IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 8 Original.

STATE OF ARIZONA,

Complainant,

v.

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

Defendants,

UNITED STATES OF AMERICA,

Intervener,

STATE OF NEVADA,

Intervener,

STATE OF NEW MEXICO,

Impleaded,

STATE OF UTAH,

Impleaded.

ARIZONA'S MOTION FOR ADOPTION, WITH EXCEPTIONS, OF THE SPECIAL MASTER'S REPORT AND RECOMMENDED DECREE.

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MOTION.

The great majority of the findings, conclusions and recommendations of the Special Master's Report (hereafter

the "Report"), and of the provisions of the Recommended Decree (hereafter the "Decree") are favorable to Arizona, and she therefore urges their adoption by the Court.

Arizona seeks modification of the Report and Decree only insofar as:

1. the Report, while reaching conclusions with which Arizona agrees, rejects basic positions advanced by Arizona as the correct premises for these conclusions; and

2. the Report recommends and the Decree provides that certain decisive issues be determined adversely to Arizona.

Accordingly, Arizona moves the adoption of all findings, conclusions and recommendations of the Report and all provisions of the Decree other than those to which she notes specific exception herein.[1] The exceptions are filed pursuant to the Court's order of January 16, 1961.

EXCEPTIONS.[2]

I. Construction of the Compact.

Arizona agrees with the Special Master's conclusions that the Compact has utility as a decisive factor in this case

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[1] We have not, of course, attempted to note all of the statements made by the Master in the course of his discussion with which we disagree (e.g., we certainly disagree with the Special Master's statement that "the Compact treats the Upper and Lower Basins on a parity one to the other in regard to the division of water . . ." (Rep. 235)). Elsewhere in his Report the Master recognized the impropriety of deciding questions of Compact interpretation which might affect Upper Basin interests in the absence of the states of the Upper Basin (Rep. 145).

[2] The exceptions are grouped under the several phases of the case as considered in the Report. Each category of exceptions is introduced by a brief statement of Arizona's position regarding the Master's treatment of the particular phase under consideration. Exceptions to particular findings, conclusions and recommendations

only insofar as it serves to determine the supply of main stream water legally available in the Lower Basin of the Colorado River and that the Compact is not relevant to the allocation of water from Lake Mead and from the main stream of the River below Hoover Dam among the Lower Basin States of Arizona, California and Nevada (Rep. 138-41; Ariz. Op. Br. 20-21).[3]

However, against the eventuality that the Court may differ with these conclusions as to the irrelevance of the Compact, the Report sets forth the Special Master's interpretation of various Compact terms (Rep. 141-50). For the same reason, Arizona notes by exception her disagreement with the Master's construction of these Compact provisions.

Accordingly, Arizona excepts to:

1. The Master's finding and conclusion that the apportionment of the use of water between the Upper and Lower

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are numbered consecutively, with appropriate page citation to the Report. Wherever deemed helpful, additional particularized grounds of exception are set forth. For the convenience of the Court, reference is made to the discussion of the points involved in Arizona's Opening and Answering Briefs before the Master with page citation. The bases of the exceptions will be more fully presented and argued in the briefs to be filed subsequently with the Court on behalf of Arizona pursuant to the Court's order of January 16, 1961.

[3] The Special Master's Report is cited as "Rep." followed by page number.

Arizona's Opening and Answering Briefs before the Special Master are cited as "Ariz. Op. Br." and "Ariz. Ans. Br.", respectively, followed by page number.

Throughout, the Colorado River Compact (Rep. 371-77) is referred to as the "Compact"; the Boulder Canyon Project Act (Rep. 379-96), 45 Stat. 1057 (1928), as the "Project Act"; the California Limitation Act (Rep. 397-98), Act of March 4, 1929, Ch. 16, 48th Sess., Statutes and Amendments to the Codes, 1929, pp. 38-39, as the "Limitation Act"; and the contracts with the Secretary of the Interior for delivery of water from Lake Mead (Rep. 399, *et seq.*), as the "water delivery contracts".

