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, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, AND COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

Exceptions of the California Defendants to the Report of the Special Master

(See list of attorneys on inside cover.)

February 27, 1961

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IN THE

Supreme Court of the United States

OCTOBER TERM 1960

No. 9 Original

STATE OF ARIZONA,

Complainant,

v.

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

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Exceptions of the California Defendants to the Report of the Special Master

February 27, 1961

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INTRODUCTION

These exceptions are filed in accordance with the notice accompanying the order of the Court (364 U.S. 940), dated January 16, 1961.[1]

Those portions of the Special Master's Report which are most adverse to the California defendants (Report, pp. 99-125, 138-248, 305-21) contain no findings of fact specially identified or conclusions of law separately stated.[2] Our exceptions are therefore directed to the adverse and erroneous determinations of ultimate issues made by the Special Master, including the underlying determinations and rulings on evidence and motions.

The exceptions are based on the grounds, to be developed in our opening brief, that these determinations are contrary to the evidence and the law.

Appended is a map of the Colorado River basin.

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[1]Pursuant to that notice, our opening brief in support of these exceptions will be filed May 22; answering brief will be filed August 14; reply brief will be filed October 2, 1961.

[2]This Court directed the Master to find the facts specially and to state separately his conclusions of law thereon, and to submit them to the Court together with a draft of a recommended decree. (See Report, p. 2.) The Report does so only with respect to certain claims of the United States (Report, pp. 267-74, 279-83, 288, 294-95, 298-300) and claims of Arizona, New Mexico, and the United States relative to the Gila River system (Report, pp. 335-43).

STATEMENT OF EXCEPTIONS

The California defendants except to the Report of the Special Master, dated December 5, 1960, and to the recommended decree contained therein, upon the following grounds:

I

EXCEPTIONS RELATING TO THE LIMITATION ON CALIFORNIA STATED IN SECTION 4(a) (FIRST PARAGRAPH) OF THE BOULDER CANYON PROJECT ACT AND THE CALIFORNIA LIMITATION ACT (Report, pp. 164-200)

A. The Issue

What is the meaning of those words of the first paragraph of section 4(a) of the Boulder Canyon Project Act[3] (repeated in substantially identical words in the California Limitation Act[4]) which are identified by emphasis and bracketed numbers in the following quotation?

> "California . . . shall agree . . . that the aggregate annual consumptive use . . . of water . . . from the Colorado River for use in the State of California . . . shall not exceed four million four hundred thousand acre-feet of the [1] *waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact,* plus not more

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[3]45 Stat. 1058 (1928), 43 U.S.C. § 617c (1958) (Report, pp. 381-82).

[4]Calif. Stats. 1929, ch. 16, p. 38 (Report, pp. 397-98).

than one-half of any [2] *excess or surplus waters unapportioned by said compact,* such uses always to be subject to the terms of said compact."[5]

B. The Determinations to Which Exception Is Taken

The Special Master erroneously concludes:

1. That the emphasized words identified by the bracketed [1]—"waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact"—and by the bracketed [2]—"excess or surplus waters unapportioned by said compact"—cannot and do not refer to the Colorado River Compact[6] or to any paragraph or provision of that Compact whatsoever (Report, pp. 170-85, 194-200).

2. That the words identified by the bracketed [1]—"waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact"—refer to the first 7.5 million acre-feet per annum of consumptive use in the lower basin from the "mainstream" (Report, pp. 170-85). The Report erroneously defines the "mainstream" as constituting only Lake Mead and the main Colorado River below Lake Mead in the United States (Report, pp. 173, 185), including the inflow of the Bill Williams River (Report, pp. 184, 225), but excluding the waters in all tributaries both be-

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[5]Words similar to these identified by emphasis and bracketed numbers also appear in the second paragraph of § 4(a) (Report, pp. 382-83). We consider the effect of the second paragraph in group II of these exceptions, in relation to the Secretary's water delivery contracts, *infra* pp. 9-17.

[6]For full text of the Compact, see Report, pp. 371-77.

low and above Lake Mead, and excluding the Colorado River itself between Lee Ferry and Lake Mead (Report, pp. 183, 227).[7]

3. That the emphasized words identified by the bracketed [2]—"excess or surplus waters unapportioned by said compact"—refer to all consumptive use in the United States in any year from the "mainstream" in the lower basin in excess of 7.5 million acre-feet (Report, pp. 194-200).

4. That the increase in use permitted to the lower basin by Article III(b)[8] of the Colorado River Compact is in legal effect identical to the apportionment made in Article III(a)[9] so that such Article III(b) waters are not "unapportioned" within the "literal" meaning of the words identified by the bracketed [2] —"excess or surplus waters unapportioned by said compact" (Report, pp. 150-51, 169, 194-96).[10]

5. That (1) the Project Act and the California Limitation Act are not to be construed as a statutory

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[7]All references hereafter to "mainstream" mean the "mainstream" as defined above in the Report. Lake Mead, the Bill Williams River, and Lee Ferry are shown on the map of the Colorado River basin appended to these exceptions.

