No. 8 Original

In the Supreme Court of the United States

OCTOBER TERM, 1960

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

BRIEF IN SUPPORT OF EXCEPTIONS OF THE UNITED STATES, INTERVENER, TO THE SPECIAL MASTER'S REPORT AND RECOMMENDED DECREE

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CITATIONS

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SPECIAL MASTER'S REPORT

The report of the Special Master dated December 5, 1960, was received and ordered filed by this Court on January 16, 1961 (364 U.S. 940).

JURISDICTION

This is an original case in which the jurisdiction of this Court rests on Article III, Section 2, of the Constitution.

QUESTIONS PRESENTED

1. Whether in making contracts with the States in the Lower Colorado River Basin for the storage of water in, and the delivery of water from, Lake Mead the Secretary of the Interior is authorized to make deductions for upstream consumptive use in Arizona

and Nevada of water which would otherwise flow into Lake Mead.

2. Whether the Secretary of the Interior may deliver water pursuant to contracts under the authority of the Boulder Canyon Project Act without regard for State law.

3. Whether the contract entered into by the Secretary of the Interior with the State of Nevada exhausts his authority under Section 5 of the Boulder Canyon Project Act so that he may not contract further for the use of impounded water within the State of Nevada or use such water for federal projects.

4. Whether water salvaged on wildlife refuges may be used there without regard to priorities otherwise applicable.

STATUTES AND COMPACT INVOLVED

The relevant statutes are the Boulder Canyon Project Act, 45 Stat. 1057, 43 U.S.C. 617; the California Limitation Act, Act of March 4, 1929, Ch. 16, 48th Sess., Statutes and Amendments to the Codes, 1929, pp. 38–39, both of which are set forth in appendices to the Special Master's Report at pp. 379 and 397, respectively. Also involved is the Colorado River Compact signed at Santa Fe, New Mexico, November 24, 1922, set forth in an appendix to the Special Master's Report beginning at p. 371.

STATEMENT

This litigation was commenced by Arizona in 1952 by a bill of complaint against California and seven of its agencies, asking for an adjudication of Arizona's rights to the use of the waters of the Colorado

River. The United States, Nevada, New Mexico, and Utah became parties either by intervention or by order of this Court (344 U.S. 919; 347 U.S. 985; 350 U.S. 114, rehearing denied, 350 U.S. 955). The present Special Master was appointed on October 10, 1955 (350 U.S. 812). After pre-trial proceedings, extensive hearings were conducted, briefs were exchanged, a draft report was submitted and commented on both in writing and at oral argument, and the present report was filed. All of the parties except Utah filed exceptions to this report in February, 1961, and it is the consideration of these exceptions which is now before this Court.

SUMMARY OF ARGUMENT

A. Our first two exceptions, which are here treated together, concern the question of whether Arizona and Nevada are to be charged with consumptive use of water upstream from Lake Mead, or whether their full allocations may be taken from Lake Mead and from the mainstream below without regard to the extent that they may have lessened the amount of water flowing into Lake Mead. It is the position of the United States that the authority of the Secretary of the Interior under Section 5 of the Boulder Canyon Project Act to contract for the storage and delivery of water includes the authority to make appropriate adjustments for upstream use. The Special Master rejected this position, holding that the only power of physical control, and therefore the only authority to contract, existed with respect to the water in Lake Mead and the mainstream below Lake Mead.

The provisions of the Boulder Canyon Project Act, when read in the light of its history, indicate an intent to authorize the Secretary of the Interior to divide the mainstream waters available in the Lower Basin. Hoover Dam was constructed to impound and regulate those waters. This purpose would be impaired by permitting Arizona and Nevada to make diversions upstream without a corresponding reduction in their entitlements to stored water.

The Special Master's rejection of this proposition rests in part on a theory that to make adjustments for upstream uses would impair the permanency of the Secretary's contracts in violation of the Project Act and also in violation of State law. But, as the United States understands the effect of making such deductions for upstream use, existing contract rights would not be curtailed. Either the upstream uses would be subject to prior contract, or, if they are prior, would result in authority to the Secretary to limit the quantity of water to be allocated by contract to less than the full amount. In either event, no existing contracts would lose their required permanency.

We believe that this interpretation gives added certainty to the allocations under the Project Act and would give some protection to California's established projects.

B. Our third exception relates to the extent that Congress has subjected the authority of the Secretary of the Interior under the Boulder Canyon Project Act to State law. Although the Special Master refused to pass upon the legality of rights of the United States to make deliveries under contracts it has made,

he did include in his findings a statement that rights under those contracts would be subject to internal State law. This position is also reflected in his recommended decree. We urge that these conclusions should be disapproved.

As we read the Project Act, the Secretary is given full authority to build a dam, store mainstream water, and deliver it to users under contracts to be executed by him. We believe that this affirmative authority is not limited by a requirement that he comply with State law. This is in accord with general principles under which the United States may perform its functions without regulation by the States. It is also in accord with decisions of this Court with respect to the authority granted the federal government in comparable statutes dealing with the use of water where it has been held that control of the operation of these federal projects shall rest entirely in the Secretary. And it is in accord with 59 years of administrative practice under the reclamation laws.

The countervailing argument is that by Section 18 of the Project Act Congress subjected the authority of the Secretary to State law. Both the legislative history of this section and the interpretation of comparable provisions of the Reclamation Act and the Federal Power Act indicate that Section 18 does not mean what the Special Master believed.

C. Our fourth exception takes issue with a single sentence in the Special Master's report in which he held that the Nevada contract, unlike the Arizona contract, contemplated that the State should subdivide the allocation among users. Our position is that Sec-

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tion 5 of the Project Act requires that deliveries from Lake Mead be made to users only pursuant to contracts with the Secretary of the Interior. Insofar as the contract with Nevada contemplates use by Nevada, it may fulfill the requirements of Section 5. With respect to other users, we urge that the language of the Nevada contract does not show an intent to depart from the procedure required by Section 5 of the Project Act and followed in Arizona and California.

D. Finally, we excepted to the failure of the Special Master to recognize the right of the United States to use on its wildlife refuges water reclaimed by federal work on those refuges. Our position here is simply predicated on the theory that he who reclaims water may use it.

ARGUMENT

In large part the United States supports the Special Master's Report as filed. However, we have filed five numbered exceptions which deal with specific sections of the report and the recommended decree. Although the fundamental conclusions in the report and major provisions of the decree do not depend upon the resolution of these issues, they are sufficiently significant to make it appropriate to have noted the exceptions and to file this brief in support of them. However, we anticipate that our answering brief in response to the exceptions of the other parties will deal more directly with the principal issues in the case on which we support the report.

Since our Exceptions I and II are closely related, we shall combine our argument in support of them

under a single heading, but will continue to number the points here to correspond with the numbers given the exceptions.

POINTS I and II

IN MAKING ALLOCATIONS OF WATERS FROM LAKE MEAD AMONG LOWER COLORADO RIVER BASIN STATES, THE SECRETARY OF THE INTERIOR IS AUTHORIZED TO MAKE DEDUCTIONS TO COMPENSATE FOR UPSTREAM CONSUMPTIVE USE IN ARIZONA AND NEVADA OF WATER WHICH WOULD OTHERWISE FLOW INTO LAKE MEAD

Our Exceptions I and II are specifically addressed to the Special Master's definition of the term "mainstream" as excluding water above Lake Mead (Report, pp. 173, 183, 185, 225, 226, 316–321; Recommended Decree, p. 345) and to his disapproval of provisions in contracts between the Secretary of the Interior and the States of Arizona and Nevada which condition the amount of water to be delivered thereunder on the amount of depletion of the flow into Lake Mead by upstream uses in these States (Report, pp. 237–247, 226–228).[1]

[1] Article 7(d) of the Arizona contract provides as follows:

"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." (Report, p. 401, App. 5.)

Article 5(a) of the amended Nevada contract contains this language:

"Subject to the availability thereof for use in Nevada under the provisions of the Colorado River Compact and the Boulder

In broad terms, the issue on both of these exceptions is whether the Special Master was correct in construing the authority of the Secretary of the Interior as limited to water to be taken from Lake Mead or from the mainstream below Lake Mead without consideration of upstream uses. We urge that the Boulder Canyon Project Act authorizes the Secretary of the Interior to take into consideration all consumptive use of water in Arizona and Nevada which would have flowed into Lake Mead if it had not been used within the Lower Basin.

A brief discussion of the geography involved is necessary to understand these exceptions. For the convenience of the Court a slightly altered copy of the map which California attached to its exceptions is attached as an appendix. The dividing line between the Upper and Lower Colorado River Basins is located at Lee Ferry, near the northern boundary of Arizona. From there, the river flows for 275 miles before it reaches the upper limits of Lake Mead, the reservoir formed by Hoover Dam. During much of the distance the Colorado River traverses between Lee Ferry and Lake Mead there are deep canyons which make diversion of the waters impractical.

