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JAMES R. BROWNING, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

No. 9 Original

STATE OF ARIZONA,

Complainant,

v.s.

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,

Parties.

Exceptions to the Report of the Special Master and Recommended Decree on File Herein, Dated December 5, 1960, Filed by Defendant, The Metropolitan Water District of Southern California, on Its Behalf and on Behalf of Its Co-Defendants, The City of Los Angeles, and Its Department of Water and Power, The City of San Diego, and The County of San Diego.

February 27, 1961

THE METROPOLITAN WATER DISTRICT
 OF SOUTHERN CALIFORNIA

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INTRODUCTION.

The defendant, The Metropolitan Water District of Southern California, is a public and municipal corporation of the State of California. Its corporate area is situated on the coastal plain of Southern California extending from (and including a part of) Ventura County to the Mexican border, a distance of 180 miles.¹ A large number of municipalities, including the City of Los Angeles (population 2,500,000), the City of San Diego (population 575,000), and a substantial part of the County of San Diego are within the boundaries of, and are served with Colorado River water on a wholesale basis by, the Metropolitan Water District.² The population of the Metropolitan Water District in 1956 was 6,423,000.³ (It is now about 7,000,000).

Its assessed valuation, in 1956, was \$9,674,000,560.⁴ (It is now \$13,820,731,775), about one-half of total assessed valuation of the State of California.⁵ All available local water sources have long since been fully developed and put to use. To sustain its present development and population, and to provide for its inevitable growth, the Metropolitan Water District is de-

¹Calif. Ex. 447 (Map showing constituent cities and municipalities—present and potential areas, and MWD distribution system as of 1941-57, Tr. 9,395), and Tr. 9,495-500 (Elder).

²*Ibid.*

³Calif. Ex. 527 (Economic Analysis—Population 1900-75, Tr. 9,395), Table 1, Tr. 9,784-92 (Dunn).

⁴Calif. Ex. 479 (Tabulation showing comparison of assessed valuation and area of constituent entities of MWD, Tr. 9,395), Tr. 9,658-61 (McKinlay); Calif. Ex. 527, note 3 *supra*, Table 9, Chart 9; Tr. 9,812-14 (Dunn).

⁵Calif. Ex. 480 (Tabulation showing comparison of assessed valuation of property taxable for local purposes within MWD and State of California from 1929/30 to 1956/57, Tr. 9,395).

pendent upon water agreed to be delivered to it under contracts with the United States (1931-1934) made under the Boulder Canyon Project Act.⁶

Municipal water requirements must be anticipated, and provisions made for continuous supply for a rapidly expanding population. Existing use, as of any given time, does not indicate requirements. Public officers in charge of water supply must look at least ten years into the future in providing municipal water supplies.⁷

The Metropolitan Water District rights to the use of Colorado River water, both appropriative⁸ and those derived by contract under the Boulder Canyon Project Act,⁹ are junior to established "present perfected rights"

⁶Ariz. Ex. 38 (Water Delivery Contract: United States and MWD, April 24, 1930, Tr. 251); Ariz. Ex. 39 (Amended Water Contract: United States and MWD, September 28, 1931, Tr. 252); Ariz. Ex. 40 (Water Delivery Contract: United States and City of San Diego, Feb. 15, 1933, Tr. 252); Ariz. Ex. 41 (Merger, San Diego Water Delivery Contract with MWD, Tr. 253); Ariz. Ex. 42 (Assignment, San Diego to MWD, March 14, 1947, Tr. 253), and Tr. 9,721-22 (Mr. Howard).

⁷Tr. 9,828 (Morris).

⁸Calif. Ex. 426 (Application for appropriation by MWD, No. 6406, August 14, 1929, Tr. 9,395); Calif. Ex. 431 (Application for appropriation by MWD, No. 6840, December 1, 1930, Tr. 9,395); Calif. Ex. 430 (Application by MWD, No. 6406, 4th Amendment, of September 26, 1947; and PERMIT No. 7641, issued January 6, 1950, Tr. 9,395); Calif. Ex. 435 (Application by MWD, No. 6840, 4th Amendment of September 26, 1947; and PERMIT No. 7642 issued January 6, 1950, Tr. 9,395); Calif. Ex. 439 (Application by MWD, as successor to City of San Diego, No. 4997, 3rd Amendment of September 26, 1947; and PERMIT No. 7640 issued January 6, 1950, Tr. 9,395); and Calif. Ex. 68 MWD Chart—chain of title of appropriative rights, Tr. 6,894, 9,487), Tr. 9,482-87 (Mr. Howard).

