grande* case, the Court, at pp. 706–707, said:
This legislation must be interpreted in the light of existing facts—that all through this mining region in the West were streams, not navigable, whose waters could safely be appropriated for mining and agricultural industries, without serious interference with the navigability of the rivers into which those waters flow. * * * To hold that Congress, by these acts, meant to confer upon any State the right to appropriate all the waters of the tributary streams which unite into a navigable watercourse, and so destroy the navigability of that watercourse in derogation of the interests of all the people of the United States, is a construction which cannot be tolerated.

of government property bordering on the stream is undoubtedly subject to their use for purposes of commerce at the direction of Congress, but this qualification does not militate against the right of the United States to make use of the water upon the reservation if it chooses.[21]

(b) *The President has authority to set apart reservations of public lands and to reserve rights to use the appurtenant navigable waters.*

Arizona questions the authority of the President to "reserve navigable water" by executive order (Ariz. Opening Br., pp. 129, *et seq.*). The argument

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[21] *United States* v. *Winans*, 198 U.S. 371, involved an actual reservation of a water right, in that case the right to take fish, in the navigable waters of the Columbia River prior to the admission of Washington to the Union. At page 384, the Court said:

> * * * surely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as "taking fish at all usual and accustomed places." * * *

And in *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690, when dealing with interference by an upstream structure with the use of the stream at a point where it was navigable, this Court said (p. 703):

> Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. * * *

is really directed toward the authority of the President to establish federal reservations for, as is demonstrated by the Court's decisions discussed above (and see Rept. 257–266, 291–294, 296–298), the reservation of the use of waters appurtenant to federal areas results from the reservation of the land.

(1) *Indian reservations.*

Arizona's argument necessarily excepts the original 75,000 acres of the Colorado River Indian Reservation which were set apart by Congress in the Act of March 3, 1865 (13 Stat. 541, 559; U.S. Ex. 501). This is a substantial exception since the area of the original statutory reservation adjacent to the Colorado River in Arizona includes within it a great part of the irrigable acreage of this reservation for which the Special Master recommends water rights be decreed. The Congressional intent to reserve rights to use water of the Colorado River manifested both in the selected location of this reservation and the many appropriation bills to finance irrigation works on such lands will be demonstrated *infra,* pp. 73–75.

With respect to the remainder of the Colorado River Indian Reservation added by executive orders, as well as the other mainstream Indian reservations, the power of the President to reserve public lands for the Indians was recognized and confirmed by Congress as early as 1887. The General Indian Allotment Act then enacted (Act of February 8, 1887, 24 Stat. 388) authorized the President to allot lands for "any reservation created for their [Indian] use, either by treaty stipulation or by virtue of an act of Congress

or executive order setting apart the same for their [Indian] use." The Court of Appeals for the Ninth Circuit in *United States* v. *Walker River Irrigation District,* 104 F. 2d 334, recognized that the effect of the Allotment Act was to make applicable to reservations created by acts of Congress or by executive order the same rules applying to reservations established by treaty.

Later Congressional enactment reposed extensive powers in the President to reserve public lands for various public purposes. By the Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. 141, the President was specifically authorized to reserve public lands of the United States for "water-power sites, irrigation, classification of lands, or other public purposes * * * and such * * * reservations shall remain in force until revoked by him or by an Act of Congress." The presidential authority to establish Indian reservations was specifically terminated with regard to the States of New Mexico and Arizona by the Act of May 25, 1918, 40 Stat. 561, 570, 25 U.S.C. 211, and by the general Act of June 30, 1919, 41 Stat. 3, 34, providing as follows:

> That hereafter no public lands of the United States shall be withdrawn by Executive Order, proclamation, or otherwise, for or as an Indian reservation except by act of Congress.

These statutes constituted a clear change in the Congressional policy with regard to the establishment of Indian reservations by executive order. Until that time, Congress had imposed no restrictions on the President in this respect.

The extent of the practice of creating Indian reservations by executive order is reflected in the Court's opinion in *United States* v. *Midwest Oil Company,* 236 U.S. 459, 470, where it is stated that prior to the year 1910 there had been issued 99 executive orders establishing or enlarging Indian reservations. The congressional acquiescence which the Court found to apply to such an extensive practice can be demonstrated with regard to the individual reservations here involved. For example, there are over 50 appropriation acts specifically providing for the development of irrigation of the Colorado River Indian Reservation, none of which distinguishes between the original reservation and the area added by executive orders. (U.S. Ex. 507 for identification.)