Canyon Project Act, the United States shall, from storage in Lake Mead, deliver to the State each year at a point or points to be selected by the State and approved by the Secretary, so much water, including all other waters diverted for use within the State of Nevada from the Colorado River system, as may be necessary to supply the State a total quantity not to exceed Three Hundred Thousand (300,000) acre-feet each calendar year. Said water may be used only within the State of Nevada, exclusively for irrigation, household, stock, municipal, mining, milling, industrial, and other like purposes, but shall not be used for the generation of electric power." (Report, pp. 420–421, App. 7.)

However, there are areas where, by the building of extensive facilities, the waters could be diverted, and, in fact, one of the possible points for diversion for the proposed Central Arizona Project lies in this area. Also in this reach of the river, above Lake Mead but below Lee Ferry, the river is joined by several tributaries, principally the Little Colorado River (Arizona and New Mexico) and Johnson and Kanab Creeks (Utah and Arizona). The Virgin River (Nevada, Utah, and Arizona) flows into Lake Mead. The parts of Arizona, Nevada, Utah, and New Mexico drained by these tributaries are included in the Lower Basin of the Colorado River system. It is obvious that consumptive use of the waters before they reach Lake Mead will reduce the quantity of water which will be impounded there subject to delivery under contracts entered into by the Secretary of the Interior.

The United States has asserted that, under a proper construction of the Boulder Canyon Project Act, the Secretary is required to consider uses in Arizona and Nevada from the mainstream above Lake Mead and from tributaries entering the mainstream between Lee Ferry and Lake Mead. Thus we would include in the waters to be distributed to California, Arizona, and Nevada pursuant to Section 4(a) of the Project Act not only waters impounded in Lake Mead, but also all water which would have reached the mainstream above Hoover Dam except for consumptive uses in Arizona and Nevada. The Special Master disagrees, holding that the Secretary may consider only the waters which are actually impounded in Lake Mead and are taken therefrom or from the mainstream below.

Under the terms of the Colorado River Compact, the consumptive use of part of the waters of the Colorado River system was divided between the Upper and Lower Basin States. Since the effectiveness of this Compact depended upon Arizona's approval, which was not forthcoming, the Project Act was made dependent on a modification of the Compact and California's adoption of a Limitation Act accepting a 4,400,000 acre-foot limitation on its use of the initial 7,500,000 acre-feet of mainstream water available annually for the Lower Basin. According to the Special Master's interpretation, the limitation also permits the consumptive use in California of not more than one-half of these waters annually available in excess of 7,500,000 acre-feet. As the Special Master found, the Project Act contemplated the control and use of "substantially all the water of the mainstream" (Report, p. 153) and the distribution of this water under contract by the Secretary of the Interior. It would frustrate this purpose if some of the States could avoid the Project Act allocations by taking the water prior to its entry into Lake Mead.

Section 5 of the Project Act specifically authorizes the Secretary of the Interior "under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof * * *." To be effective such contracts may reasonably require that the uses of water of the mainstream above the dam and the tributaries feeding it should be accounted for in allocations of the water in storage. Unless the Secretary's authority is read in this manner, there is a serious flaw in his

authority to make the distribution among the Lower Basin States.

The Special Master's conclusion that the waters contemplated by Congress in enactment of Section 4(a) of the Project Act are mainstream waters is based on the legislative history, reviewed at pp. 173 to 200 of the Report, which clearly so indicates. His conclusion that the aggregate waters from which California's share is to be derived do not include waters taken from the mainstream or the tributaries above Lake Mead—that the waters contemplated by Congress in the enactment of Section 4(a) of the Project Act are only those which actually arrive in Lake Mead or in the mainstream below Hoover Dam—is predicated primarily on this reasoning:

> * * * The Project Act was concerned primarily with the construction and operation of Hoover Dam, and most of its provisions relate to this basic purpose. Hoover Dam gives the United States physical control over the water stored in Lake Mead and over the use of substantially all of the water in the mainstream below, but it does not enable the United States physically to control the use of water from the mainstream above Lake Mead. Consistently with this physical fact, the provisions of the Project Act do not purport to govern the mainstream above Lake Mead. Section 5 authorizes the Secretary of the Interior to contract for the delivery of water stored in Lake Mead at points which may be agreed upon along the Lake and the mainstream below; that section specifically applies only to water in Lake Mead and to water released therefrom. Also Sections 6 and 8 of the Project Act apply in terms to water con-

> trolled by the United States by means of Hoover Dam.
>
> Section 4(a) must be interpreted within the context just described. Consistent with the other provisions of the Project Act, I interpret Section 4(a), as applying only to Lake Mead and the mainstream below. * * * [Report, p. 183. See also p. 173.]

This analysis, however, overlooks the previously determined fact that Congress authorized a project which it "realized * * * would impound *substantially all* the water of the mainstream * * *." (Report, p. 153; emphasis added.) It appears to attribute to Congress a disregard for anything which might happen above the reservoir to frustrate or partially to frustrate the purposes of the dam. Such disregard for the successful accomplishment of the purposes of the project should not be implied simply from the fact that Congress gave the Secretary of the Interior specific instructions with respect to the operation of the dam and the delivery of waters stored thereby, and spoke otherwise in terms of water "controlled by the United States."[2] It is more reasonable to conclude that when Congress authorized the construction of a

[2] At page 114 of the Report, the Special Master states that no new projects in either the Lower or Upper Basins which would affect Lower Basin mainstream supply can be constructed without congressional action or acquiescence. While we agree with this statement and that the authorities cited support it, nevertheless we think that when Congress (1) authorized the construction of Hoover Dam, which it realized would impound substantially all of the mainstream waters, and (2) authorized the Secretary of the Interior to contract for the storage of such waters and the delivery thereof, it did not contemplate that the contracts the Secretary might make pursuant to that authorizaton might be defeated by a future determination by Congress to divert, or permit the di-

dam capable of impounding and controlling "substantially all the water of the mainstream" and entrusted the operation of that structure to the Secretary of the Interior, Congress intended that the Secretary should do everything reasonably within his broad powers to assure that the waters of the tributaries and mainstream above the dam would not be intercepted before reaching the reservoir.

At pp. 160–161 of the Report the Special Master has very properly declared:

> Clearly the United States may construct a dam and impound the waters of the Colorado River, a navigable stream. *Arizona* v. *California,* 283 U.S. 423 (1931); see *United States* v. *Twin*

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version of, the mainstream waters before they reach Lake Mead. The words of this Court in *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 299–300, respecting the Central Valley Project would seem to be equally applicable to this suggestion concerning the Boulder Canyon Project:

"* * * It would be a physical impossibility to withdraw the facilities. As for the possibility of discrimination in the administration of those facilities, it seems farfetched to foresee the Federal Government 'turning its back upon a people who had been benefited by it' and allowing their lands to revert to desert.[10] The prospect is too improbable to figure in our decision."

"[10] [footnote, 357 U.S. at 300] Senator Gore (then Representative) gave this compelling answer to these trepidations in 1947; 'I cannot conceive of a Government that would spend $384,000,000 building one of the great reclamation-irrigation projects of the world and suddenly because some evil agent of Government had gotten into a bureau, turning its back upon a people who had been benefited by it and who in turn had greatly benefited the Nation by production of food stuffs and wealth. I just do not conceive of the United States as being that kind. * * *' Hearings before the Subcommittee of the House Committee on Appropriations on the Interior Department Appropriation Bill for 1948, 80th Cong., 1st Sess. 737."

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> *City Power Co.*, 350 U.S. 222 (1956); *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53 (1913); *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690 (1899). Clearly, also, once the United States impounds the water and thereby obtains physical custody of it, the United States may control the allocation and use of unappropriated water so impounded. *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275 (1958); *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950). * * *

It is just as clear that in making contracts for the storage and delivery of water which it has impounded the United States may properly attach conditions requiring those with whom it contracts and others subject to their control not to interfere with water which would otherwise reach the reservoir. And it is equally clear that in Section 5 and the general scheme of the Project Act Congress has authorized the Secretary so to condition the contracts he makes.

The Special Master has cited three principal reasons for his conclusion that Article 7(d) of the Arizona contract and Article 5(a) of the Nevada contract, to the extent they make the quantities of water deliverable from Lake Mead dependent upon the extent of depletions in the respective States of inflow into Lake Mead, are not authorized by the Project Act and are therefore not enforceable. He says these provisions—

> (1) "are contrary to the command of Section 5 that 'contracts respecting water for irrigation and domestic uses shall be for permanent service * * *,'"

(2) "violate Section 18 [of the Project Act];" and

(3) "result in an allocation of mainstream water totally out of harmony with the limitation on California contained in Section 4(a)." (Report, p. 237.)