Basins of the Colorado River made by Article III(a) and (b) of the Compact is achieved by imposing limitations on the quantity of water which may be appropriated in each Basin as against the other (Rep. 140, 146-47, 149).

> Article III(a) and (b) of the Compact, correctly construed, do not impose limitations upon the quantity of water which may be appropriated in each Basin, but rather make an apportionment of water in perpetuity to each Basin, regardless of the extent of actual use or appropriation in either Basin of the water so apportioned.

2. The Master's finding and conclusion that Article III(a), (b), (c), (f) and (g) and the first sentence and last paragraph of Article VIII of the Compact deal with both the main stream and tributaries of the Colorado River and not with the main stream exclusively (Rep. 142-47).

> The terms of the Compact, when construed in relation to the pre-existing conflict between the two Basins, the purposes sought to be achieved and the geographical and physical facts, establish that Article III(a), (b), (c), (f) and (g) and Article VIII deal with the main stream of the Colorado River and not with Lower Basin tributaries (Ariz. Op. Br. 20-32; Ariz. Ans. Br. 1-5).
>
> As the Special Master found, the history and text of the Compact show that interbasin, not interstate relations were the subject of agreement (Rep. 138-40). These interbasin relations involved problems of concern to each Basin. These problems, created by existing and contemplated uses of main stream water (Rep. 9, 11, 13, 18, 20-22, 24, 139), impelled the adoption of the Compact. It is thus clear that the Compact was intended to deal with main stream problems and not with those, present or future, on Lower Basin tributaries (Ariz. Op. Br. 21-24).
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> The geographical fact that Lee Ferry is a point in the Grand Canyon separating the Basins, the Com-

pact provision naming Lee Ferry as the point where the Upper Basin is required to deliver water to the Lower Basin and the hydrological fact that Lower Basin tributary water is inaccessible and unavailable to the Upper Basin, all demonstrate that the Upper Basin could obtain physical control and acquire rights against the Lower Basin in main stream and Upper Basin tributary water only; hence the water of Lower Basin tributaries was not, and in the nature of things could not have been, subject to the division of water between the two Basins made by the Compact (Ariz. Op. Br. 26-27; Ariz. Ans. Br. 2-3).

Although the Compact defines the "Colorado River System" as "that portion of the Colorado River and its tributaries within the United States of America"—terminology emphasized by the Special Master (Rep. 140-43)—Article III (a) apportions water *"from"*, not *"of"*, the Colorado River System and Article III (b) treats of "such waters". Thus, as expressly stated in Article I, "an apportionment of the use of *part* of the water of the Colorado River System is made".[4] (See also Articles III (f) and (g) and VI). The "part" of the "System" apportioned by the Compact is main stream, not Lower Basin tributary water (Ariz. Op. Br. 25-26; Ariz. Ans. Br. 2-3).

There is a clear and necessary correlation, and not a mere "coincidence" (Rep. 188), between the requirement of Article III (d) that 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" and the "7,500,000 acre-feet of water per annum" apportioned to the Lower Basin by Article III (a). The purpose of the Article III (d) water delivery requirement was to guarantee the Lower Basin a quantity of water sufficient to assure satisfaction of the apportionment to the Lower Basin made by Article III (a),

[4] Unless otherwise indicated, italics within quotations are supplied.

even during periods when the water supply originating in the Upper Basin might be insufficient to fulfill the total apportionment made to both Basins by Article III (a) (Ariz. Op. Br. 28-30; Ariz. Ans. Br. 3-4). The Master's holding that an interpretation is inadmissible which makes the provisions of Article III (a) and (d) correlative rather than coincidental is founded on invalid premises: that Article III (a) imposes a limitation on appropriations and that Article III (a) extends to Lower Basin tributaries as well as to the main stream (Rep. 144).

Article VIII of the Compact, which provides that "present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this Compact", was intended to reserve to Lower Basin users their legal right to demand the release of water to satisfy priorities asserted by them until such time as storage facilities were provided to assure them a stable water supply. Article VIII expressly provides for satisfaction of such rights "whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin . . ." This reference is plainly and necessarily to rights in main stream, not Lower Basin tributary water (Ariz. Op. Br. 31-32).