(2) *Other federal reservations.*

As is evident from the text of the Act of June 25, 1910, 43 U.S.C. 141, quoted in part *supra,* p. 70, Congress there confirmed the broad powers of the President to deal with public lands. These powers continued to apply to reservation of public lands for all public purposes except that as to Indian reservations they were terminated by the Acts of May 25, 1918 and June 30, 1919, *supra,* p. 70. Accordingly, there can be no question of the authority of the President to establish by executive order the Lake Mead National Recreation Area (Executive Orders dated May 3, 1929 (No. 5105) and April 25, 1930 (No. 5339)), the Havasu Lake National Wildlife Refuge (Executive Order of January 22, 1941 (No. 8647)), and the

Imperial National Wildlife Refuge (Executive Order of February 14, 1941 (No. 8685)).[22]

In the case of the Gila National Forest located on the mainstream of the Gila River, the Forest was established by Presidential Proclamation dated March 2, 1899, pursuant to the express provisions of Section 24 of the Act of March 3, 1891 (26 Stat. 1103, 16 U.S.C. 471). The area of the forest reserve was later enlarged and modified (U.S. Exs. 2720A–2720B).

(c) *Water rights have been reserved for the particular reservations here involved.*

In sustaining the claims of the United States for use of water on mainstream Indian reservations, the Special Master has applied the *Winters* doctrine which holds, as explained above, that the creation of an Indian reservation out of the public domain, whether by treaty, statute, or executive order, in arid country also implies a reservation of the beneficial use of the quantity of water necessary to effectuate the purposes of the reservation. Confronted with this established rule, Arizona seeks to distinguish the degree of proof required to show the intent of Congress, arguing that there must be a "clear manifestation of intent to reserve *navigable* water." (Arizona Opening Br., p. 135, emphasis added.) No logical reason is advanced for requiring an express intent to reserve rights with respect to navigable waters when implied

[22] Attention is invited to pages 51 to 53 of the United States Brief in Support of Exceptions. The United States is entitled, without regard to the matter of reservation, to use the waters salvaged by development of the Havasu and Imperial Wildlife Refuges for the operation of those refuges.

intent is sufficient for all others. The considerations which have resulted in the finding of intent by implication in the decided cases require that the same implications be found when the waters are navigable. If there is to be any difference, it should be in favor of the reservation of navigable waters because the Desert Land Act does not open them to private appropriation.

(1) *The Colorado River Indian Reservation.*

Although it is not necessary to find express intent to reserve navigable waters, the Congressional intent is easily demonstrated with respect to the Colorado River Indian Reservation by examination of events contemporaneous with the creation of the Reservation. The Superintendent of Indian Affairs for Arizona had been authorized to select a reservation for Indians of the Colorado River (U.S. Ex. 511). He caused an engineering survey to be made of 75,000 acres of valley lands on the eastern bank of the Colorado River from "Corner Rock to Halfway Bend." (U.S. Ex. 513, p. 157.) The conclusion of the survey was that the lands were most fertile and highly suitable for irrigation from the Colorado River (U.S. Ex. 514). This report was transmitted to, and considered by, Congress (U.S. Ex. 502). By the Act of March 3, 1865, there was set apart in the Territory of Arizona 75,000 acres from Half-Way Bend to Corner Rock on the Colorado River for an Indian reservation "for the Indians of said river and its tributaries" (U.S. Ex. 501; 13 Stat. 541, 559).

A need for water for irrigation to make the reservation habitable was at least as plain from the geography of the area as was the need on which the Court based its implication of intent in *Winters*. This was articulated by the Delegate from the Territory of Arizona in arguing, contemporaneously with approval of the Act creating the Reservation, for an appropriation with which to initiate irrigation on the Reservation.[23]

> Irrigating canals are essential to the prosperity of these Indians. Without water there can be no production, no life; and all they ask of you is to give them a few agricultural implements to enable them to dig an irrigating canal by which their lands may be watered and their fields irrigated, so that they may enjoy the means of existence. * * * [Cong. Globe, March 2, 1865, p. 1321; U.S. Ex. 502.]

Notwithstanding this manifest concern with irrigability of the reservation thus created, Arizona finds it significant that neither the statute of creation nor later executive orders mention "water of the Colorado River much less any reservation of that water" (Arizona Opening Br., p. 140).[24] But Arizona neglects to mention that the Executive Order of May 15, 1876 (U.S. Ex. 505), enlarged the reservation by *including* within its boundaries the Colorado River.

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[23] The first appropriation, of $50,000, was made by the Act of March 2, 1867. (U.S. Ex. 507 for identification.)

[24] The same argument was advanced in *Winters*, but the Court found the omission did not defeat the reservation implied by the circumstances. 207 U.S. at 576; 143 Fed. 740, at 745.