There is no inconsistency between these contract provisions and the "permanent service" requirement of Section 5 of the Project Act. As the Report recognizes, pp. 152, 162–163, 202, the Secretary of the Interior was under no compulsion to contract with Arizona and Nevada for the delivery of any particular quantities of water. What he has contracted for is the delivery from Lake Mead

(1) to Nevada of so much water, *"including all other waters diverted for use within the State of Nevada from the Colorado River system,* as may be necessary to supply the State a total quantity not to exceed Three Hundred Thousand (300,000) acre-feet each calendar year." (Report, p. 420, App. 7.)

(2) for use in Arizona of the quantities specified in paragraphs (a) and (b) of Article 7 of the Arizona contract, less the amount by which consumptive uses above Lake Mead shall diminish the flow into Lake Mead (paragraph (d), Article 7). (Report, pp. 400–401, App. 5.)

We do not understand anyone to contend that at the present time the amounts of water which the Secretary of the Interior has contracted to deliver for uses in Arizona and Nevada, respectively, when added to existing upstream appropriations, exceed the amounts allocable to those states. Thus there is no impediment to the fulfillment of both the contracts

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

The flaw in the Special Master's conclusion is the assumption that upstream uses under new appropriations would cut into deliveries under existing contracts. This is not required either under the State law, as interpreted by the Special Master, or by the provisions of the contracts themselves. Certainly the requirement for permanency was not intended to permit a State to increase its allotment by contracting for the delivery of water from Lake Mead and then proceeding to duplicate its share by withdrawing from the source of that water. The United States in contracting with a State does its part to meet the permanency requirement as to the State when it agrees to

deliver a specified quantity of stored water for use in the State unless the State elects to take or to permit its citizens to take its allotment upstream from the reservoir.

The Special Master errs in suggesting (pp. 239–240), that the provisions in question "generate new causes of uncertainty." On the contrary, they are designed to protect against the very real uncertainty which would arise if the Secretary were to contract for delivery of water from storage without regard to how far the amounts of water available for storage might be affected by upstream depletions. It is to be emphasized that the contracts under discussion are contracts with the respective States, designed primarily to allocate waters for use within those States; they are not definitive contracts for the delivery of specified quantities for specific projects. The States have the choice of having additional projects to be served with stored water or of foregoing them in favor of additional upstream projects. As a consequence, the aggregate water supply for the entire Boulder Canyon Project, including uses in California as well as those in Nevada and Arizona, is made more, and not less, certain. The hazard of impairment of the Project water supply by uncontrolled depletions upstream from the dam is removed. With such depletions taken into account in making commitments for delivery from Lake Mead, the principal uncertainty as to supply remaining results from the forces of nature.

The Special Master's conclusion that Articles 7(d) of the Arizona contract and 5(a) of the Nevada

contract violate Section 18 of the Project Act is equally unsound. Section 18 provides that nothing in the Project Act—

> shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or interstate agreement.

Apparently the Special Master again construes the contract as requiring rights to delivery under contract to be terminated by later upstream appropriations.[3] He states that this is a flagrant violation of Section 18 and a dictation to Arizona and Nevada of priorities within those States. However, as we point out above, the contract provisions do not require a termination of rights because of subsequent appropriations. Thus this objection is merely an alternative method of stating the first stated objection and falls for the same reason.

As a third reason cited in the report for the conclusion that the Article 7(d) and Article 5(a) provisions are illegal, the Special Master states that enforcement of these provisions would result in an allocation of mainstream water out of harmony with the limitation on California imposed by Section 4(a) of the Project Act (Report, pp. 241–247). In explanation, he supposes total releases from Hoover Dam to permit consumptive uses of 7.7 million acre-feet in

[3] We set forth what we believe to be the correct interpretation of Section 18, *infra*, pp. 34–37.

California, Arizona, and Nevada in a year when Arizona's diversions from the Little Colorado deplete the flow into Lake Mead by .1 million acre feet.

> Under the interstate apportionment established by the Section 4(a) limitation on California and the delivery contracts with Arizona and Nevada, of the first 7.5 million acre-feet of mainstream consumption, Arizona would be allocated 2.8 million acre-feet, California 4.4, and Nevada .3. Of the .2 million acre-feet constituting surplus, Arizona and California would each be allocated one-half. Thus to California would be apportioned a total consumption of 4.5 million acre-feet for the year in question. She could not consume more than this amount because of the Section 4(a) limitation, which is based on mainstream considerations only. To Nevada would be apportioned a total consumption of .3 million acre-feet, and she could not utilize more than this since that constitutes her full contractual allotment. To Arizona would be apportioned a total consumption of 2.9 million acre-feet. But if Article 7(d) of her contract were applied in this situation, the Secretary's delivery obligation of 2.9 million acre-feet would be reduced by the amount of the depletion of the flow into Lake Mead, and Arizona could consume only a total of 2.8 million acre-feet from the mainstream. Thus, although 7.7 million acre-feet were released for consumption within the three states for the year, only 7.6 million acre-feet could be utilized under the statutory and contractual limitations. 100,000 acre-feet of water released for consumption could not be used. [Report, pp. 242–243.]

We do not agree with this conclusion. We suggest that the 100,000 acre-feet of Little Colorado depletions is part of the total mainstream supply available for allocation. This is necessary to achieve Congress' purpose to impound and regulate "substantially all the mainstream water" and to accomplish the interstate allocation established by the Section 4(a) limitation on California and the delivery contracts with Nevada and Arizona. We urge the Court to adopt this view.

The Special Master states at pages 243–244 of his report that charging the States with upstream uses, as provided by Articles 7(d) and 5(a), presents problems of measurement since, "for example, 100,000 acre-feet of consumptive use on the Little Colorado will result in a depletion of the flow into Lake Mead by a substantially smaller quantity of water." It is appropriate that Arizona and Nevada should be charged only to the extent such upstream uses actually deplete the mainstream supply available for division between the three States. There is no incompatability between such measurement of the upstream uses and the measurement of Lake Mead and downstream uses by diversions less returns. It is to be remembered that the Article 7(d) and 5(a) provisions have been imposed as conditions upon the deliveries for use in Nevada and Arizona of stored waters in order to protect the common supply available for downstream division. It should not be necessary for the Secretary to charge those States, against their shares of the common supply, with a greater quantity of usage than that quantity by which the upstream uses deplete the common supply.

The task of measuring upstream depletions of the flow into Lake Mead would present an additional, but by no means impossible, complication. The measurement at downstream points of depletions of flow by upstream diversions is based on concepts and standards which receive rather general acceptance in the engineering profession today. (Ariz. Exs. 65 and 65A; Upper Colorado River Basin Compact, Article VI, 63 Stat. 31.) Any problems in administration of the 7(d) and 5(a) contract provisions (Report, p. 246) would be relatively slight in comparison with the complications which might well be involved in case of suit by California to protect itself against "undue depletions on the tributaries and the mainstream above Lake Mead * * *." (Report, p. 247.)

The adverse effect upon California's established projects of the ruling with respect to the Article 7(d) and 5(a) contract provisions ought not to be imposed in the absence of a clear requirement therefor in the controlling statute or its legislative history. We believe no such requirement exists.

POINT III

RELATIVE RIGHTS INTRASTATE TO THE DELIVERY OF COLORADO RIVER WATERS, IN TERMS OF QUANTITY AND PRIORITY, ARE GOVERNED BY THE TERMS OF THE DELIVERY CONTRACTS MADE UNDER AUTHORITY OF THE PROJECT ACT AND BY APPLICABLE FEDERAL LAW RATHER THAN BY STATE LAW

The United States urged the Special Master to determine its right to deliver water to Boulder City, Nevada, under the Act of September 2, 1958, 72 Stat.

1726, and to the several mainstream federal reclamation projects and to nearby lands and users under a variety of contracts which have been made respecting such deliveries. He has declined to make such determinations for these stated reasons:

> The relevant issues for such a decision have not been tried and it would be impossible to determine here all of the relevant rights and priorities under the applicable state laws which would affect a project's water rights. Furthermore, persons who are the most concerned with this decision are other users or potential users in the states, who are not parties to this suit. [Rept. 218, and see 303.]

We do not agree that the relevant issues were not tried; that it would be impossible in this litigation to determine the right of the United States to deliver the waters contracted for or otherwise committed to the several contracting districts and other users; or that there are others not party to this case who are either indispensable or necessary parties to such determination. However, in the interest of expediting a conclusion to this litigation, we have not taken exception to the Special Master's refusal to rule now on these issues.