[8]For text of Article III(b), see Report, p. 373.

[9]Report, pp. 147-50. For text of Article III(a), see Report, p. 373.

[10]Notwithstanding the cited determination, to which we except, that if the Compact is construed literally the million acre-feet of consumptive use referred to in Article III(b) of the Compact is "apportioned," the Report concludes that § 4(a) of the Project Act, separately construed, does not exclude California from participation in that million acre-feet. We agree that California is not excluded, but assert that this result follows whether arrived at by interpretation of the words "excess or surplus waters unapportioned" in the Project Act and the Limitation Act, or the words "is hereby given the right to increase its beneficial consumptive use" in Article III(b) of the Colorado River Compact.

compact or consensual agreement established by the offer by the United States to California contained in the Project Act and the acceptance by California in the Limitation Act; and (2) the limitation on California, even if it were construed as a consensual agreement, has the meaning ascribed to it by the Report, as set forth above (Report, pp. 180-83).

C. The Correct Conclusions

The Special Master should have concluded:

1. That the identified words, in each instance, take their meaning from the Colorado River Compact.

2. That the words identified by the bracketed [1]—"waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact"—refer to the first 7.5 million acre-feet of consumptive use per year from the Colorado River system (*i.e.*, the entire Colorado River main stream from Lee Ferry to the Mexican boundary, and all of its tributaries in the United States) within the lower basin, in conformity with the meaning which the Report properly attributes to Article III(a) of the Colorado River Compact (Report, pp. 144, 173), and not merely from the "mainstream."

3. That the words identified by the bracketed [2]—"excess or surplus waters unapportioned by said compact"—refer to all consumptive use from the Colorado River system within the lower basin in excess of the first 7.5 million acre-feet of consumptive use per year from the Colorado River *system* in the lower basin, and not merely from the "mainstream."

4. That the increase in use permitted to the lower basin by Article III(b) of the Colorado River Compact

is not in legal effect identical with the apportionment in perpetuity made in Article III(a). Article III(b) waters are "unapportioned" within the meaning of (1) the Colorado River Compact and (2) the Project Act and Limitation Act expression identified by bracketed number [2]—"excess or surplus waters unapportioned by said compact"—as well as being "excess . . . waters" within the meaning of the expression last quoted.

5. That (1) section 4(a) of the Project Act and the California Limitation Act establish by reciprocal legislation a statutory compact between the United States and California, accepted by six basin states (excepting Arizona) as a premise for six-state ratification for the Colorado River Compact, and (2) that limitation adopts the Compact method of accounting above set forth.

D. The Effect of the Resolution of This Issue

The Special Master in effect holds that the Boulder Canyon Project Act, unlike the Compact, truncated the Colorado River at the upper margin of Lake Mead[1] (Report, pp. 151, 183, 225-26).

All parties apparently agree that there probably will be sufficient water throughout the Colorado River *system*

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[1]"Thus I hold that Section 4(a) of the Project Act and the California Limitation Act refer only to the water stored in Lake Mead and flowing in the mainstream below Hoover Dam, despite the fact that Article III(a) of the Compact deals with the Colorado River *System,* which is defined in Article II(a) as including the entire mainstream and the tributaries." (Report, p. 173. Emphasis in the original).

in the lower basin to sustain permanently the consumptive use of at least 7.5 million acre-feet annually. Of this, the permanently dependable supply in the tributaries now supports about 2 million acre-feet per annum of consumptive use, and the permanently dependable supply in the Colorado River from Lee Ferry to the Mexican boundary can probably support a beneficial consumptive use of not less than 5.5 million acre-feet per annum.

Therefore, if the emphasized words identified by the bracketed number [1] relate to Colorado River *system* water throughout the lower basin, the permanently dependable supply is adequate to sustain California's use of at least 4.4 million acre-feet per annum, as well as the consumptive use of 3.1 million acre-feet by the other lower basin states: Arizona, Nevada, New Mexico, and Utah. No problem of shortage need be resolved, with respect to that 7.5 million.

Whenever *system* supply in the lower basin will support beneficial consumptive uses exceeding 7.5 million acre-feet per annum, there is "excess or surplus" in which California may participate to the limit of one half.

However, the Report's interpretation of the words identified by the bracketed number [1] limits the waters referred to therein to that segment of the Colorado River system which the Report labels "mainstream." This interpretation makes it impossible to satisfy permanently 7.5 million acre-feet of consumptive use from such waters because the permanently dependable supply

of the "mainstream," so defined, available for consumptive use in the lower basin is substantially less than 7.5 million.[2] (See group III of these exceptions, relating to water supply.) This interpretation creates the shortage which is dealt with in the "contractual allocation scheme" and proration formula to which group II of these exceptions relates.