Continuation of the intent to reserve a quantity of water sufficient to irrigate a large area is demonstrated by appropriation acts commencing in 1867, which financed construction of works of various sorts for the diversion of Colorado River water to Reservation lands, culminating in the completion in 1941 of Headgate Rock Dam by which 105,000 acres of the Reservation can be irrigated by gravity. (U.S. Ex. 507 for identification; Tr. 13,992.)

Arizona seeks to detract from this continuous policy based on the original purpose to enable the Indians to obtain a livelihood dependent on irrigation on the Reservation by referring to the Act of April 21, 1904, 33 Stat. 224, which authorizes inclusion of lands of the Colorado River Indian Reservation in a reclamation project under the Federal Reclamation Act of 1902. (Ariz. Opening Br., p. 142.) But this 1904 statute dealt with the application of the 1902 Act, which has in fact never been applied; it has no reference to the reserved rights which have been developed on the Reservation. Nor is it apparent how Arizona gains any comfort from the Appropriations Act of April 4, 1910, 36 Stat. 273, and the later appropriations acts referred to in its brief (Ariz. Opening Br., pp. 144–148) which show Congress' purpose through the years to develop an irrigation project on the Colorado River Indian Reservation of the magnitude of 150,000 acres. The appropriations supplement, rather than negate, the existing authority. The significant fact is that a substantial project was built—it is in being and constitutes the best evidence of congressional and executive intent to reserve adequate

water from the mainstream of the Colorado River for use on the project.

(2) *Other mainstream Indian reservations.*

The considerations reviewed above support the Special Master's conclusion that under the *Winters* doctrine, water rights were also reserved for the other mainstream Indian reservations. The aridity of their climate is substantially identical to that of the Colorado River Indian Reservation. The need for water for irrigated agriculture to provide even a minimum subsistence for those living on the reservations is the same. Without water, the reservation lands are "a barren waste" (*Winters* v. *United States, supra,* 207 U.S. at 577). Arizona's objections are based more on denial of the power of the Executive to establish the reservations than on doubt as to whether there was an implied reservation of water rights. See Arizona's comments on Fort Mohave Reservation (Arizona Opening Br., pp. 148–150). And, as is pointed out above, the specific provisions for water from other sources, referred to by Arizona, may be taken to supplement rather than supersede the reserved rights.

(3) *The Gila National Forest.*

Arizona disagrees with, but does not argue, the Master's conclusion (Rept. 335) that the United States has reserved rights to use the waters of the Gila and San Francisco Rivers on the Gila National Forest.[25] Arizona states that it is not necessary that this

[25] Since no specific challenge has been directed at the Special Master's similar conclusions respecting the Lake Mead National Recreation Area (Rept. 291) and the Havasu and Imperial National Wildlife Refuges (Rept. 296), we rely simply on the general principles above discussed to support those conclusions.

question be resolved, since, according to the contention, the Master erred in his finding of an intent to reserve water for national forest purposes. (Arizona Opening Br., p. 193.)

Arizona bases its contention on the Acts of March 3, 1891 (26 Stat. 1101), and June 4, 1897 (30 Stat. 36), and certain statements and declarations by congressional committees and the Forest Service and Department of Agriculture, which Arizona apparently presents as administrative construction of the mentioned acts. Arizona concludes this argument with the statement of an Assistant Secretary of Agriculture in 1956 that:

> For example, it has been the firmly established policy of this Department for nearly half a century to acquire, in strict accordance with State laws and procedures, the water rights needed for the administration of the national forests. [Arizona Opening Br., p. 198.]

This statement is taken from hearings before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs.

Arizona's argument ignores the fact that Section 1 of the Act of June 4, 1897, 30 Stat. 36 (16 U.S.C. 481) expressly provides [26] that water on the national forests may be used in accordance with state or *federal* law. Surely, there is nothing in this language to sup-

[26] "All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder."

port the contention that the United States may not exercise, by reservation or otherwise, its rights to use the unappropriated waters which pertain to the national forest lands. As the Special Master stated: "The power of the United States to make such a reservation with respect to the Forest cannot be logically differentiated from the power of the United States with respect to Indian Reservations and Recreation Areas." (Rept. 335.)

Moreover, we deny that there has been any consistent administrative interpretation that rights of the United States to use water on national forests must be obtained in accordance with State law. Explanatory of the policy of the Department of Agriculture and the Forest Service in proceeding under State law, is a recent statement of the Secretary of Agriculture made to the Senate Committee on Interior and Insular Affairs.

> It has long been the policy of this Department to make filings with appropriate State agencies and in accordance with the procedures established by State law on waters needed in connection with the development and administration of the National Forests. In this way, we have endeavored to indicate those rights which are needed in connection with the administration of the National Forests so that both the State officials and those seeking to use the waters from the National Forests would have information as to the needs of the Federal Government. The project of making these filings is not complete but is proceeding as rapidly as funds and

> manpower permit. The Department plans to continue this policy.[27]

Thus it appears that the filings are for the purpose of giving information, not of establishing legal rights.