II. Construction of the Project Act and Limitation Act.

Arizona concurs in the Special Master's findings and conclusions that the provisions, general operative scheme and legislative history of the Project Act establish that both Section 4(a) of that Act and the Limitation Act refer only to water stored in Lake Mead and flowing in the main stream below Hoover Dam and that, as to this water, principles of equitable apportionment or priority of appropria-

tion are irrelevant (Rep. 138, 151-52, 173-74, *et seq.*; and see Ariz. Op. Br. 35-43).

Arizona further agrees with the Special Master that the words of Section 4(a) and the substantially identical language of the Limitation Act—"waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact" and "excess or surplus waters unapportioned by said compact"—refer to main stream water only and not to water of tributaries (Rep. 167-85; Ariz. Op. Br. 43-45).

However, Arizona reads the Compact's apportionment provisions as covering main stream water only (pp. 4-6 *supra*). Consistently, Arizona asserts that the Section 4(a) and Limitation Act references to "waters apportioned . . . by paragraph (a) of Article III of the . . . compact" and to "excess or surplus waters unapportioned by said compact" are to main stream and not tributary water.

In any event, it is the interpretation put upon the Compact by Congress in enacting the Project Act, and that construction alone, which is controlling.

Arizona asserts that by referring in Section 4(a) to provisions of the Compact either Congress construed those provisions correctly as dealing exclusively with water of the main stream, or (assuming the Compact apportionment provisions may be properly regarded as including tributaries) Congress in effect modified the Compact provisions referred to by limiting their application to main stream water.

Only in the event that the Court should hold that the Section 4(a) references to the Compact must necessarily be construed in the Compact sense, and no other, will the correct interpretation of the Compact provisions become decisive.

Against this eventuality Arizona excepts to:

3. The Master's finding and conclusion that Section 4(a) of the Project Act and the Limitation Act refer only to water stored in Lake Mead and flowing in the main stream below Hoover Dam, "*despite the fact*" that Article III (a) of the Compact deals with the Colorado River "System", which, as defined in Article II (a), includes the entire main stream and tributaries of the Colorado River (Rep. 173; cf. Ariz. Op. Br. 23-34; Ariz. Ans. Br. 2-5).

> Arizona agrees that Section 4(a) of the Project Act and the Limitation Act refer only to water stored in Lake Mead and flowing in the main stream below Hoover Dam. Arizona disagrees with the Master's conclusions that Article III (a) of the Compact deals with tributaries as well as the main stream (Ariz. Op. Br. 23-34; Ariz. Ans. Br. 2-5).

4. The Master's finding and conclusion that Congress in Section 4(a) of the Project Act regarded Article III (a) of the Compact as a source of supply rather than as a limitation on appropriations and accorded Article III (a) a meaning different from the Compact meaning (Rep. 149).

> Arizona's position is that Congress regarded Article III (a) as an apportionment of main stream water to the Lower Basin without reference to appropriations and that this construction of Article III (a) is correct (Ariz. Op. Br. 35-43).

5. The Master's finding and conclusion that Section 6 of the Project Act was intended to give intrabasin protection to water rights "perfected" within the Lower Basin states (Rep. 234, 306, *et seq.*).

> Arizona contends that the language of Section 6 of the Project Act—"satisfaction of present perfected

rights in pursuance of Article VIII of said Colorado River compact"—does not recognize or confirm the existence of any intrabasin rights. This clause was intended to comply with the provisions of Article VIII which discharged the Upper Basin from "claims of . . . rights, *if any,* by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin", after storage capacity of five million acre-feet had been provided "on the main Colorado River within or for the benefit of the Lower Basin".

Properly construed, Article VIII provides for satisfaction of perfected rights basin versus basin only and makes no provision for satisfaction of intrabasin rights. Congress intended in Section 6 of the Project Act to give effect to Article VIII of the Compact, and nothing more (Ariz. Op. Br. 31-32; Ariz. Ans. Br. 46-47).