However, while the Special Master declined to make the determinations sought in this respect, he did state "* * * that state law governs intrastate rights and priorities to water diverted from the Colorado River." (Rept. 216; 303.) And he further declared that "How much water a particular project or user may receive out of a state's total apportionment as against other users in the state who also have

or may in the future obtain delivery contracts with the Secretary of the Interior must be decided under State law." (Rept. 218.) This view is reflected in the recommended Decree (Art. II(C)(1)), which would enjoin the United States, its officers, attorneys, agents and employees from releasing water for "any use or user in violation of state law" except as otherwise provided in the recommended Decree and except as federal statutes otherwise specifically direct. (Rept. 350.) We have excepted to the quoted statements appearing on pages 216 and 218 of the Report, the expressions on pages 217–218 in support thereof, and the quoted portion of the recommended Decree, as inconsistent with the Special Master's primary holding, unnecessary to the decision of this case and in error.

A. THE STATEMENTS IN THE REPORT AND THE PROVISION OF THE RECOMMENDED DECREE RESPECTING APPLICABILITY OF STATE LAW TO THE DETERMINATION OF RELATIVE RIGHTS INTRASTATE TO USE THE BOULDER CANYON PROJECT WATERS ARE UNNECESSARY TO THE RECOMMENDED DECISION AND SHOULD BE ELIMINATED

Since the Special Master has declined to rule on the rights, intrastate, of the United States to deliver water to those agencies and other persons with whom contracts have been made,[4] the statements in the Report respecting the applicability of State laws to such rights and the rights of users under such contracts are not necessary to the recommended decision. This is likewise true as to the language of Art. II(C)(1)

[4] The direction to the Secretary of the Interior by the Act of September 2, 1958, 72 Stat. 1726, to deliver water to Boulder City, Nevada, is treated by the Master as the equivalent of a contract. (Rept. 303.)

of the recommended Decree (Rept. 350) which would enjoin the United States, its officers, from releasing water for "any use or user in violation of state law." [5]

It is submitted that, for the reasons hereinafter set forth, this language in the Report and the related provision of the recommended Decree are erroneous. Acceptance of the Report by the Court without correction of the error might be prejudicial, both to the United States and those with whom contracts have been made, in future litigation to determine the matters upon which the Special Master has declined to rule. It is accordingly urged that the material referred to be purged from the Report and the recommended Decree.

B. BY SECTION 5 AND OTHER PROVISIONS OF THE BOULDER CANYON PROJECT ACT THE SECRETARY OF THE INTERIOR IS GIVEN BROAD POWERS IN THE ADMINISTRATION AND DISPOSITION OF THE PROJECT WATER SUPPLY, INCLUDING THE POWER, BY CONTRACT WITH WATER USERS, TO MAKE ALL APPROPRIATE PROVISIONS RESPECTING QUANTITIES OF WATER TO BE DELIVERED TO DIFFERENT USERS AND THE CONDITIONS ON AND UNDER WHICH DELIVERIES WILL BE MADE

The Boulder Canyon Project Act was enacted by Congress in valid exercise of its powers (1) to control the navigable waters of the United States for the purposes of commerce, including, *inter alia,* the control of floods, improvement of navigation, power production, and watershed and river development, *Okla-*

[5] We believe that if this provision of the recommended decree is to be retained it should be revised to prohibit the violation of the provisions of applicable law. Certainly as far as the United States itself is concerned, it is not theoretically possible for it to violate State law in a field where federal law is dominant. The suggested modification would recognize any State law which might be applicable by adoption as federal law.

homa v. *Atkinson Co.*, 313 U.S. 508; *Arizona* v. *California*, 283 U.S. 423; *United States* v. *Appalachian Power Co.*, 311 U.S. 377; (2) to 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 (3) to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. Constitution of the United States, Article IV, Section 3, Clause 2. And see *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.

In broad language, Section 1 of the Act (Report, p. 379, App. 3) authorized the Secretary of the Interior to construct, operate and maintain the Project, including Hoover Dam, Imperial Dam, and the All-American Canal system[6] "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

[6] Additional works and projects, such as Parker Dam, Davis Dam, the Gila Reclamation Project, the distribution system and appurtenant flood control works for the Coachella Division, All-American Canal System, Boulder Canyon Project, have since been authorized to supplement and be integrated with the works originally authorized. See, *e.g.*, 49 Stat. 1039; 61 Stat. 628; H. Doc. 415, 80th Cong., 1st Sess.

the project herein authorized a self-supporting and financially solvent undertaking * * *."

With respect to the storage and disposition of the project water supply, Section 5 (Report, p. 384, App. 3) specifically authorizes the Secretary "to contract for the storage of water * * * and for the delivery thereof at such points on the river * * * as may be agreed upon, for irrigation and domestic uses * * *." That section further provides, *inter alia,* as follows:

> Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.[7]

In light of the constitutional background for the Project, the language of Section 5 is clearly designed to and does vest in the Secretary of the Interior, as an element of project operation, full authority to contract with users of project waters and to specify the quantities to be delivered to various users and relative priorities as between them.[8] The Section 5 contract authority is substantially unlimited insofar as the

[7] The provisions of Sec. 5, and of Sec. 6 hereinafter referred to, clearly constitute reasonable conditions and limitations on the use of federal funds, federal property, and federal privileges. *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U.S. 275.

[8] The views expressed by opponents of the Act during the debates in Congress support this analysis of the Section 5 language. H.R. 5773, 70th Cong., 1st Sess., December 5, 1927, contained language substantially as enacted in the first paragraph of Section 5 of the Act. During the debate in the House

project water supply is concerned except for (1) the requirement that contracts shall be "for permanent service and shall conform to paragraph (a) of section 4," and (2) the provisions of Section 6 prescribing priorities as between the various project purposes enumerated in Section 1.[9]

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regarding H.R. 5773, Mr. Douglas of Arizona, while speaking in opposition to the bill, stated:

"The bill further provides for congressional amendments of State water codes. Further than that, it vests in the Secretary of the Interior complete and absolute control over the waters of the Colorado below Boulder Dam." (Cong. Rec., Vol. 69, p. 9623.)

During the same discussion, Mr. Colton of Utah stated in opposition to the bill:

"You are saying that you are going to take it [water] away from the States and place it in the Federal Government, and Section 5 of this bill asserts that very principle. It provides that the Secretary of the Interior shall have control of all of the water stored in the reservoir and its delivery to any part of the river below." (Cong. Rec., Vol. 69, p. 9648.)

Mr. Colton later remarked, after quoting the first portions of Section 5:

"If that does not give him absolute control of this water, or if it does not seek to give the Secretary of the Interior absolute control of this water, I cannot understand the English language; and, gentlemen, that is exactly what we are objecting to." (Cong. Rec., Vol. 69, p. 9649.)

The proponents of the bill made no response to this interpretation.

[9] Section 6 (Report, p. 387, App. 3) provides as follows:

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

The requirement for satisfaction of "present perfected rights" is dealt with at pp. 307–312 of the Report. And see p. 161.

The broad discretion of the Secretary in the matter of making delivery contracts is recognized at page 215 of the Report:

> * * * I interpret the Boulder Canyon Project Act as empowering the Secretary of the Interior to contract for delivery of mainstream water to states and to individual users, whether private or public. The Project Act does not require or even suggest that the delivery contracts must be made only with states. It is certainly within the discretion of the Secretary, under the Project Act, to contract directly with individual users in the various states for the delivery of water. * * *

This holding accords with the previous statements at pages 152–153:

> The Act itself clearly reserves to the United States broad powers over the water impounded in Lake Mead and delegates this power to the Secretary of the Interior, as agent of the United States. He is specifically authorized to impound the water of the Colorado River in Lake Mead and to exercise custody over the water so impounded through his control, management and operation of the dam and reservoir. No user, whether it be a state or an individual, may receive the impounded water unless the Secretary, by contract, agrees to release it for delivery to that user. Nothing in the Act purports to require the Secretary to agree to deliver specific quantities of water to any particular state or user, except that Section 6 requires him to satisfy water rights perfected as of June 25, 1929. [fn.] *On the contrary, the Act clearly contemplates that water un-*

> *appropriated as of that date is to be made available for use within a state only if the Secretary, within his discretion, contracts for the delivery of the water to that state. In short, no contract, no water,* * * *. [Emphasis added; fn. omitted.]
>
> And at page 216 appears this language:
>
> In other words, the Secretary has agreed with the State of Arizona that he will deliver a certain amount of water to Arizona users, but he has reserved to himself discretion to decide with which users he will contract. This being the case, the Secretary is free, subject to statutory limitations, to contract with users in Arizona qualifying under the reclamation law for delivery to them of certain amounts of water out of the total amount allocated to Arizona. This is precisely what the Secretary has done in the contracts which are before us in this case.