(d) *The water rights reserved include at least sufficient water to accomplish the purposes of the reservations.*

Generally speaking, the quantity of water necessary to accomplish the purpose of a reservation is the minimum measure of the rights to use water reserved by the reservation of public lands for federal purposes. In the case of an Indian reservation, the measure is the quantity required to satisfy the ultimate needs of the Indians of the reservation.

The Special Master concluded "that the United States effectuated the intention to provide for the future needs of the Indians by reserving sufficient water to irrigate all of the practicably irrigable land in a Reservation and to supply related stock and do-

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[27] Letter of June 14, 1961 from Orville L. Freeman, Secretary of Agriculture to Senator Clinton P. Anderson, Chairman, Senate Committee on Interior and Insular Affairs (Hearings before the Committee on Interior and Insular Affairs, United States Senate, 87th Cong., 1st Sess., on problems arising from relationships between the States and the Federal Government with respect to the development and control of Water Resources, June 15 and 16, 1961.)

The fact that in the Lower Colorado Basin the project for making filings under State law, referred to in the Secretary's letter, had been completed as of the close of the evidence before the Special Master with respect to only 537 places of use within the national forests in the basin out of a total of 5204 places of present use demonstrates the error of the Arizona argument. U.S. Exs. 2702–2722.

mestic uses." (Rept. 262.)[28] This conclusion is amply supported by decisions of this Court and the Court of Appeals for the Ninth Circuit recognizing that the reserved right extends to the ultimate needs of the Indians. *United States* v. *Powers,* 305 U.S. 527; *United States* v. *Ahtanum Irrigation District,* 236 F. 2d 321 (C.A. 9), certiorari denied, 352 U.S. 988; *Conrad Investment Co.* v. *United States,* 161 Fed. 829 (C.A. 9).

Arizona's argument that irrigable acreage is not a correct measure of the reserved water right was made to the Special Master who responded as follows:

> * * * Arizona seems to envisage that the United States intended to create water rights in gross which would fluctuate in magnitude as the Indian population and needs fluctuated, the water right being measured by the amount of water needed at any particular time by the Indians actually inhabiting a particular Reservation. As pointed out above, the more sensible conclusion is that the United States in-

[28] Whether the reservation of water rights is limited to the needs of the Indians for irrigation and related stock and domestic uses is a question which need not be considered insofar as the reservations for which the Master recommends that rights be decreed are concerned. In *Conrad Investment Co.* v. *United States,* 161 Fed. 829, 831, the Court of Appeals for the Ninth Circuit recognized that the accomplishment of "other useful purposes" is included within the intent of the reservation. Cf. Rept. 265. In an appropriate case, we would assert that the needs of the Indians to be satisfied by the reserved water rights include additional uses of the reserved lands which serve the economic necessities of the Indians entitled to reside there.

> tended to reserve enough water to irrigate all of the practicably irrigable lands on a Reservation and that the water rights thereby created would run to defined lands, as is generally true of water rights.
>
> But even if Arizona were correct in her contention, the most feasible way to give full effect to the water rights created by the United States, as Arizona defines them, would be to decree to each Reservation enough water to irrigate all of the practicably irrigable acreage. It is clear that the water rights of the five Reservations in question cannot be fixed at present uses for this would defeat the basic purpose of reserving water to meet future requirements. Even if, as Arizona argues, the reservation of water was in gross for Indians and not Reservation lands, the Indians' needs may well increase in the future and these increased needs would have to be provided for. * * * [Rept. 263.]

The necessity for making provision for the expanding needs of the Indians of the Lower Colorado River Basin as the Special Master recommends (Rept. 262, *et seq.*) is amply demonstrated by the record in this case. The population of the Indians of the Lower Basin is increasing and a total population of over 130,000 can reasonably be expected by the year 1970. Tr. 15,237. They presently number in the neighborhood of 120,000. Calif. Ex. 2600–1 through 2600–26. The mainstream Indian reservations include 136,636 acres of irrigable land. Certainly it cannot be said that water rights for 136,636 acres as the Special

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Master recommends is in excess of the future needs of the Indians of the reservations.[29]

The Colorado River Reservation was established "for the Indians of said river and its tributaries." Act of March 3, 1865, *supra,* p. 69.[30] Arizona says "the Indians of said river and its tributaries" means only those tribes which were found in the area of the Lower Basin near the mainstream in 1865. Congress has indicated a contrary view. By the Act of April 19, 1950, 64 Stat. 44, Congress authorized the appropriation of $88,570,000 to promote the rehabilitation of the Navajo and Hopi tribes in better utilization of the Navajo and Hopi Indian Reservations and for other purposes, including the relocation and resettlement of Navajo and Hopi Indians on the Colorado River Indian Reservation. Speculation as to considerations which might deter the settlement there of additional Indians, as argued by Arizona, is not a proper basis for limiting the quantum of the water rights reserved for a reservation established "for the Indians of the [Colorado] river and its tributaries."