If some 2 million acre-feet of consumptive use which is now sustained by the permanently dependable supply of the tributaries in the lower basin is eliminated from the accounting, as the Report would do, the "mainstream" supply, considered alone, contains no "excess or surplus." This makes inoperative, for all practical purposes, the provision of section 4(a) which permits California to use up to one half of "excess or surplus waters unapportioned by said compact."

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[2]"With the storage provided by Lake Mead, and barring a drought unprecedented in the recorded history of the River, the Lower Basin has, under the guarantee of the Compact, available for use at Hoover Dam a minimum of 7,500,000 acre-feet of water per year, less transit losses between Lee Ferry and the dam, evaporation loss from Lake Mead, and its share of the Mexican treaty obligation." (Report, pp. 144-45.) When minimum figures are substituted for the deductions specified by the Master and for similar losses below Hoover Dam which the Report properly characterizes as a further diminution of supply (Report, p. 187), this is a "guarantee" under the Compact of less than 6 million acre-feet per year of consumptive use from the "mainstream." Thus, there must be a supply of at least 10 million acre-feet of water annually in the "mainstream" to satisfy 7.5 million acre-feet of beneficial consumptive use from the "mainstream" in Arizona, Nevada, and California.

II

EXCEPTIONS RELATING TO THE BASIS OF WATER RIGHTS IN THE LOWER BASIN: THE "CONTRACTUAL ALLOCATION SCHEME" AND THE NULLIFICATION OF THE PRINCIPLES OF INTERSTATE PRIORITIES AND EQUITABLE APPORTIONMENT (Report, pp. 151-64, 201-48, 305-14)

A. The Issues

1. Did Congress in the Boulder Canyon Project Act nullify interstate priorities and equitable apportionment principles in the "mainstream," and substitute therefor an authorization to the Secretary of the Interior to establish, as the sole basis of interstate rights to such waters, a "contractual allocation scheme" in which the execution of water delivery contracts perpetually apportioned water *en bloc* among Arizona, California, and Nevada irrespective of time of initiation or construction of projects or quantity of use?

2. Did successive Secretaries of the Interior purport to exercise such an authority or make such an apportionment in any contract?

3. How are shortages in "mainstream" waters to be borne, interstate, among competing claimants in Arizona, California, and Nevada?

B. The Determinations to Which Exception Is Taken

The Special Master erroneously concludes:

1. That the Boulder Canyon Project Act nullified the principles of equitable apportionment and priority of appropriation in the "mainstream" (Report, pp. 138, 152), although (as the Report correctly concludes) those doctrines control (1) interstate controversies between

users of "mainstream" water and users of waters of lower basin tributaries, including the Colorado River itself above Lake Mead (Report, pp. 316-18), and (2) interstate controversies between users on the tributaries of the Colorado River (Report, p. 325).

2. That the Boulder Canyon Project Act delegated to the Secretary of the Interior the authority, in default of prior interstate agreement, (1) to divide, without regard to appropriation and use (except for "present perfected rights") among California, Arizona and Nevada, "unappropriated"[3] water in the "mainstream" by means of water storage and delivery contracts, and (2) by signature of such contracts (subject to the provisions of the first paragraph of section 4(a) of the Project Act) to impose on the states a federal apportionment of the waters of the "mainstream" (Report, pp. 151-54, 173, 221-22).

3. That the authority so given includes also the authority to deliver "mainstream" water, to which rights had theretofore validly been acquired under the laws of a state, to others than the holders of such rights, to the extent that the rights thereby invaded do not qualify under

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[3]There is unresolved confusion in the Master's Report: At page 152 he speaks of the Project Act as authority for an "allocation of all of the available water" in the "mainstream"; at pages 153 and 210 he speaks of authority to divide the "unappropriated water" as of the effective date of the Project Act; at page 307 he categorizes all appropriations as either "perfected rights" or "mere paper filings" and gives legal effect only to the former.

As the Master recognizes (Report, pp. 234-35), appropriative rights, if diligently pursued, relate back, in priority and in full quantity, to the date of the initiation thereof. *Wyoming v. Colorado,* 259 U.S. 419, 459 (1922).

section 6 as "present perfected rights" as of June 25, 1929 (Report, p. 152), leaving open only the question of right to compensation for their taking (Report, p. 161).

4. That (1) "present perfected rights" based upon water rights under state law are limited to quantities of water actually applied to use as of June 25, 1929 (Report, p. 308); (2) "present perfected rights" of federal reservations created prior to June 25, 1929, extend to the quantities of water ultimately required for those reservations, and are not limited to the quantities actually put to use at that date, or affected by the absence of any use at any time (Report, pp. 309-11).

5. That successive Secretaries of the Interior, during the period 1930-1944, in a series of water storage and delivery contracts, have "forever allocated" or "apportioned" (Report, pp. 313-14) all "mainstream" waters among the states of Arizona, California, and Nevada by the mere execution of those contracts (Report, pp. 201-27, 237-47).

6. That the Project Act and water delivery contracts place on a parity all interstate rights in "mainstream" waters (Report, pp. 233, 236) irrespective of the principles of equitable apportionment and priority of appropriation (Report, p. 152), or time of commencement of use or quantities in fact used, subject only to protection of "present perfected rights" (Report, pp. 308-12).