A construction of the Project Act which would require the Secretary of the Interior to ascertain the priority of rights on the River, both as to the time of vesting and the extent of each right and to manage the dam and reservoir so as to respect these varying rights would be completely inconsistent with the plain language of the Act and the purpose of Congress to control and store all the water in the main stream of the Colorado River at the site of Hoover Dam and to distribute the stored water pursuant to contracts with the Secretary (Ariz. Ans. Br. 36-47).

6. The Master's finding and conclusion that Section 6 of the Project Act provides for the satisfaction of rights perfected as of June 25, 1929, the effective date of the Act, rather than rights perfected as of November 24, 1922, the date when the Compact was signed (Rep. 152 note 20; 308-11).

Section 6 of the Project Act provided for satisfaction "of present perfected rights *in pursuance of Article VIII of said Colorado River compact*".

The Compact, when ratified, speaks as of the date when it was signed and not as of the date when it was approved by Congress.

The language and purposes of Article VIII demonstrate that the phrase "present perfected rights", as used therein, referred to rights perfected as of the Compact date, i.e., November 24, 1922, and not to rights perfected after that date.

However, Arizona agrees with the Master insofar as he holds that a water right is a "present perfected right" only if acquired in compliance with state law and only to the extent that it represents 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 (Rep. 308).

III. Construction of the Project Act and the Water Delivery Contracts.

Arizona adheres to her position before the Special Master that the Project Act establishes a mandatory formula for the apportionment of water which the Secretary is required to follow with precision in making contracts for delivery of water from Lake Mead; and, as a corollary, that existing water delivery contracts, insofar as they do not conform to the formula established by the Act, are beyond the power and authority of the Secretary and without legal effect (Ariz. Op. Br. 46-57; Ariz. Ans. Br. 16-23).

Therefore, Arizona excepts to:

7. The Master's finding and conclusion that Section 4(a) of the Project Act does not establish a mandatory formula for allocation of water which the Secretary is required to follow precisely in his water delivery contracts (Rep. 162-63, 202).

8. The Master's finding and conclusion that Article 7(b), (f) and (g) of Arizona's water delivery contract, providing for Arizona's recognition of rights in Nevada, New Mexico and Utah, are valid (Rep. 205-07).

> Even though the water delivery contracts may have been voluntary acts of the parties thereto, those agreements are beyond the power and authority of the Secretary and without legal effect insofar as they do not conform to the mandatory formula for allocation of water established by Section 4(a) of the Project Act (Ariz. Op. Br. 53-57; Ariz. Ans. Br. 16-18).[5]
>
> Assuming the Master is correct in holding that Section 4(a) does not establish a mandatory formula for water allocation, Article 7(b), (f) and (g) are nevertheless invalid since they "are contrary to the command of Section 5 that 'contracts respecting water for irrigation and domestic uses shall be for permanent service . . .' " (see Rep. 237).
>
> Article 7(b) and (g) are invalid for the additional reason that they introduce tributary considerations into a main stream apportionment (see Rep. 242).

IV. Claims of the United States on the Main Stream.

The Special Master has sustained certain claims of the United States to main stream water of the Colorado River for use on Indian Reservations and other federal establishments created out of public lands.

The Master holds that no contracts are required for the delivery of water from Lake Mead for use on Indian

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[5] The Nevada water delivery contracts are also invalid in part. Under those contracts there are included in the 300,000 acre-feet of water to be delivered annually to Nevada "all other waters diverted for use within . . . Nevada from the Colorado River system" (Rep. 420), i.e., water from Lower Basin tributaries in Nevada (Ariz. Op. Br. 55).

Reservations and similar federal establishments (Rep. 312 note 3a). This is directly contrary to the express prohibition of Section 5 of the Project Act that "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."

In determining the claims of the United States on behalf of Indian Reservations, the Special Master relies basically on *Winters* v. *United States,* 207 U. S. 564 (1908), a case involving the reservation of the waters of a non-navigable stream for use on an Indian Reservation created in the Territory of Montana, and concludes that the federal government has the power to reserve water rights in a navigable stream for the benefit of all federal establishments, regardless of whether the power is exercised with respect to navigable waters of a territory of the United States or with respect to navigable waters of a state.