Pursuant to the broad authority conferred by Sections 1 and 5 of the Project Act, the Secretary early in the life of the Project Act made contracts with a number of agencies within the State of California, incorporating in each the so-called Seven-party agreement. This agreement specifies the quantities of Colorado River water which the several agencies may receive and the relative priorities as between them. (See, *e.g.*, Article (6) of the contract of February 7, 1933, between the United States and the Palo Verde Irrigation District, Report, pp. 424–429, App. 8.) The amounts and priorities so specified were "in accordance with the recommendation of the Chief of the Division of Water Resources of the State of

California" (Report, p. 424), but there has never been a determination that they accord in all respects with California law. Regardless of the recommendation of the Chief of the Division of Water Resources, the rights of the several agencies party to those contracts to receive, and of the United States to deliver, water in accordance with the specified quantities and priorities, do not come about by application of state law—they are a matter of contract between the United States and the agencies except as the Project Act provision for satisfaction of "present perfected rights" (Report, pp. 307–312) may require a different order of delivery.

Also under the broad authority vested in him to contract for use and disposition of the Project water supply, the Secretary has made contracts with a water users association and four irrigation districts in Arizona, each of which provides for the delivery of so much water as may be ordered and "reasonably required and beneficially used" within the particular project area, subject only to availability of the water under the Colorado River Compact and applicable federal laws.[10] (Report, pp. 212–214.) There are also outstanding water right application contracts with the individual non-Indian landowners in the Reservation Division of the Yuma Project in California (Report, p. 212). These water right application contracts generally provide for the delivery of either

[10] These contracts make no provision as to relative priority. Presumably, then, the rule of ratability would apply as between them except as the Project Act requirement for satisfaction of "present perfected rights" establishes a different order. See *infra*, pp. 32–34.

a specified quantity of water or so much as may be required to irrigate the lands to be served, subject to a limitation that the amount to be delivered shall not exceed an "equitable proportionate share * * * of the water actually available at the time for all of the area being watered from the same source of supply, *such proportionate share to be determined by the project manager.*" (Cal. Ex. 380; emphasis added.) The Secretary has also made a number of special contracts for the delivery of water through the facilities of the Yuma, Yuma Auxiliary, and Gila Reclamation Projects, for use outside the project areas. (Rept. 214; Ariz. Ex. 163 and 165.) Each of them specifies water quantity and, without regard to the Arizona law relating to priority of appropriation, provides, in accordance with applicable federal law (43 U.S.C. 521; 43 U.S.C. 523), that the use of water thereunder shall be subordinate to the use of water on the respective project areas.[11]

The Special Master has found each of these contracts valid with the exception of one special-use contract which he has found violates the "permanent service" requirement of Section 5 of the Project Act (Report, p. 218). He has also found that the Act of

[11] A more recent demonstration of exercise by the Secretary of his broad authority to contract with respect to the disposition of project water, and in so doing, to determine rights, quantities and priorities, intrastate, is to be found in the contract of November 12, 1959 between the United States and the City of Yuma. By this contract, executed subsequent to the conclusion of the evidence before the Master, the Secretary contracted to deliver a specified quantity of Colorado River water to the City of Yuma but assigned such contract a priority subsequent to all earlier Arizona contracts.

September 2, 1958, 72 Stat. 1726, providing that the Secretary of the Interior shall supply Boulder Canyon Project water to Boulder City, Nevada, effects a valid commitment to the use of Boulder City of a part of Nevada's entitlement under that state's amended contract with the Secretary. (Report, p. 303.)

But in addition to the broad authority to make contracts respecting water deliveries which is extended to the Secretary by Section 5 of the Project Act, Section 14 provides:

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

Ever since the Reclamation Act was enacted in 1902 (32 Stat. 388), the rights of landowners to receive and use the waters developed by a federal reclamation project have been derived under and determined by contracts made with the United States in pursuance of applicable federal law.[12] As noted

[12] Section 10 of the Act (32 Stat. 390, 43 U.S.C. 373) conferred on the Secretary of the Interior broad authority "to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect." Section 5 (32 Stat. 389, 43 U.S.C. 431, 439) required that entries upon public lands to be irrigated by project works be in compliance with the homestead laws and required that at least half the irrigable lands of each entry be reclaimed. Section 5 also provided that "No right to the use of water" developed by the project works "shall be sold" for a tract exceeding 160 acres to any one landowner and that, *inter alia*, "no such right shall permanently attach until all payments therefor are made." Forfeiture of rights for failure to make stipulated payments was

supra, p. 31, the water right application contracts on the Yuma Project, one of the earliest projects built under authority of the Reclamation Act, establish the rule of ratability on an acreage basis in case of shortage in the project water supply. (Cal. Ex. 379.) Later applications on the same project expressly provide that the proportionate share of each landowner should "be determined by the project manager." (Cal. Ex. 378, 380; Ariz. Ex. 168.) The water-right applications on the Salt River Reclamation Project

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likewise provided for. The proviso to Section 8 (32 Stat. 390, 43 U.S.C. 372) provides: "That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

Further evidence of the retention and exercise by the United States, acting through the Secretary of the Interior, of its power to control the acquisition and definition of rights to receive and use the waters of a federal reclamation project is to be found in many of the subsequent acts of Congress relating to such projects. (See 43 U.S.C., chapter 12.) E.g., the Act of August 13, 1914, 38 Stat. 686, Section 8 (43 U.S.C. 440) authorized the Secretary to make general rules and regulations governing the use of water in the irrigation of the lands within any project and to impose specified requirements respecting the areas under each water-right application or entry to be reclaimed within three and five irrigation seasons and to provide for continued compliance with such requirements. "Failure on the part of any water-right applicant or entryman to comply with such requirements shall render his application or entry subject to cancellation." And the Act of May 25, 1926, 44 Stat. 636 (43 U.S.C. 423–423g), established a procedure for exclusion from an established project of lands found to be unproductive and provided that "the water right formerly appurtenant to such permanently unproductive lands shall be disposed of by the United States under the reclamation law * * *." (43 U.S.C. 423.)

in evidence here contain a similar provision. (U.S. Ex. 31.)

The rule of ratability so frequently applied in the making of contracts for disposition of a reclamation project water supply differs greatly from State laws of prior appropriation. But it is consistent with the broad authority of the Secretary of the Interior "to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect." (43 U.S.C. 373.) And the practice which the Secretary has followed and which we believe he is authorized to continue to follow in the making of contracts relating to the storage and delivery of the Boulder Canyon Project water supply, including the fixing, intrastate, of particular quantities and relative priorities, is equally consistent with the broad authority conferred by Sections 1 and 5 of the Project Act.

C. SECTION 18 OF THE PROJECT ACT DOES NOT LIMIT THE BROAD AUTHORITY CONFERRED ON THE SECRETARY OF THE INTERIOR BY SECTIONS 1 AND 5 TO OPERATE THE BOULDER CANYON PROJECT AND TO CONTRACT FOR STORAGE AND DELIVERY OF THE PROJECT WATER SUPPLY

In concluding that "state law governs intrastate rights and priorities to water diverted from the Colorado River," the Special Master relies primarily upon Section 18 of the Project Act. That section provides

> Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within

> their borders, except as modified by the Colorado River compact or other interstate agreement.

But the first thing to note about this language is its reference to "such rights as the States *now* have." Although the Report does not discuss the significance of this language, it was explained when the amendment which became Section 18 was proposed.

During the discussion in the Senate regarding H.R. 5773, which the House had approved with amendments, Mr. King of Utah offered as an amendment language identical with Section 18 as enacted. Mr. Johnson of California, a proponent of the bill, then stated:

> Mr. President, with the understanding that the verb relates to the present—the rights they now have to do all of the things that subsequently follow—I have no objection to the amendment. [70 Cong. Rec. 593.][13]

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[13] Other proposals which were much more appropriately worded to accomplish the intent which the Special Master attributes to Section 18 were not accepted.

The House Committee on Irrigation and Reclamation appended a draft of a substitute bill to its report on H.R. 9828, the second version of the third Swing-Johnson Bill. Contained in this draft was the following provision:

"SEC. 8(a) All appropriations of water from the Colorado River, incident to or resulting from the construction, use, and operation of the works herein authorized, shall be made and perfected in conformity with the laws of those states which may or shall have approved the Colorado River compact ratified in section 12 of this act." (H. Rept. 1657, 69th Cong., 2d Sess., p. 32.)