7. That successive Secretaries of the Interior, in executing all of their various contracts over the period 1930-1944, voluntarily bound themselves to follow substantially the allocation which the Report attributes

to the second paragraph of section 4(a) of the Boulder Canyon Project Act, specifying the terms of a tri-state compact among Arizona, California, and Nevada which was never executed or ratified by any state (Report, pp. 222-24), notwithstanding the Report's correct conclusion that section 5 of the Project Act did not require the Secretary to follow the allocation described in the second paragraph of section 4(a), absent its ratification by the three states (Report, pp. 163, 202).

8. That (1) successive Secretaries of the Interior, by voluntarily following in their various contracts the allocation described in the second paragraph of section 4(a) of the Project Act, adopted the construction now accorded that paragraph by the Report (Report, pp. 173, 183-85, 196, 200, 225, 226, 316-18); but (2) while purportedly following the allocation described in the second paragraph of section 4(a), in fact imposed 44/75 of the Mexican Treaty burden on the California defendants, whereas the nonexistent tri-state compact stated in the second paragraph of section 4(a) (clause (4)) would have imposed only one half of that burden on California.

9. That (1) the provisions of article 7(d) of the Arizona water delivery contract and of article 4 of the 1944 Nevada contract (amending article 5(a) of the 1942 Nevada contract), which diminish the Secretary's aggregate delivery obligations in respect of uses made of water in those states above Lake Mead, are invalid (Report, pp. 201, 207, 210, 237-47), but that (2) the invalidation of those provisions does not affect the validity of the remainder of said contracts (Report, pp. 207, 210).

10. That (1) the several contracts of the successive Secretaries of the Interior thus establish a proration formula under which the first 7.5 million acre-feet or less of consumptive use from the "mainstream" is apportioned in perpetuity in fixed proportions: to Arizona 28/75, to California 44/75, to Nevada 3/75; and of consumptive use of "mainstream" waters in excess of 7.5 million, one half to California, one half to Arizona, unless the Secretary makes a contract with Nevada for 4 per cent of such surplus, in which event Nevada will be apportioned 4 per cent and Arizona 46 per cent thereof (Report, pp. 221-25, 241, 305-06); (2) such apportionments in such fixed proportions of the 7.5 million acre-feet are subject to displacement only if the supply is insufficient to sustain "present perfected rights"; and (3) the numerator and the denominator of the fractions in that formula include valid rights in the natural flow antedating the effective date of the Project Act (Report, pp. 305-12).

C. The Correct Conclusions

The Special Master should have concluded:

1. That rights to the consumptive use of all Colorado River system water in the lower basin, including "mainstream" water, whether founded upon valid water rights under state law or asserted under contracts executed under the Boulder Canyon Project Act or other portions of the reclamation law, are governed by equitable apportionment principles established by this Court, including (1) the principles of priority, and (2) the principle of protection of existing uses against impairment for the benefit of new projects. Waters to supply such rights are subject to the quantitative limi-

tations expressly imposed thereon by the Compact and the California limitation.

2. That the Boulder Canyon Project Act does not impose a federal apportionment or interstate allocation upon the states, or authorize the Secretary of the Interior to do so.

3. That (1) the authority conferred by the Project Act upon the Secretary of the Interior to contract for the storage and delivery of water does not include authority to impair valid rights under state law to the natural flow waters, acquired prior to the effective date of the Project Act, whether or not such waters had been fully put to use prior to that date; and that (2) contracts for the storage and delivery of waters to holders of such rights merely confirm such preexisting rights, which retain their interstate priorities.

4. That (1) "present perfected rights," as that expression is used in section 6 of the Project Act, are not limited to the quantities of water actually applied to use prior to June 25, 1929, but extend to the quantities of water capable of use from the natural flow by works constructed or in process of construction with due diligence prior to the effective date of the Colorado River Compact, and theretofore or thereafter put to use by the exercise of due diligence, pursuant to appropriations which were initiated under state law or pursuant to reservations which were established under federal law, prior to said effective date; (2) although the effective date of the Colorado River Compact as a six-state agreement was June 25, 1929, nevertheless if Arizona is held to have effectively ratified the Compact on February 24, 1944, then 1944 is the effective

date of the Compact as a seven-state agreement and the date to which the expression "present perfected rights" in Article VIII of that Compact and in section 6 of the Project Act relates; (3) "present perfected rights," as that expression is used in article 7(*l*) of the 1944 Arizona contract (Report, p. 403), extend to the quantities of water capable of use by works in California, actually constructed or in process of construction with due diligence prior to February 24, 1944, and theretofore or thereafter put to use by the exercise of due diligence, pursuant to appropriations initiated, federal reservations established, or federal water storage and delivery contracts executed, prior to February 24, 1944.

5. That no Secretary of the Interior has effectuated or purported to effectuate an interstate apportionment of water either by water delivery contracts or otherwise.