Arizona singles out for separate treatment the quantity of water allocated to the Fort Mohave Indian

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[29] Even were the matter of need to be measured by the present population of the organized tribes entitled to reside on the several reservations, it is to be noted that the irrigable lands per Indian, calculable from the table at page 157 of Arizona's brief, would in no case be as much as the irrigable acreage allowed under Federal Reclamation law for support of a family, and in most instances it would be very greatly less.

[30] The Fort Mohave Reservation was established "for the use and occupation of the Fort Mojave and such other Indians as the Secretary of the Interior may see fit to settle thereon." U.S. Exs. 1304, 1305.

Reservation, apparently because of its undeveloped nature, and claims that the United States has "abandoned" irrigation on this Reservation (Arizona Opening Br., p. 166). But the Indians themselves are without means to develop an irrigation project. The fact that the United States has not gone forward with development does not support the argument that the rights reserved for the benefit of these Indians should now be foreclosed. As the Court of Appeals for the Ninth Circuit recently said in *United States* v. *Ahtanum Irrigation District,* 236 F. 2d 321, 328, certiorari denied, 352 U.S. 988, "We deal here with the conduct of the Government as trustee for the Indians. It is not for us to say to the legislative branch of the Government that Congress did not move with sufficient speed to appropriate the funds necessary to complete this irrigation system by 1908 rather than by 1915, or that the Government had thus lost or forfeited the rights reserved for the Indians."[31]

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[31] The record discloses a population of several hundred members of the Fort Mohave Tribe entitled to reside on the Fort Mohave Reservation. The record also discloses that a considerable number of these Indians live in a nearby colony in Needles, California, which was established with Tribal funds received from sale of some of the Reservation lands. Tr. 13,764–5, 14,220–2. This colony is close to their place of employment by the Santa Fe Railroad. Although great emphasis is placed by Arizona on the fact that what little irrigation there was in times past on this Reservation has been discontinued, the evidence demonstrates that efforts to develop the valley lands of the Reservation were frustrated by the flood hazard prior to the closure of Hoover and Davis Dams. With the completion of the dams referred to and channelization of the river through the lands of the Reservation, this hazard is now eliminated and development of the lands of the Reservation for irrigation can now go forward. Tr. 14,076–8.

4. *The attempted distinction between navigable and non-navigable waters lacks merit; therefore, the United States' right to use appurtenant navigable waters on its public and reserved lands was not surrendered upon the admission of Arizona, California, or Nevada to statehood.*

Since the federal ownership of the usufruct of non-navigable waters on the public domain is well established, except where the right has been transferred to others under the Desert Land Act or other Congressional authorization, Arizona attempts to draw a distinction between navigable and non-navigable waters. Arizona argues upon this basis that ownership of navigable waters passed to the States upon their admission to the Union along with title to the bed of the stream. We submit that there is no merit to the distinction. None of the differences between the law governing navigable streams and the rules applicable to non-navigable waters supports the anomalous conclusion that although the United States retained ownership of the right to use non-navigable waters in the public lands States, it surrendered ownership of its similar rights in streams which are equally essential to the development of the federal domain and intimately related to the control of navigation and river development.

The decisions of this Court which Arizona cites to establish the point that, upon admission of a State

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As held in the *Ahtanum* case, *supra*, delay by the United States in developing the lands of this Reservation to provide for the needs of the Indians entitled to reside thereon is no basis for a determination that rights of the United States to use water thereon have been lost.

into the Union, title to the "water * * * of navigable streams" passes to and vests in the State do not support the argument.[32] With one exception, each involved the question of ownership of the shores of, or lands beneath, navigable waters;[33] none involved the

[32] The Arizona argument respecting the United States' ability to reserve, prior to the admission of a State, rights to use the waters of a navigable stream boils down to one respecting intent and is answered, *supra*, pp. 72 to 79.