Neither H.R. 9826 nor the substitute draft were enacted into law. However, much of the language in the substitute draft reappeared in the bill which finally became the Boulder Canyon

This emphasis on the word "now" makes plain that Section 18 was intended to do no more than preserve whatever rights the States of the Lower Basin then had to use, and to regulate the use of, waters then subject to their jurisdiction. But these States were then and, we submit, are now without right or authority to use or regulate the use of the waters of the Colorado River as against the exercise by the United States of its right and power to use and control the use of such waters for constitutionally authorized purposes.

The Colorado River is a navigable stream and the Boulder Canyon Project was authorized and constructed in valid exercise of the commerce power (*Arizona* v. *California,* 283 U.S. 423) and other fundamental powers of the United States under the Constitution. *Supra,* pp. 24–25.

In 283 U.S., at pages 451–452, the Court said:

> The United States may perform its functions without conforming to the police regulations of a state. *Johnson* v. *Maryland,* 254 U.S. 51; *Hunt* v. *United States,* 278 U.S. 96. If Congress has power to authorize the construction of the dam and reservoir, Wilbur is under no obligation to submit the plans and specifications to the state Engineer for approval. * * *

This holding with respect to the Arizona law which purported to require submission of the plans and specifications for Hoover dam to the State Engineer

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Project Act, but Section 8(a) of the substitute draft was omitted.

And see 69 Cong. Rec. 10467.

for approval was but the inevitable consequence of the supremacy clause of the Constitution (Art. VI, Cl. 2) as it has been construed and applied by this Court since the decision of *McCulloch* v. *Maryland,* 4 Wheat. 316, in 1819. The laws of the several States relating to the appropriation, control and use of water which the Special Master says control quantities of and priorities for project water intrastate are police regulations like that provision of the Arizona law considered in the first *Arizona* v. *California* decision.[14]

Applying the same principles in *Ivanhoe Irrig. Dist.* v. *McCracken,* 357 U.S. 275, 295, after upholding the constitutional authority of the United States to construct and operate the great Central Valley Reclamation Project in California, the Court said:

> The lesson of these cases is that the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof. Conversely, a State cannot compel use of federal property on terms other than those prescribed or authorized by Congress. *Public Utilities Comm'n of California* v. *United States,* 355 U.S. 534 (1958). Article VI of the Constitution, of course, forbids state encroachment on the supremacy of federal legislative action.

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[14] *Vineyard Land & Stock Co.* v. *District Court*, 42 Nev. 1, 171 Pac. 166, 173, 174 (1918); *Pacific Live Stock Co.* v. *Lewis*, 241 U.S. 440, 448, 449 (1916); *In re Mass*, 219 Cal. 422, 424, 27 P. 2d 373 (1933); Kinney, *Irrigation and Water Rights* (2d ed.), vol. 3, sec. 1341, pp. 2428, 2429; Wiel, *Water Rights in the Western States*, (3d ed.), vol. 2, sec. 1184, p. 1097; 30 Am. Jur., *Irrigation*, sec. 3, p. 851.

The Court's opinion in *First Iowa Coop.* v. *Federal Power Commission,* 328 U.S. 152, is especially pertinent:

> The [Federal Power] Act leaves to the States their traditional jurisdiction subject to the admittedly superior right of the Federal Government, through Congress, to regulate interstate and foreign commerce, administer the public lands and reservations of the United States and, in certain cases, exercise authority under the treaties of the United States. * * * [328 U.S. 171.]
>
> The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls. * * *
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> * * * * *
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> It is the Federal Power Commission rather than the Iowa Executive Council that under our constitutional Government must pass upon these issues on behalf of the people of Iowa as well as on behalf of all others. [328 U.S. 181–182.]

See also *Tacoma* v. *Taxpayers,* 357 U.S. 320; *United States* v. *Appalachian Power Co.,* 311 U.S. 377; *Oklahoma* v. *Atkinson Co.,* 313 U.S. 508.

Equally applicable are the decisions of this Court respecting the States' lack of authority to impose conditions upon the use by the United States of its property.[15] See *Ivanhoe Irrigation District* v. *Mc-*

[15] We do not argue the question of federal ownership of the rights to use the waters of the Colorado River or the unappropriated rights to use the waters of the tributaries. But see: *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. Since the contracts for the stor-

Cracken, supra, p. 37; *Gibson* v. *Chouteau,* 13 Wall. 92; *United States* v. *Rio Grande Irrigation Co.,* 174 U.S. 690, 703; *Winters* v. *United States,* 207 U.S. 564; *Utah Power & Light Co.* v. *United States,* 243 U.S. 389, 404; *United States* v. *Oregon,* 295 U.S. 1; *Camfield* v. *United States,* 167 U.S. 518; *Hunt* v. *United States,* 278 U.S. 96. In *Federal Power Commission* v. *Oregon,* 349 U.S. 435, 445, where the jurisdiction of the Federal Power Commission rested upon the fact that the project involved would be located on reserved lands of the United States, the Court said:

> To allow Oregon to veto such use, by requiring the State's additional permission, would result in the very duplication of regulatory control precluded by the *First Iowa* decision.

Statutory language which merely preserves "such rights as the States now have" cannot be construed as a grant to the States of any part of the federal government's authority to control the operation of its own projects. Freedom of the States to enact laws does not compel the conclusion that the Secretary of the Interior is bound by those laws. Language more clear and definitive than that of Section 18 is necessary to warrant the conclusion that "Congress has specifically declined to give the Secretary of the Interior authority to deliver water to users within a

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age and delivery of waters impounded by Hoover dam involve the use of federal funds, federal properties and federal privileges in the sense of physical facilities, and because the Project is authorized in part "for reclamation of public lands" (Project Act § 1), decisions respecting the States' lack of authority to control the use of federal property are applicable.

state in disregard of the state's water law." (Report, p. 217.)

The second thing to note about Section 18 is its generality in contrast with the specific contracting authority granted by Section 5. Of course, it is always held that the specific language of a statute qualifies the general language thereof and not vice versa. *Ivanhoe Irrigation District* v. *McCracken, supra; Fourco Glass Co.* v. *Transmirra Corp.,* 353 U.S. 222, 228–229; *MacEvoy Co.* v. *United States,* 322 U.S. 102, 107; *Ginsberg & Sons* v. *Popkin,* 285 U.S. 204, 208; *Arizona* v. *California,* 283 U.S. 423; *Baltimore National Bank* v. *Tax Commission,* 297 U.S. 209, 215. That Section 5 specifically authorizes the making of water delivery contracts on such terms as the Secretary deems appropriate, except as his discretion may be limited by other specific provision, is demonstrated in subdivision B, *supra,* of this part.

Finally, there is to be noted the similarity of Section 18 to Section 8 of the Reclamation Act of 1902 [16] and Section 27 of the Federal Power Act.[17]

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[16] The language of this section pertinent to this consideration is as follows:

"That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws * * *." (June 17, 1902, ch. 1093, § 8, 32 Stat. 390, 43 U.S.C. 383.)

[17] "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control,

The Special Master suggests that Section 8 of the Reclamation Act, together with the fact that the Project Act is denominated "as a supplement" to reclamation law, "buttress" the conclusion "apparent from the plain language of Section 18 itself, that state law governs rights and priorities among intrastate users." (Report, p. 218.) But the fact is that both Section 8 of the Reclamation Act and Section 27 of the Federal Power Act have been construed by this Court as *not* having the effect which the Report would attribute to Section 18 of the Project Act.

In its decisions respecting the meaning of Section 8 of the Reclamation Act, this Court has distinguished between the *acquisition* of rights to use water for a reclamation project and the *operation* of the project. This was clearly set forth in *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275. As to acquisition of rights, the Court said at page 291:

> As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein.[18]

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appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." (June 10, 1920, ch. 285, § 27; 41 Stat. 1077, 16 U.S.C. 821.)

[18] In this sense § 8 has been construed as meaning that if, in the construction or operation of a reclamation project, the United States impairs rights recognized under State law, compensation must be paid without regard to whether the rights would be valid as against the United States under federal law. *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725.

But the operation of federal reclamation projects was excluded from any effect by Section 8 by this statement (*id.* at 291–292):

> But the acquisition of water rights must not be confused with the operation of federal projects. As the Court said in *Nebraska* v. *Wyoming, supra,* at 615: "We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system." * * * We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State.