6. That any rights based upon water storage and delivery contracts are subject to and controlled by section 8 of the Reclamation Act of 1902[4] and by sections 14[5] and 18[6] of the Project Act, which compel the application of priority and not parity to interstate water rights.

7. That the water delivery contracts made by the successive Secretaries of the Interior do not purport to and do not follow the terms of the nonexistent tri-state compact set forth in the second paragraph of section 4(a).

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[4]32 Stat. 390, 43 U.S.C. §§ 372, 383 (1958), quoted in part in Report, p. 217.

[5]See Report, p. 394.

[6]See Report, pp. 217, 395.

8. That the successive Secretaries of the Interior, in executing their various water storage and delivery contracts from time to time during a period of 14 years and administering them during a period of 30 years, have not accorded to the second paragraph of section 4(a) of the Project Act the meaning attributed thereto by the Special Master as independent of the Colorado River Compact.

9. That (1) the Arizona and Nevada contracts are administrative devices establishing quantitative limitations or ceilings upon the aggregate quantity of water which may be stored and delivered by the Secretary of the Interior to Arizona and Nevada water users, respectively, pursuant to federal reservations or appropriations under state law, or under contracts made by the Secretary directly with such users; (2) the provisions of article 4 of the Nevada 1944 contract and article 7(d) of the Arizona contract, diminishing the stated aggregate quantities in respect of uses of water made above Lake Mead, are valid; and (3) if those provisions of article 4 of the 1944 Nevada contract and article 7(d) of the Arizona contract are invalid, the contracts are invalid in their entirety, because those provisions are not severable from the remainder of the contracts.

10. That rights in natural flow are properly added to, and not included within, any rights in stored waters, howsoever allocated.

D. The Effect of the Resolution of These Issues

As pointed out above, there is not enough water permanently available in the truncated "mainstream" to sustain 7.5 million acre-feet of consumptive use in Ari-

zona, California, and Nevada. The effect of the Report's formula is to prorate shortages among Arizona, California, and Nevada in fixed percentages, or fractions, disregarding interstate priorities. Under the Report's formula, California users are thus required to bear 44/75 of such shortage, irrespective of the relative magnitudes or priorities of rights in natural flow, interstate, which preexisted the creation of storage (excepting only "present perfected rights").

The dependable "mainstream" supply permanently available will not support more than about 6 million acre-feet per annum of consumptive use. (See group III of these exceptions.) Therefore, if the Report's construction of the limitation on California is sustained —that the 7.5 million acre-feet of Article III(a) water must be found, if at all, in the "mainstream" alone— this proration formula restricts California to 3,520,000 acre-feet of consumptive use out of that dependable supply (44/75 of 6 million). (See Report, p. 311.)

Under priority and equitable apportionment principles, California's existing uses, which were 4.6 million acre-feet per annum at the time of trial (Report, p. 128 and n.73), would be protected at least to the extent of the quantitative limitation of 4.4 million acre-feet per annum stated in the limitation. Moreover, the Report precludes the possibility of any "excess or surplus" in the "mainstream" because the Report excludes the main stream between Lee Ferry and Lake Mead and all lower basin tributaries from the accounting. (See group III of these exceptions, relating to water supply.)

III

EXCEPTIONS RELATING TO WATER SUPPLY AND JUSTICIABILITY (Report, pp. 99-135)

A. The Issues

1. Is the determination of the dependable (*i.e.*, permanently available) water supply necessary in this case?

2. Is there a justiciable controversy before the Court if the dependable water supply is based on the Report's premises that the Colorado River Compact is a "ceiling on appropriations" in each basin and is irrelevant to the issues in this case?

3. What effect does water supply have upon the resolution of the issues?

4. What is the dependable water supply of the Colorado River in the lower basin?

B. The Determinations to Which Exception Is Taken

The Special Master erroneously concludes:

1. That water supply is irrelevant to the resolution of the issues in this suit (Report, pp. 99-102, 145-46), notwithstanding the correct conclusions that existing projects cannot be economically operated unless a dependable supply of water is available (Report, p. 239), and that new projects can be financed only if a relatively constant and dependable supply seems likely to be available after their completion (Report, p. 239), both physically and legally (Report, p. 133).

2. That (1) the apportionment in perpetuity to the upper basin of 7.5 million acre-feet of consumptive use per annum made by Article III(a) of the Colorado River Compact constitutes a "ceiling on appropriations," so that water temporarily available in the lower basin but legally apportioned to the upper basin may be treated as part of the lower basin's dependable supply (Report, pp. 110-15, 140-42, 144, 149, 176) and (2) there is nothing to indicate that upper basin depletions will expand to "anywhere near" 6.5 million acre-feet per annum (Report, p. 111), or indeed beyond 4.8 million (Report, pp. 112, 113).

3. That, under the premises of the Report and of the decree recommended therein, Article III(c) of the Colorado River Compact need not, and should not, in the absence of the upper basin states, be herein construed (Report, pp. 145-46).