In determining claims of the United States on behalf of Indian tribes, the Special Master has conceived and applied the principle that the establishment of an Indian Reservation, in and of itself, impliedly reserves from a navigable stream in perpetuity for use on the Reservation whatever quantity of water may be potentially required in the indefinite future to irrigate every irrigable acre within the Reservation. The resulting water rights are held to be of fixed magnitude and priority and appurtenant to defined lands, so that their use is not restricted to Indians alone but may be made available to non-Indians as well (Rep. 254-66).

The questions regarding water rights of the United States for use in the Lake Mead National Recreation Area and in the Havasu Lake and Imperial National Wildlife Refuges are similarly dealt with by application of the same

principles as those invoked in the Special Master's treatment of Indian Reservations (Rep. 297-300).

The Master's Report does not examine into the source of the federal power to reserve rights in navigable streams. The failure to distinguish between the extent of federal power with respect to the water of a navigable stream and that with respect to the water of a non-navigable stream has led the Master into error.

Title to navigable water passes from the federal government to the states at the time of their admission to the Union. While it is true that the federal government has the power, prior to or at the time of admission, to reserve rights in navigable waters for the benefit of federal lands, the intent to reserve such rights must be clearly manifested and an inference that such rights were reserved may not be drawn simply from the fact that an Indian Reservation is created in a generally arid region. Had the Master examined the statutes and executive acts creating the Indian Reservations in the Lower Basin for evidence of an intent to reserve water of the Colorado River for their benefit, he would have found no such manifestation of intent and would therefore have been obliged to conclude that there had been no reservation of such water.

Moreover, where the power to reserve navigable water for federal purposes does exist, it resides in Congress and no authority exists in the Executive to dispose by executive order or otherwise of navigable waters for such purposes in the absence of definite and explicit authority conferred by act of Congress.

After statehood the federal government has no power whatever with respect to the water of a navigable stream except the power conferred by the Commerce Clause.

Even if it be held that the United States did reserve water from the Colorado River for the benefit of the Indian Reservations of the Lower Basin, the quantity of water reserved should be measured by the reasonably foreseeable needs of the Indians occupying the Reservations, rather than by the needs of the potentially irrigable acres within the Reservations. The holding of the Master permits the maximum use of water for the Reservations concerned and leads to results which are inequitable.

If there were no express, and could be no implied, reservation of main stream water of the Colorado River for use on Indian Reservations, the same general considerations which have led the Court to employ principles of equitable apportionment in the allocation of water between states, absent a statutory apportionment, should be applied here. While Indian tribes today do not have the status of a true sovereign, nevertheless the laws of the state are generally without force within the boundaries of Indian Reservations within the state. In addition, since Indians are wards of the federal government, a true sovereign, it is peculiarly appropriate that equitable principles should be applied in weighing the claims of the United States on their behalf against those of the State of Arizona as *parens patriae.*

Accordingly, Arizona excepts to the Report in the following respects regarding claims of the United States:

9. The Master's finding and conclusion that no contracts with the Secretary of the Interior are required for Indian Reservations and similar federal establishments (Rep. 312 note 3a).

A. Indian Reservations.

a. The Master's General Recommendations.

10. The Master's finding and conclusion that the United States, despite the absence of any expressed purpose to that effect, impliedly intended to reserve main stream water for the future water needs of the Chemehuevi, Cocopah, Yuma, Colorado River and Fort Mohave Indian Reservations (Rep. 259-62).

11. The Master's finding and conclusion that the United States effectuated its implied intention to provide for future Indian needs by reserving sufficient water to irrigate all the irrigable acreage in each Reservation and to supply related stock and domestic uses regardless of the number of Indians inhabiting the Reservation (Rep. 262).

12. The Master's finding and conclusion that the water rights established for the benefit of the five named Indian Reservations are of fixed magnitude and priority, are appurtenant to defined lands and, as such, may be utilized regardless of the character of the particular user (e.g., by non-Indian lessees or purchasers of Reservation lands) and may be utilized or disposed of by the United States for the benefit of the Indians as the relevant law may allow (Rep. 266).

b. The Master's Specific Findings of Fact and Conclusions of Law.