[33] The property right in question in each case was as follows: *Borax Consolidated, Ltd.*, v. *Los Angeles*, 296 U.S. 10—title to land in Los Angeles Harbor claimed to be tideland; *United States* v. *Utah*, 283 U.S. 64—title to the bed of the Colorado River in Utah; *Massachusetts* v. *New York*, 271 U.S. 65—title to land under the navigable waters of Lake Ontario; *United States* v. *Holt State Bank*, 270 U.S. 49—title to the bed of Mud Lake in Minnesota; *Port of Seattle* v. *Oregon & W.R.R.*, 255 U.S. 56—the right of the owner of upland along navigable water to build a pier in the soil covered by the navigable water in order to reach the navigation channel wherein the State of Oregon claimed ownership of the soil under the navigable water; *United States* v. *Mission Rock Co.*, 189 U.S. 391—title to submerged lands in San Francisco Bay; *Knight* v. *United States Land Ass'n*, 142 U.S. 161—title to property in the City of San Francisco claimed to have been below the line of ordinary high-water upon the acquisition of California from Mexico and thus property of California after its admission to the Union; *Goodtitle* v. *Kibbe*, 50 U.S. 471—title to property in the City of Mobile claimed to be part of the shore of a navigable tide-water river and lying below high-water mark when Alabama was admitted to the Union and thus property of the State; *Pollard* v. *Hagan*, 44 U.S. 212—title to property in the City of Mobile claimed to be in the same area as that in *Goodtitle* v. *Kibbe*, *supra; Martin* v. *Waddell's Lessee*, 16 Pet. 367—title to land under the navigable waters of the Raritan river and bay in the State of New Jersey.

United States v. *Rio Grande Irrigation Co.*, 174 U.S. 690, is the one exception noted in the text. That case does not help Arizona's argument either. There no question of ownership of navigable waters by the State was involved. The question was whether the State could authorize construction of a dam and the

question of ownership of the water itself and, even more significantly, none involved the question of the United States' rights to use the waters upon its public and reserved lands.

Furthermore, any claim of ownership of the water or of the right to use the water of the Colorado River which Arizona may assert on the basis of title to the bed of the stream is refuted by the Court's holding in *United States* v. *Chandler-Dunbar Co.,* 229 U.S. 53. At p. 69 the Court said:

> But whether this private right to the use of the flow of the water and flow of the stream be based upon the qualified title which the company had to the bed of the river over which it flows or the ownership of land bordering upon the river is of no prime importance. In neither event can there be said to arise any ownership of the river.* * *

Of the dictum in Mr. Justice Brandeis' opinion in *Port of Seattle* v. *Oregon & W.R.R. Co.,* 255 U.S. 56, 63, quoted at p. 123 of Arizona's Opening Brief, the Court said in *United States* v. *Appalachian Power Co.,* 311 U.S. 377, 425: "[That case] centered around the issue of title to land under navigable water. Nothing further was involved as to the use of the water than its navigability."

Arizona's argument is likewise refuted by the decision in *Moore* v. *Smaw,* 17 Cal. 199 (1861) by Mr. Justice Field while he was Chief Justice of the Su-

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diversion of water in the non-navigable upper reaches of the Rio Grande River, against the United States' contention that the dam and proposed diversions would be an obstruction to navigation in the lower reaches of the river.

preme Court of California. The case involved the ownership of minerals in land in California patented by the United States in confirmation of a grant made by the Mexican Government before the territory was ceded to the United States. The Court concluded, first, that "[a]t the date of the cession of California to the United States" the minerals in question were "the property of the Mexican nation, and by the cession passed, with all other property of Mexico within the limits of California, to the United States." 17 Cal. 216–217. The defendants did not deny this but claimed that the United States held the minerals "in trust for the future State, and that upon the admission of California the ownership of them vested in her * * *." 17 Cal. 217.[34] At pages 218–219 the Court noted the distinction between sovereign and proprietary rights.

> It is undoubtedly true that the United States held certain rights of sovereignty over the territory which is now embraced within the limits of California, only in trust for the future State, and that such rights at once vested in the new State upon her admission into the Union. But the ownership of the precious metals found in public or private lands was not one of those rights. Such ownership stands in no different relation to the sovereignty of a State than that of any other property, which is the subject of barter and sale. Sovereignty is a term used to express the supreme political authority of an

[34] This is the same contention which Arizona is making here except that here the resource is water while there it was gold and silver.

> independent State, or nation. Whatever rights are essential to the existence of this authority are rights of sovereignty. Thus the right to declare war, to make treaties of peace, to levy taxes, to take private property for public uses, termed the right of eminent domain, are all rights of sovereignty, for they are rights essential to the existence of supreme political authority. In this country this authority is vested in the people, and is exercised through the joint action of their Federal and State Governments. * * * To the existence of this political authority of the State—this qualified sovereignty, or to any part of it—the ownership of the minerals of gold and silver found within her limits is in no way essential. The minerals do not differ from the great mass of property, the ownership of which may be in the United States, or in individuals, without affecting in any respect the political jurisdiction of the State. They may be acquired by the State, as any other property may be, but when thus acquired she will hold them in the same manner that individual proprietors hold their property, and by the same right; by the right of ownership, and not by any right of sovereignty.