4. That (1) the dependable water supply of the Colorado River in the lower basin, hence the effect of the recommended decree, is not determinable within useful limits of accuracy (Report, p. 103); (2) the record in this case gives no indication that the decision and decree recommended by the Report will destroy or seriously impair existing projects in California (Report, pp. 102-25); and (3) a great deal of water has been permitted to waste in California as purportedly evidenced by large annual "unused runoff" into the Salton Sea (Report, p. 103 n.25).

5. That this case presents a justiciable controversy with compelling reasons for its adjudication (Report, pp. 129-35) despite the determinations (1) that the Colorado River Compact constitutes a ceiling on appropriations in each basin (Report, pp. 111-13, 140-41, 144, 149, 176) and is irrelevant to the suit (Report, p. 138) and (2) that California's existing uses (and *a fortiori,* Arizona's and Nevada's uses from the "mainstream") are "in no danger of curtailment unless and until many vast new projects, some of which are not even contemplated at this time, are approved by Congress and constructed" (Report, p. 115).[7]

C. The Correct Conclusions

The Special Master should have concluded:

1. That the determination of the dependable water supply is relevant and essential in the resolution of the issues in this suit with respect to (1) the existence of a justiciable controversy, (2) the appraisal of the effect of the apportionment proposed by the Report, and (3) the testing of the result of any decision in this case against the intent of Congress and the legislatures of the Colorado River basin states as of 1928 in light of the water supply anticipated by those bodies as of that date.

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[7]California's existing uses (1955-1957) were 4,483,885 acre-feet annually (Report, p. 128); corrected in accordance with note 73 at that page, these uses are 4,586,392 acre-feet, for all practical purposes identical with the 4,600,000 acre-feet of dependable supply sought by California in its proposed decree submitted to the Master, vol. I, Calif. Findings and Conclusions.

2. That the apportionment in perpetuity to the upper basin made by Article III(a) of the Colorado River Compact has withdrawn the apportioned quantity from the permanently dependable supply of the lower basin, irrespective of the time when the waters so apportioned may be put to use, subject only to the overriding delivery obligations imposed on the states of the upper division by the Colorado River Compact, *e.g.*, Articles III(c) and III(d) of the Compact.

3. That, under the premises of the decision and decree recommended by the Report, Article III(c) must be construed to determine or permit determination of the effect of the recommended decree on the dependable lower basin main stream supply.

4. That the dependable water supply of the lower basin is determinable within useful limits of accuracy, and the formula proposed, applied to that dependable supply, produces inequitable results (see pars. 6-8 *infra*).

5. That (1) the controversy is justiciable if, and only if, the apportionment to the upper basin by Article III(a) of the Colorado River Compact is regarded as a deduction from the lower basin supply at least to the extent that existing and authorized storage works in the upper basin make possible utilization of that apportionment without impinging on upper division obligations under the Compact, *e.g.*, Articles III(c), III(d), and III(e) of the Compact; and (2) if effect is not so given to the apportionment to the upper basin made

by Article III(a) of the Compact, the water supply presently available in the Colorado River from Lee Ferry to the Mexican boundary so greatly exceeds the claims thereto of Arizona, California, and Nevada that there is no justiciable controversy between any of those states.

6. That the dependable supply permanently available under the Colorado River Compact from the "mainstream" for use in Arizona, California, and Nevada will not sustain more than 6,000,000 acre-feet per annum of consumptive use.

7. That (1) the proration formula proposed by the Report, applied to a dependable supply of only 6 million acre-feet, would supply California with only 3,520,000 acre-feet of beneficial consumptive use annually (Report, pp. 306, 311), or 1 million acre-feet less than that required by California's uses existing at the time of trial (see Report, p. 128, noted *supra* p. 20 n.7); and (2) the decision and decree recommended by the Report will accordingly result in disaster to California by seriously curtailing California's present uses in the dependable supply and by eliminating all diversions from that supply by the defendant The Metropolitan Water District of Southern California.

8. That under existing circumstances California projects operate with high efficiency and make reasonable, nonwasteful use of Colorado River water.

D. The Effect of the Resolution of These Issues

If the water supply premises of the Report were adopted, this suit should be dismissed as not justiciable. On the premises of the Report there is an abundant water supply for all present and contemplated lower basin projects and there is no likelihood of any shortage in the foreseeable future, unless and until Congress authorizes large new projects. Therefore, the Court would be rendering an advisory opinion to Congress on a moot controversy.

If the Court rejects the water supply premises of the Report and accepts the dependable water supply which is established in the evidence, then the Report's proposed resolution of the issues must be rejected as inequitable and contrary to the intention of Congress and the state legislatures in 1928. The decision proposed in the Report would completely destroy the permanent water supply of the defendant The Metropolitan Water District of Southern California and seriously curtail the water supply for California's agricultural agencies. This result could not have been intended by Congress or the state legislatures in light of the dependable water supply anticipated as of 1928.