(1) *Chemehuevi Indian Reservation.*

13. The Master's finding of fact numbered 2 that in withdrawing lands for the Chemehuevi Indian Reservation the United States intended to reserve rights to the use of so much water from the Colorado River as would be necessary to irrigate all of the practicably irrigable acreage therein and to satisfy related uses (Rep. 267).

14. The Master's conclusion of law that for the benefit of the Chemehuevi Indian Reservation the United States has the right to the annual diversion of a maximum of 11,340 acre-feet of water from the Colorado River or to the quantity of main stream water necessary to supply the consumptive use required for irrigation of 1,900 acres and for the satisfaction of related uses, whichever is less, with a priority of February 2, 1907 (Rep. 267).

(2) *Cocopah Indian Reservation.*

15. The Master's finding of fact numbered 2 that in withdrawing lands for the Cocopah Indian Reservation the United States intended to reserve rights to the use of so much water from the Colorado River as would be necessary to irrigate all of the practicably irrigable acreage therein and to satisfy related uses (Rep. 268).

16. The Master's conclusion of law that for the benefit of the Cocopah Indian Reservation the United States has the right to the annual diversion of a maximum of 2,744 acre-feet of water from the Colorado River or to the quantity of main stream water necessary to supply the consumptive use required for irrigation of 431 acres and for the satisfaction of related uses, whichever is less, with a priority of September 27, 1917 (Rep. 268).

(3) *Yuma Indian Reservation.*

17. The Master's finding of fact numbered 2 that in withdrawing lands for the Yuma Indian Reservation the United States intended to reserve rights to the use of so much water from the Colorado River as would be necessary to irrigate all of the practicably irrigable acreage therein and to satisfy related uses (Rep. 268-69).

18. The Master's conclusion of law that for the benefit of the Yuma Indian Reservation the United States has the right to the annual diversion of a maximum of 51,616 acre-feet of water from the Colorado River or to the quantity of main stream water necessary to supply the consumptive use required for irrigation of 7,743 acres and for the satisfaction of related uses, whichever is less, with a priority of January 9, 1884 (Rep. 269).

(4) *Colorado River Indian Reservation.*

19. The Master's finding of fact numbered 7 that in withdrawing lands for the Colorado River Indian Reservation the United States intended to reserve rights to the use of so much water from the Colorado River as would be necessary to irrigate all of the practicably irrigable acreage therein and to satisfy related uses (Rep. 271).

20. The Master's conclusion of law numbered 7 that for the benefit of the Colorado River Indian Reservation the United States has the right to the annual diversion of a maximum of 717,148 acre-feet of water from the Colorado River or to the quantity of main stream water necessary to supply the consumptive use required for irrigation of 107,588 acres and for satisfaction of related uses, whichever is less, with priority dates of March 3, 1865 for lands reserved by the Act of March 3, 1865 (13 Stat. 541, 559); November 22, 1873 for lands reserved by the Executive Order of said date; November 16, 1874 for lands reserved by the Executive Order of said date, except as later modified; May 15, 1876 for lands reserved by the Executive Order of said date; November 22, 1915 for lands reserved by the Executive Order of said date (Rep. 273-74).

(5) *Fort Mohave Indian Reservation.*

21. The Master's finding of fact numbered 12 that in withdrawing lands for the Fort Mohave Indian Reservation the United States intended to reserve rights to the use of so much water from the Colorado River as would be necessary to irrigate all of the practicably irrigable acreage therein and to satisfy related uses (Rep. 281).

22. The Master's conclusion of law numbered 6 that for the benefit of the Fort Mohave Indian Reservation the United States has the right to the annual diversion of a maximum of 122,648 acre-feet of water from the Colorado River or to the quantity of main stream water necessary to supply the consumptive use required for irrigation of 18,974 acres and for the satisfaction of related uses, whichever is less, with priority dates of September 18, 1890, for lands transferred by the Executive Order of said date; February 2, 1911 for lands reserved by the Executive Order of said date; provided, however, that lands conveyed to the State of California pursuant to the Swamp and Overflowed Lands Act [9 Stat. 519 (1850)], as well as any accretions thereto to which the owners of such land may be entitled, and lands patented to the Southern Pacific Railroad pursuant to the Act of July 27, 1866 (14 Stat. 292) shall not be included within the above-described rights (Rep. 283).