It then rejected the defendant's claim saying at p. 222:

> It follows * * * that * * * the gold and silver which passed by the cession from Mexico were not held by the United States in trust for the future State; that the ownership of them is not an incident of any right of sovereignty; that the minerals were held by the United States in the same manner as they held any other public property which they acquired from Mexico; and

> that their ownership over them was not lost, or in any respect impaired by the admission of California as a State.

This analysis is particularly applicable to the usufruct of all the waters, navigable as well as non-navigable, upon the public and reserved lands in the arid portion of the United States. Title to those lands has *not* passed to the States except for those specifically granted. "To the existence of the political authority of [Arizona] * * * the ownership of the [navigable waters of the Colorado River] is in no way essential." But the continued ownership of the right to use such waters "so far at least as may be necessary for the beneficial uses of the government property" bordering on the stream (*United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690, 703) is essential to the United States administration and disposition of those lands, except as Congress may specifically have determined otherwise. The considerations which have resulted in the Court's determinations with respect to the transfer of ownership of lands underlying navigable waters upon admission of a State into the Union are not applicable with respect to the waters themselves or the right to use them.

5. *The reserved rights appurtenant to federal reservations are "present perfected rights" for the satisfaction of which water must be released under Section 6 of the Project Act.*

Those reserved rights of the United States, to use mainstream waters upon its Indian and other federal reservations adjacent to the mainstream, which antedate the Project Act are accorded preferred status in

the statutory plan for distribution of the project water supply. The direction of Section 6 of the Project Act is that Hoover Dam shall be used, *inter alia,* for the satisfaction of "present perfected rights." As we have pointed out above, the right to use water, a basic necessity for any use of these arid lands, is effectively preserved when the land is reserved for federal uses. The reserved right constitutes a "perfected right" recognized by the Act, with priority as of the date of establishment of the reservation. This was the conclusion of the Special Master in his report at pp. 310–311:

> To hold that Congress did not include reserved water within the protection of Section 6 would require a holding that Congress, without saying so expressly, and without ever considering the matter, [fn. omitted] intended to nullify, in times of shortage, the very purpose of the reservation. The cases cited at pp. 258–259, *supra,* demonstrate that reservation of water was made by the United States to assure an adequate supply of water for the future needs of the federal establishments, in order that they could fulfill their purposes. It would frustrate this intent to deny the United States the use of this reserved water in times of shortage.
>
> I do not believe that Congress, when directing that the dam be operated in "satisfaction of present perfected rights," intended these consequences, and accordingly, I conclude that water rights reserved before June 25, 1929, for federal establishments are "perfected rights" within the meaning of Section 6.

6. *The principles of equitable apportionment are inapplicable to adjudication of rights reserved by the United States for use in Arizona vis-à-vis other users in Arizona.*

Arizona argues that the rights of the United States to use water on its Indian reservations should be determined, as against potential uses in Arizona, by application of principles of equitable apportionment. In this connection, Arizona would confer a quasi-sovereign status on the Indian tribes of the several reservations and, on this basis, argues what counsel appear to consider the equities of non-Indian citizens of that State *vis-à-vis* its Indian citizens.

The novelty of Arizona's suggestion is emphasized by the argument in Part I of its brief (pp. 40, *et seq.*) against application of the principles of equitable apportionment to the controversy among the states. In effect, Arizona is saying that the doctrine of equitable apportionment should not be applied to resolve the interstate controversy, the area of historical application of the doctrine,[35] but that it is properly usable to resolve rights intrastate.

We shall not reargue here the proposition that, under the Project Act, it is not equitable apportionment but the authorized distribution by the Secretary of the Interior which governs the use of the Boulder Canyon Project and the waters controlled thereby. (*Supra,* pp. 22 to 26.) That proposition is as true with respect to the rights of the United States

[35] *Nebraska* v. *Wyoming*, 325 U.S. 589; *Colorado* v. *Kansas*, 320 U.S. 383; *New Jersey* v. *New York*, 283 U.S. 336; *Connecticut* v. *Massachusetts*, 282 U.S. 660.

to use water on its Indian reservations as it is with respect to the interstate allocation. (*Supra,* pp. 58–60, 89–90.)

We do note, however, that even in an interstate allocation which is not controlled by statute, as the Project Act controls here, the reserved rights of the United States are not subject to reduction by apportionment between the states. This court's decision in *Hinderlider* v. *La Plata Co.,* 304 U.S. 92, makes clear that rights acquired under state law are subject to ultimate determination of the state's equitable share of the waters of an interstate stream. This principle, however, is not applicable to rights of the United States established by reservation out of its original ownership of the public domain. Rights so established are reserved out of the entire water supply which affects them and which they affect. The rights reserved transcend state boundaries and extend against all conflicting claims of use upstream and downstream. Since they do not depend for their validity upon the law of any state, they are not, unlike rights established under state law, subject to limitation by determination of the equitable share in the river of the state in which the federal reservation may happen to be situated.