IV

GENERAL EXCEPTIONS

1. The California defendants except to the Report on the ground that the decision therein proposed is outside the order of reference of this Court.

2. The California defendants except to the Report on the ground that the decision therein proposed is outside the issues pleaded and tried, and contrary to facts established by admissions in the pleadings.

3. The California defendants except to the erroneous determination that the limitation upon use of water in California set out in the first paragraph of section 4(a) of the Project Act and accepted by the reciprocal California Limitation Act continues operative despite the Report's conclusion that Arizona effectively ratified the Compact on February 24, 1944, thereby effecting seven-state ratification of the Compact (Report, pp. 27, 166-67).

4. The California defendants except to the erroneous determination that California had no diversion works as of 1928 capable of diverting Gila River water for use in that state, that no such use of Gila River water in California was contemplated at that time, and that California has not used Gila River water since 1928 (Report, p. 179 n.38).[8]

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[8]As of 1928, the diversion works for Imperial Irrigation District in California were located below the mouth of the Gila, and Gila River system waters, when available, were diverted by the District until 1940 when the All-American Canal diversions at Imperial Dam above the mouth of the Gila were made for the first time. (See Report, pp. 54-55.)

5. The California defendants except to the erroneous determinations of (1) the quantities of water reserved by the United States for Indian reservations (Report, pp. 254-87) and for other federal lands and purposes (Report, pp. 291-300), (2) the priorities accorded to such federal reservations, and (3) the bases upon which the Report predicates water rights for such federal reservations.[9]

6. The California defendants except to the erroneous determination of the western boundary of the Colorado River Indian Reservation with respect to the "Olive Lake Cutoff" and the "Ninth Avenue Cutoff," as reflected in findings of fact 8, 9, 10, 11, 12, 13, 15, and 17 (Report, pp. 271-72), conclusions of law 1, 5, 6, and 7 (Report, p. 273), and the opinion (Report, pp. 274-78).[10]

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[9]Although we indicate here our disagreement in principle with the Master's determinations which sustain the United States claims for Indian and other federal reservations, we do not now plan to brief this point. First, the quantities of Indian water in dispute in California are relatively small. Second, the Special Master has correctly decided that federal uses in Arizona and Nevada are chargeable to those states out of water from which California users are excluded by the California Limitation Act, and the Master asserts that "all of the parties seem to agree to this accounting." (Report, p. 247.) However, if the decision that federal uses are so chargeable should be attacked by any party, we reserve by this exception our challenge to the determinations which sustain the federal reservation claims.

[10]We understand that the Special Master does not purport to adjudicate the rights to land of persons not parties to this suit. Report, p. 278; Tr. 20,289, 20,371.

7. The California defendants except to the erroneous denial of their motion of June 10, 1960 (California Comments on the Draft Report, pp. 61-90), in which the California defendants moved (1) that the Master submit to the Court tables which should set forth specified data as to the water supply of the Colorado River system in the lower basin and (2) that the Master either appoint or recommend that the Court appoint independent experts to testify as the Court's own witnesses on the dependable supply (letter to all counsel from Special Master, dated July 1, 1960, reported at Tr. 22,598-601).

8. The California defendants except to the erroneous denial of their motion to reopen the hearings to receive the evidence tendered in their Offer of Proof as well as any other evidence relating thereto which might be tendered by other parties (Report, pp. 248-53).

9. The California defendants except to the erroneous denial of their motion of August 31, 1960, to reopen the trial for the taking of evidence on the future depletion of the Colorado River at Lee Ferry by the upper basin (Report, p. 112 n.41).

V

EXCEPTIONS RELATING TO THE RECOMMENDED DECREE (Report, pp. 345-60)

The California defendants except to the erroneous decree recommended in the Report, especially in the following particulars:

1. The recommended decree reflects the errors specified above (Decree arts. I-III).

2. The recommended decree grants injunctive relief where no foundation for an injunction has been established (Decree arts. II, III).

3. The recommended decree specifically subjects the California defendant agencies to an injunction which does not apply to their counterparts in Arizona and Nevada (Decree art. III).

4. The recommended decree with respect to "non-contract" uses of water, which are largely on federally owned lands, does not apply to the United States (Decree art. III(C)), the only party with practical or legal means to prevent those uses.

5. The recommended decree fails to make clear that the consumptive use in the lower basin of ground water interconnected with the Colorado River, within the safe annual yield of the ground water basin, is chargeable under any interstate allocation which may be decreed (Decree art. I).

6. The recommended decree fails to make clear that jurisdiction is retained (Decree art. IX), among other

things, to hear and decide any interstate case of "mainstream" users against tributary users and the issuance of a supplementary decree thereon.

7. The recommended decree fails to encompass every portion of the Colorado River system within the lower basin from which, according to the record, major new diversion works have been proposed.[11]

WHEREFORE, the California defendants request that the Court reject the Report of the Special Master and the recommended decree contained therein, and that the Court decide this cause in the manner indicated by the modifications of the Special Master's Report and recommended decree described above.

Dated: February 27, 1961.