B. National Forests, Recreation Areas, Parks, Memorials, Monuments and Lands Administered by the Bureau of Land Management.

Arizona excepts to the Report in the following respects regarding the water rights of the United States for National Forests, Recreation Areas, Parks, Memorials, Monuments and lands administered by the Bureau of Land Management:

(1) Lake Mead National Recreation Area.

23. The Master's finding of fact numbered 3 that in withdrawing lands now constituting the Lake Mead National Recreation Area the United States intended to reserve rights to the use of so much water from the Colorado River as might thereafter be reasonably needed by the National Park Service for appropriate purposes (Rep. 295).

24. The Master's conclusion of law that the United States has the right to divert water from the main stream of the Colorado River in quantities reasonably necessary to fulfill the purposes of the Lake Mead National Recreation Area in Arizona and Nevada with priority dates of May 3, 1929, for lands reserved by the Executive Order of said date (No. 5105), and April 25, 1930, for lands reserved by the Executive Order of said date (No. 5339) (Rep. 295).

(2) Havasu Lake National Wildlife Refuge.

25. The Master's finding of fact numbered 3 that in withdrawing lands for the Havasu Lake National Wildlife Refuge the United States intended to reserve rights to the use of so much water from the Colorado River as might be reasonably needed to fulfill the purposes of the Refuge (Rep. 298-99).

26. The Master's conclusion of law that the United States has the right to the annual diversion of a maximum of 41,839 acre-feet or to the annual consumptive use of 37,339 acre-feet, whichever is less, of water from the Colorado River for use in the Havasu Lake National Wildlife Refuge, with a priority of January 22, 1941, as to land reserved by Executive Order No. 8647 and a priority of February 11, 1949, as to land reserved by Public Land Order 559 (Rep. 299).

(3) Imperial National Wildlife Refuge.

27. The Master's finding of fact numbered 2 that in withdrawing lands for the Imperial National Wildlife Refuge the United States intended to reserve rights to the use of so much water from the Colorado River as might be reasonably needed to fulfill the purposes of the Refuge (Rep. 300).

28. The Master's conclusion of law that the United States has the right to the annual diversion of a maximum of 28,000 acre-feet or to the annual consumptive use of 23,000 acre-feet, whichever is less, of water from the Colorado River for use in the Imperial National Wildlife Refuge with a priority of February 14, 1941 (Rep. 300).

V. Claims of the United States on Tributaries.

The Special Master has held that with the exception of the Gila National Forest, it is unnecessary to pass on claims of the United States to water of the Gila River and its tributaries for use in National Forests, Parks, Memorials and Monuments and lands administered by the Bureau of Land Management (Rep. 334). However, he concludes with respect to the Gila National Forest that the United States intended, when it withdrew this Forest from entry, to reserve the water necessary to fulfill the purposes for which the Forest was created (Rep. 335).

Arizona contends that this finding of intent is unsupported by and contrary to the evidence.

Accordingly, Arizona excepts to:

29. The Master's finding of fact numbered 30 that, in withdrawing lands for the Gila National Forest, the United

States intended to reserve rights to the use of so much water from the Gila River and the San Francisco River as might be reasonably needed to fulfill the purposes of the Forest (Rep. 342).

30. The Master's conclusion of law numbered 11 that the United States has the right to divert water from the main stream of the Gila River and San Francisco River in quantities reasonably necessary to fulfill the purposes of the Gila National Forest, with priority dates as of the date of withdrawal for forest purposes of such area of the Forest within which the water is used (Rep. 343).