We submit that the Special Master has overlooked this distinction in his reliance on Section 8 and the cases cited.[19]

[19] Regardless of what the language in *Ivanhoe* may indicate respecting the effect of § 8 as to the relative rights between a reclamation project and other users within the same State, that is not the question with which we are here concerned. Here, under § 5 of the Project Act, "*No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.*" It is the relative rights of users under contracts made in accordance with this requirement with which we are concerned. There is no question, and there can be none under the Boulder Canyon Project Act, respecting the rights of persons who are not participating in the project water supply in accordance with the Project Act. In *Nebraska* v. *Wyoming*, 325 U.S. 589, 615, the Court made the same distinction that it made in *Ivanhoe*, as indicated in the quotation in the text. Moreover, the Court in its discussion of § 8 there was not considering the problem we are confronted with here—that of whether relative rights within a federal project to use the project water supply are governed by State law or by the contracts which have been made in pursuance of applicable federal law. The question there was one of title as between the United States and the project landowners. And while under

The contracts which the Secretary has made with the reclamation projects, lands bordering reclamation projects and special users, are for the purpose of disposing of or allocating the impounded Colorado River waters. The power of the Secretary to determine, without threat of veto by State authorities, the quantities and priorities of the water to be de-

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the particular facts of that case the Court held title to the project water supply was not in the United States, we think the following excerpts fairly indicate the true intent of the holding:

"* * * The water right is appurtenant to the land, the owner of which is the appropriator. * * * Indeed § 8 of the Reclamation Act provides as we have seen that 'the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.' * * * We intimate no opinion whether a different procedure might have been followed so as to appropriate and reserve to the United States all of these water rights. No such attempt was made. * * * [In this case, it is to be noted, an entirely different procedure has been followed. The United States has *not* followed State prescribed procedures to appropriate the Boulder Canyon Project water supply.] The rights so acquired are as definite and complete as if they were obtained by direct cession from the federal Government. Thus even if we assume that the United States owned the unappropriated rights, they were acquired by the landowners in the precise manner contemplated by Congress." (325 U.S. 614–615.)

And in *Ickes* v. *Fox*, 300 U.S. 82, without discussing the holding as to title to the project water rights, it is even more plain that the determination of title in the project landowners was based, not on State law, but rather on contracts made under federal reclamation law. At page 95 the Court said: "Appropriation was made not for the use of the government, but, *under the Reclamation Act*, for the use of the land owners; and *by the terms of the law and of the contract already referred to*, the water-rights became the property of the land owners * * *." (Emphasis added.)

livered is as essential to efficient and effective operation intrastate as his power to select the persons to whom the water will be supplied. Therefore, as these contracts pertain to the operation of the Boulder Canyon Project, it is clear under the decision in *Ivanhoe* that there is nothing in § 8 of the Reclamation Act, or in § 18 of the Project Act, to preclude the Secretary from delivering water in the amounts and priorities as determined under the contracts, without regard to state laws relating to appropriation, control and use of water.

Sections 9(b) and 27 of the Federal Power Act were construed in *First Iowa Cooperative* v. *Federal Power Commission,* 328 U.S. 152. The issue before the Court was whether under the Federal Power Act a power company, as a condition precedent to the issuance of a federal license to construct, operate, and maintain a power project in navigable waters, had to prove to the Commission that it had met the requirements of the laws of Iowa. This Court held that it was not required to do so as this would give the state a veto over the federal project. At page 164 the Court said:

> * * * Such a veto power easily could destroy the effectiveness of the Federal Act. It would subordinate to the control of the State the "comprehensive" planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government.

After holding that Section 9(b) [20] of the Act does not require compliance with State law, the Court observed that Section 27 (328 U.S. at 175):

> * * * expressly "saves" certain state laws relating to property rights as to the use of water, so that these are not superseded by the terms of the Federal Power Act.

And it further explained the effect of that section by this statement (*id.* at 175–176):

> The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase "any vested right acquired therein" further emphasizes the application of the section to property rights. * * *

In other words, the Court considered Section 27 to be an expression of Congress' intention not to exercise its full power to pre-empt the navigable waters of the United States without regard to rights

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[20] Section 9(b) provides:

"That each applicant for a license hereunder shall submit to the commission—

* * * * *

"(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this act." June 10, 1920, ch. 285, § 9, 41 Stat. 1068; 16 U.S.C. 802.)

to the use thereof recognized under state law. See *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, and, as to Section 8 of the Reclamation Act, *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725. Cf. *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53; *United States* v. *Twin City Power Co.*, 350 U.S. 222.

Similar meaning is to be given to Section 18 of the Project Act. Section 18, like Section 27, "saves" such rights as the States then had to waters subject to their respective jurisdictions and to enact laws relating thereto, *but without extending such saving to all vested rights recognized by the States;*[21] *but* Section 5, like Section 9, is not limited or controlled by State law simply because Section 18, as Section 27, "saves" certain rights of the States. Similarly, though Congress by Section 18 has "saved" the right of the States to *enact* laws respecting waters subject to their jurisdiction, there is nothing, either in Section 18 or Section 5, which requires that users under contracts made with the Secretary of the Interior be "under no disability to receive such water under the applicable state law."

We are not unmindful that the language to which we object in Article II(C)(1) of the recommended Decree is qualified by the words "except as federal statutes may otherwise specifically direct." And we realize that at page 217, note 83, the Special Master

[21] The limit of the Project Act's recognition of what might have qualified as state recognized vested rights to use the mainstream waters is the § 6 requirement for the satisfaction of "present prefected rights." Report, pp. 307–312, 161.

has disclaimed any intention to pass on the question "whether other federal statutes such as the Gila Project Reauthorization Act, 61 Stat. 628 (1947), supersede state law in particular cases." But we are also aware that, notwithstanding the specific direction by Congress to the Secretary of the Interior by the Act of September 2, 1958, 72 Stat. 1726, to deliver water to Boulder City, Nevada,[22] the Special Master apparently does not consider this statute any more "specific" than he appears to consider Section 5. For at page 303 of the Report he declares: "Boulder City's priorities are to be determined in the same manner as those of all other Nevada users, *under Nevada law,* * * *." (Emphasis added.)

We respectfully submit that under Sections 1 and 5 of the Project Act the Secretary of the Interior is expressly authorized to make contracts for the storage of water in Lake Mead and for the delivery of such water for the purposes specified in the Act; that this authority of necessity includes authority to contract for the storage and delivery of specific quantities and for the order in which the contracts of the various users will be satisfied; and that there is nothing in Section 18 of the Project Act which can be construed as taking from the Secretary and vesting in State agencies any part of the authority so conferred on the Secretary.

[22] Section 9(d) of the Act provides that if the requirements of the municipality shall at any time exceed 3,650 gallons a minute the Secretary may furnish whatever additional water and whatever additional carrying capacity may be needed.

POINT IV

THE NEVADA WATER DELIVERY CONTRACT DOES NOT EXHAUST THE AUTHORITY OF THE SECRETARY OF THE INTERIOR UNDER SECTION 5 OF THE BOULDER CANYON PROJECT ACT TO CONTRACT FURTHER FOR THE USE OF IMPOUNDED WATER WITHIN THE STATE OF NEVADA OR TO APPLY UNUSED WATER TO USE ON FEDERAL PROJECTS

At page 210 of the Report the Special Master stated:

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

The United States has excepted to this and urges that the language of the recommended decree, referred to in the footnote, should not be construed to implement it.[23]

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[23] Article II(B)(6) of the Recommended Decree in the Special Master's Draft Report (p. 309) stated that water apportioned for consumptive use in a state but not consumed

"*whether for the reason that users therein do not have delivery contracts for the full amount of the state's apportionment*, or that they cannot apply all of such water to beneficial uses * * *." (Emphasis added.)

might be released by the Secretary of the Interior for use in other States. Nevada, in commenting on the Draft Report, proposed that the provision emphasized in the language quoted be amended so as to give recognition to Nevada's contention that the requirements of Section 5 of the Project Act are fully satisfied by Nevada's amended contract insofar as uses of stored water in that State are concerned. The United States

Article 5(a) of the contract, as amended January 3, 1944 (Rept. p. 420, App. 7), provides that, subject to availability of the water for use in Nevada, the United States shall annually deliver to the State from storage in Lake Mead—

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

In our view this contract, like the Arizona contract, is effective to allocate for use in the State the quantity of water therein specified, in accordance with the plan for interstate allocation of mainstream water contemplated by the Project Act. But only to the extent that Nevada itself may qualify as a *user* of water does it satisfy the requirement of Section 5 that no person shall have or be entitled to have the use of the stored water except by contract made as stated in that section. Uses in Nevada made by others than the State continue to be governed by that requirement and, as demonstrated in part III, *supra,* the validity of such uses and the extent of the rights therefor must depend upon their recognition by contracts with the users

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opposed this proposal during the argument before the Special Master August 17–19, 1960. Article II(B)(8) (which is the counterpart of II(B)(6) in the earlier draft) of the Recommended Decree reads:

"* * * whether for the reason that delivery contracts for the full amount of the state's apportionment are not in effect or that users cannot apply all of such water to beneficial uses * * *." (Rept., p. 349.)

made by the Secretary in conformity with *all* of the Section 5 requirements. While Nevada may make recommendations to the Secretary respecting the making of contracts with users in that State, the provisions of Section 5 do not authorize or permit the substitution of State regulation for the discretion which the Project Act authorizes the Secretary to exercise.