Respectfully submitted,

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[11]The main Colorado River above Lake Mead within the lower basin, which includes one alternative point of diversion (Report, pp. 227-28) for the Central Arizona Project (which Arizona alleged was the precipitating cause of this litigation, Ariz. Complaint, par. XX; Report, p. 131) is outside the terms of this decree (Report, pp. 152, 183-85, 227, 237-47, 345) and is left to adjudication in future litigation (Report, pp. 247, 316-21).

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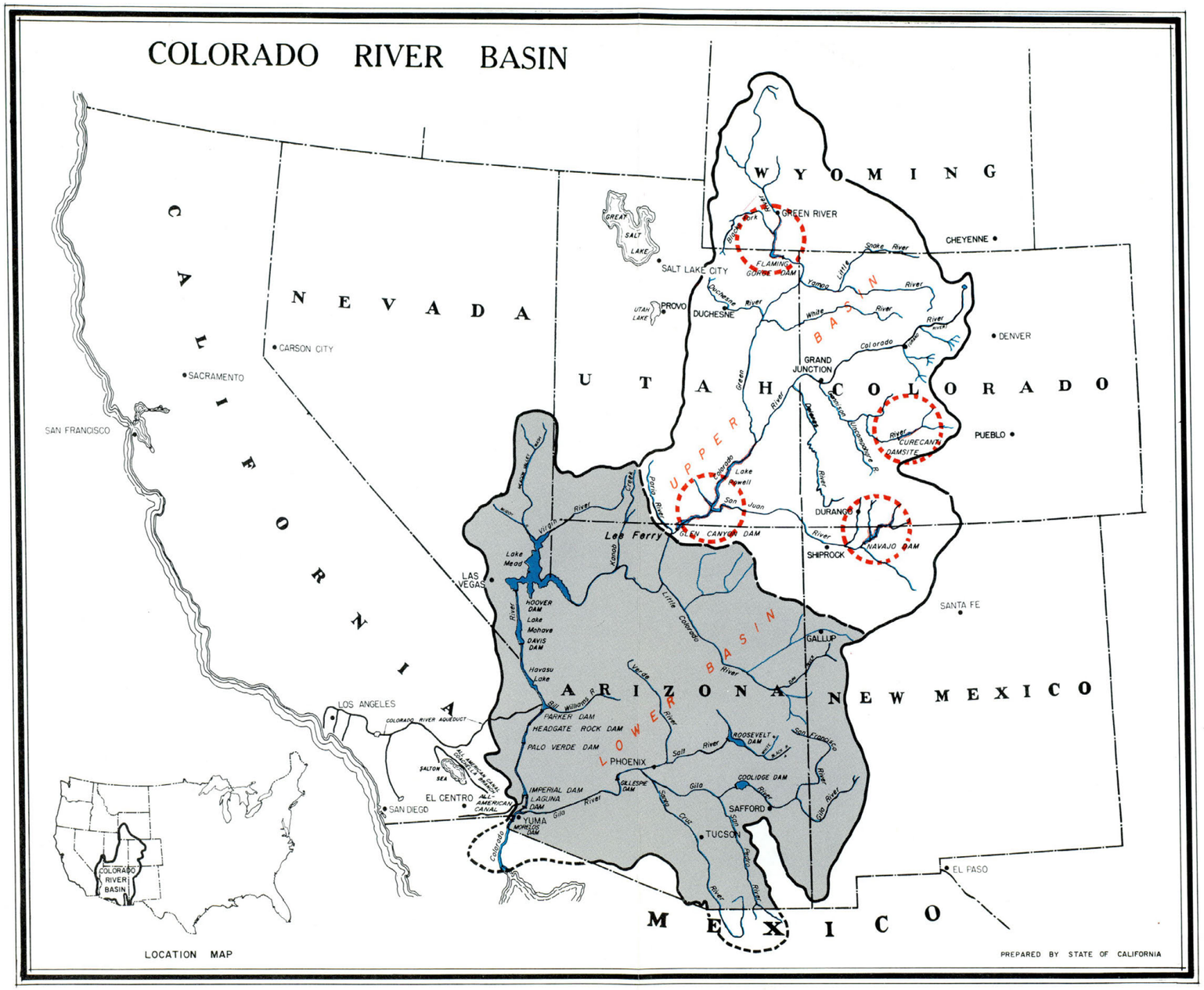
APPENDIX

MAP OF THE COLORADO RIVER BASIN

The accompanying map illustrates the Colorado River system in the upper and lower basins and the principal storage and diversion works located therein.

Reservoirs outlined in red are the four major storage reservoirs authorized or under construction in the upper basin, pursuant to the Colorado River Storage Project Act, 70 Stat. 105 (1956), 43 U.S.C. §§ 620-620*o* (1958).

COLORADO RIVER BASIN



LOCATION MAP

PREPARED BY STATE OF CALIFORNIA

Service of the within and receipt of a copy thereof is hereby admitted this.....day of February, A. D. 1961.