VI. Recommended Decree.

Arizona excepts as follows to the provisions of the Recommended Decree:

31. Article II(B)(2) (Rep. 347) for the reasons stated in Exceptions 7 and 8 (pp. 10-11, *supra*).

32. Article II(B)(5) and (6) (Rep. 348-49) for the reasons stated in Exceptions 5 and 6 (pp. 8-10, *supra*).

33. Article II(B)(8) (Rep. 349-50):

> We hesitate to advocate a position which would apparently result in a waste of water. Nevertheless, we believe that the provisions recommended by the Special Master would contravene the clear language of both the Project Act and the Limitation Act. The proposed provisions would permit the release of water from Lake Mead without a contract for delivery thereof in violation of the Project Act and would sanction the diversion of water in excess of the quantities authorized by the Project and Limitation Acts and existing water delivery contracts with the Secretary of the Interior.
>
> Additionally, since these provisions speak in terms of water "consumed" in a state rather than water diverted for use in a state, they might be construed

as prohibiting a state from using water apportioned to it for any non-consumptive use such as off-stream or groundwater storage and would unduly restrict the states in the use of the water apportioned to them. Further, the word "consumed" is not appropriate since water may be put to use without necessarily being entirely consumed or exhausted.

Accordingly, Arizona proposes that there be substituted for Article II(B)(8) the following:

> (8) If, in any one year, main stream water apportioned for consumptive use in a state will not be ~~consumed~~ diverted for use in that state, ~~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, or for any other reason,~~ nothing in this decree shall be construed as prohibiting the Secretary of the Interior from releasing such apportioned but unused water during such year for consumptive use in the other states; provided, however, that nothing herein contained shall be construed as authorizing the diversion or use of water without a contract with the Secretary of the Interior as required by the Boulder Canyon Project Act or in excess of the amounts permitted by said Act, the California Limitation Act and contracts made by the Secretary of the Interior for the delivery of water pursuant to Section 5 of the Boulder Canyon Project Act. No rights to the recurrent use of such water shall accrue by reason of the use thereof;
>
> (deletions from the Recommended Decree lined out; additions underlined)

34. Article II(C)(2)(a) through (h) (Rep. 350-53) for the reasons stated in Exceptions 9 through 28 (pp. 14-20, *supra*).

35. Article III(B), (C) and (D) (Rep. 353-54):

These provisions deal with water which, as the Master holds, is "stored in Lake Mead and flowing in the mainstream below Lake Mead" (Rep. 225). Insofar as they would enjoin the State of Arizona, its officers, attorneys, agents and employees from "permitting the interference with releases and deliveries . . . of water controlled by the United States", from "permitting the diversion of water" and from "permitting the consumptive use of water", they would transfer to the State of Arizona duties with respect to main stream water which the Secretary of the Interior is required to perform under the Project Act and his water delivery contracts (see, e.g., Rep. 152-54, 186, 214-16). Furthermore, the authority of the State of Arizona to prevent the interference, diversions and uses referred to is open to serious question.

36. Article IV(E) (Rep. 357-58), insofar as it provides that the United States has the right to divert water in quantities reasonably necessary to fulfill the purposes of the Gila National Forest, for the reasons stated in Exceptions 29 and 30 (pp. 20-21, *supra*).

37. Article VI (Rep. 359) for the reasons stated in Exceptions 5 and 6 (pp. 8-10, *supra*).

38. Arizona excepts to the failure to include in the Recommended Decree a provision requiring that quantities of water released by the Secretary of the Interior pursuant to orders therefor but not diverted by the party ordering the same shall be charged to that party.

The evidence established that on many occasions water released from Hoover Dam on order was not used by the ordering party with the result that it flowed downstream to Mexico but was not or could not be credited to satisfaction of the Mexican Treaty.

Arizona submitted to the Special Master an addition to Article V, subdivision (E) of the Recommended Decree which, if adopted, would have discouraged this wasteful practice (see Arizona's Comments on the Draft Report and Recommended Decree, p. 10). However, the suggested addition was rejected in material part by the Special Master (see Rep. 358).

Accordingly, Arizona proposes that Article I of the Recommended Decree be amended by adding thereto as subdivision (L) the following:

> (L) Consumptive use of mainstream water shall include the quantities of water released by the Secretary of the Interior pursuant to orders therefor but not diverted by the party ordering the same, except to the extent that such quantities of water are delivered to Mexico in satisfaction of the Mexican Treaty or are diverted by others in satisfaction of rights decreed herein.

Respectfully submitted,

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