But even if the doctrine of equitable apportionment were applicable as Arizona suggests, it does not justify reducing the quantity of water reserved for use on the Indian reservations. It is true that this Court held in *Nebraska* v. *Wyoming,* 325 U.S. 589, that factors other than priority of appropriation may have to

be considered in order to secure an equitable apportionment. But the Court did not say, or even suggest, that priority is to play no part in that apportionment. It went no further in this respect than to hold that an established economy based on *present use* under junior rights should not be destroyed by future expanded uses under senior rights. There is nothing in any of the equitable apportionment decisions of this Court to support Arizona's suggestion that use of water on the reservations should be subject to defeasance because of a claim that the water could be better used elsewhere within the State. If Arizona were right, no federal water development within a State would be secure against a later State determination that other areas need the water more. Cf. *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508, 534–535. The priorities of the rights for the mainstream Indian reservations have been established; the quantities of those rights as recommended by the Special Master are realistic and fair in the light of the future needs of the reservations. Nothing in the doctrine of equitable apportionment weighs against adoption of the Recommended Decree.

C. THE RIGHTS OF THE UNITED STATES TO WATER FOR FEDERAL ESTABLISHMENTS MUST BE SAFEGUARDED, WHATEVER APPORTIONMENT MAY BE DECREED AMONG THE STATES

The preceding argument shows that the United States has certain rights to the use of water in the Lower Colorado River Basin arising from its ownership of land and the reservation of certain of those lands for

specified purposes. These rights to use water carry with them priorities according to the dates of creation of, and addition to, the various Reservations. These rights extend to the ultimate needs of the Reservations.

The Special Master has given full recognition to the rights of the United States and has integrated such rights into his allocation among the States. However, the Court's ultimate decree in this case should sustain these rights regardless of its action upon the Special Master's allocation. These rights of the United States exist independently, against all other uses, without regard to state boundaries or shares. They are rights of the United States, not capable of limitation by the apportionment among the States. Accordingly, these rights must be safeguarded, whatever the basis or the nature of the allocation among the States.

III

MISCELLANEOUS MATTERS

A. BOUNDARIES OF THE COLORADO RIVER INDIAN RESERVATION AND THE FORT MOHAVE INDIAN RESERVATION

In the process of determining the irrigable acreage of the Colorado River Indian Reservation and the Fort Mohave Indian Reservation and the consequent quantity of the water rights to be decreed for these Reservations, the Special Master had to resolve disputes between the United States and California concerning the proper location of the western boundary of each of these Reservations. The opinions of the

Special Master are found on pp. 274–278 and 283–287, respectively, of the Report.

With particular reference to the boundary determinations respecting the Colorado River Indian Reservation, California continues to argue (California Opening Br., pp. 279–283) that the Decree should disclaim any intention to pass on land titles of occupants of the disputed areas. Responsive to such California request, the Special Master stated:

> Of necessity, a determination of the amount of irrigable acreage within the Reservation and the consequent award of a quantity of water based on this determination requires adjudication of the boundaries of the Reservation. The findings herein made are therefore binding on the parties. Nevertheless, in the hearings and in this Report, I did not inquire into or determine the right of any occupant, whoever he might be, to the possession of lands within the questioned areas. [Rept. 278.]

We agree that this is the extent of the assurance that can be accorded California in this matter. The determination of the boundary of each Reservation is an essential prerequisite to the determination of the quantum of the water rights for that Reservation. There is no question of the Court's jurisdiction to resolve boundary questions nor of the authority of California to act as *parens patriae* for its citizens in such matters. *Rhode Island* v. *Massachusetts,* 37 U.S. 657. We oppose the disclaimer proposed by California because of its possible derogative effect upon the water rights herein decreed to the United States.

B. RESPONSE TO NEVADA'S PROPOSAL FOR AMENDMENT OF THE DECREE

Nevada continues to argue, in its opening brief (pp. 52–55), that the general requirement of the Recommended Decree that all users of mainstream waters have contracts with the Secretary of the Interior should be made inapplicable to users in Nevada. Our opposition to the Nevada argument is set forth in Point IV, pp. 48–51, of the Brief in Support of Exceptions of the United States to the Special Master's Report and Recommended Decree.

CONCLUSION

For the foregoing reasons it is respectfully submitted that with respect to the interstate allocations and the recognition of the right to use waters on the federal reservations, the Report of the Special Master and the proposed decree should be approved except as otherwise pointed out in the brief of the United States in support of its exceptions to the Report.

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