We submit that the statement at page 210 of the Report to which we have excepted is in conflict with the provisions of Section 5. We submit further that it does not give proper meaning to the language of Article 5(a) of the contract underscored in the quotation above. If that language is read to mean what it says, the contract will not only be given literal meaning, but the conflict with Section 5 of the Act, which the Master's interpretation engenders, would be eliminated.

The underscored language excludes from the agreement to deliver "to the State" all other diversions for use within the State. Such exclusion preserves the Secretary's authority to contract with users in Nevada and precludes the possibility of an attempted waiver of the Section 5 requirement for contracts with *all* users. It likewise constitutes an effective reservation of the United States' general power to provide, within the unused part of Nevada's allocation, for uses on federal projects within Nevada. (Rept., 257–266; 292–294; 297; 303). So construed, it is plain that the language of Article 5(a) of the contract providing for delivery "to the State" is but a shorthand way of saying, as in the Arizona contract

(Rept. 400, App. 5): "The United States shall deliver * * * water * * * for * * * use * * * in [Nevada] * * *."

We have shown in Point III, *supra,* that there is no basis in the Project Act, or in the decisions of this Court, for concluding that the Secretary of the Interior is subject to the control of Nevada in delivering water from storage in Lake Mead. The State of Nevada is not "free to determine who shall use the water." Nor is it free to determine the priority of the various water users under such contracts as may be made. These matters rest within the discretion of the Secretary of the Interior in exercising his authority to make contracts disposing of waters of the Colorado River impounded by Hoover Dam.

The Court is requested to reject the conclusion at page 210 of the Report, above quoted, and to make clear that Article II(B)(8) of the Recommended Decree, if it is approved by the Court, does not impair either the authority of the Secretary to contract with users in Nevada under Section 5 of the Project Act or the general power of the United States to apply unused waters within the Nevada apportionment to use on federal projects in that State.

POINT V

THE UNITED STATES IS ENTITLED TO USE ON ITS WILDLIFE REFUGES WATERS SALVAGED IN DEVELOPMENT OF THE REFUGE AREAS WITHOUT REGARD TO PRIORITIES ESTABLISHED BY CREATION OF THE REFUGES

With respect to the Havasu Lake National Wildlife Refuge and the Imperial National Wildlife

Refuge, both on the mainstream of the Colorado River, the United States proved that the change in and control of the vegetation which will be effected by the development of these refuge areas will result in water consumption less than that which presently occcurs in the overflow and undeveloped areas where the refuges are presently located. (Tr. 15,691; 15,694; 15,753; 15,759–60.) The Special Master omitted to make the Findings of Fact proposed by the United States reflecting this salvage of water, and further omitted to provide in the Conclusions of Law and Recommended Decree that water salvaged by the United States from the mainstream of the Colorado River may be used by it on federal mainstream Wildlife Refuges without limitation by the priority dates decreed for the respective refuge areas.

It is a fundamental maxim of water law that the right to use the portion of stream flow salvaged by means of artificial improvements belongs to the one making the improvements. Hutchins, *Law of Water Rights in the West,* pp. 361, *ff.* Decisions in support of this proposition have been rendered by a number of the Supreme Courts of the western States.[24] Recognition of the salvage doctrine is to be found also in the decisions of this Court. *Washington* v. *Oregon,* 297 U.S. 517, 522–23; *Nebraska* v. *Wyoming,* 325 U.S. 589, 618–9.

[24] For example, *Pomona Land & Water Co.* v. *San Antonio Water Co.*, 152 Cal. 618, 623–624 (1908); *Reno* v. *Richards*, 32 Idaho 1, 6, 12–13 (1918); *Ironstone Ditch Co.* v. *Ashenfelter*, 57 Colo. 31, 43–44 (1914).

The application of this principle in this case will not disarrange the allocation or priority schedule recommended by the Special Master. Quantities and priorities of water rights for the mentioned Refuges are provided by Article II, Subdivision (C), paragraphs (2)(g) and (2)(h), of the Recommended Decree (Rept., pp. 352–353). Recognition of the additional basis of right, the right to use water salvaged by the development of these Refuge areas without limitation by priority dates, would in no way increase the quantities used beyond those presently specified in the Recommended Decree. We believe there should be added to each of the paragraphs of the Recommended Decree last above noted a proviso to the following effect:

> *Provided,* That to the extent the water used on such Refuge shall be salvage water resulting from development of the refuge area, such water may be used without regard to such priority dates.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the exceptions filed by the United States should be sustained.

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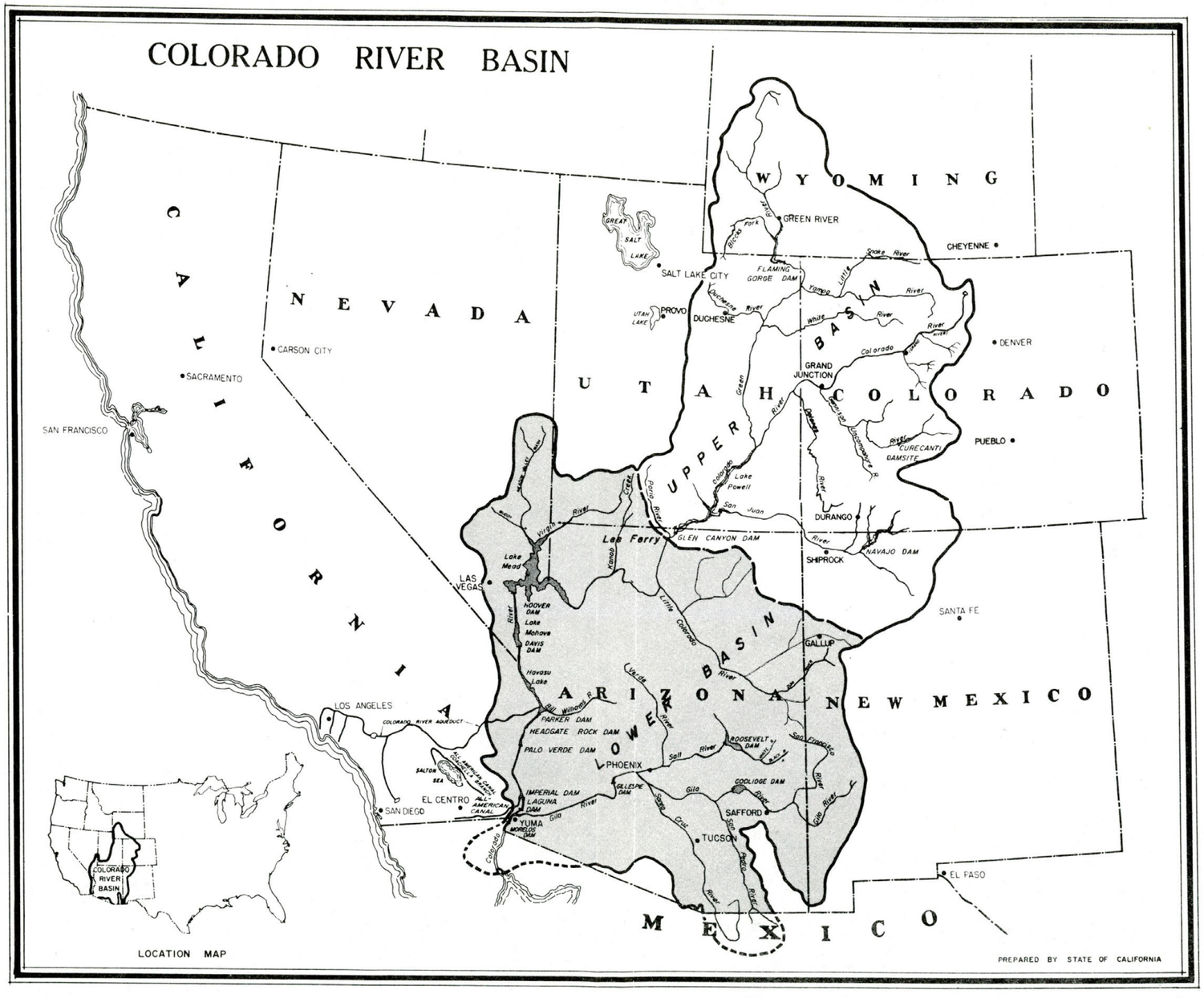

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