⁹See note 6, *supra*.

as of 1929. Under an agreement made in 1931,¹⁰ embodied in the water delivery contracts with the United States made by the Secretary of the Interior under the Boulder Canyon Project Act, such rights are junior to old agricultural rights on the river. It follows that, in the event that the conclusions in the pending Report of the Special Master be sustained, the District would suffer the major damage resulting from errors of law appearing in the Report and Recommended Decree. In fact, under water supply conditions, revealed by the evidence but as to which the Special Master erroneously declines to make findings,¹¹ the application of the principles asserted by the Report would result in complete elimination of the District's water supply from the Colorado River.

Counsel for the defendant, the Metropolitan Water District, have co-operated with the State's Attorney General in the preparation of exceptions and objections to the Special Master's Report and Recommended Decree, and join therein. Because it appears in this cause, and has been considered by the Special Master, as a separate defendant, and has a special interest in the outcome of the pending litigation, the Metropolitan Water District, on behalf of itself, and on behalf of its co-defendants and constituent agencies, the City of Los Angeles and its Department of Water and Power, the City of San Diego and the County of San Diego, herewith files additional exceptions to the Special Mas-

¹⁰Ariz. Ex. 27 (Seven-Party Priority Water Agreement, August 18, 1931, Tr. 242).

¹¹Report pp. 99-102, 146.

ter's Report on file herein, dated December 5, 1960, on grounds hereinafter set out.

The erroneous conclusions adverse to the defendant, the Metropolitan Water District, are not separately stated as findings and conclusions in the Report, but are in large part merged in the text of the Report and reflected in the Recommended Decree. Consequently, the following exceptions relate to the ultimate conclusions hereinafter specified and to all incidental determinations involved in reaching such ultimate conclusions.

Specification of Errors and Exceptions

Exception No. 1:

The Special Master errs in all holdings, determinations, and conclusions supporting the proposition that the contract¹² entered into in 1931 by the United States, acting through the Secretary of the Interior under the Boulder Canyon Project Act,¹³ and the defendant, the Metropolitan Water District, providing for delivery to the District from storage in the reservoir created by Hoover Dam (Lake Mead), water up to a fixed quantity, and providing for "permanent service" (subject to the Colorado River Compact¹⁴ and the Boulder Canyon Project Act), which contract was relied upon by the defendant, the Metropolitan Water District, in constructing the Colorado River Aqueduct, is subject to impairment

¹²Ariz. Ex. 39 (Amended Water Contract: United States and MWD September 28, 1931, Tr. 252).

¹³45 Stat. 1058 (1928), 43 U.S.C. Sec. 617c (1958); Report, p. 379, Appx. 3.

¹⁴Ariz. Ex. 1 (Colorado River Compact, Tr. 214); Report, p. 371, Appx. 2.

and defeat in whole or in part by acts of a later Secretary of the Interior in 1944,^{14a} which acts the Special Master erroneously holds to constitute an apportionment of the use of water to other states.^{15 15a}

Exception No. 2:

The Special Master errs in holding that the Congress "imposed" a limitation on use of water of the Colorado River in California¹⁶; and in failing to recognize that the Boulder Canyon Project Act¹⁷ and the California Limitation Act¹⁸ constitute a compact between the United States and the State of California voluntarily entered into, consensual in character, and subject to interpretation under the law of contract.¹⁹

Exception No. 3:

The Special Master errs in holding that the references in the Boulder Canyon project Act (first paragraph of Section 4(a)), and the corresponding language in the California Limitation Act, to "waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact"²⁰ (by definition, water in the Colorado River System, including its tribu-

^{14a}Ariz. Ex. 32 (Water Delivery Contract between United States and Arizona, Feb. 9, 1944, Tr. 248); Report, p. 399, Appx. 5.

¹⁵Report, pp. 150-54, 221-28, 313-14.

^{15a}A contract dated Feb. 15, 1933 between the City of San Diego and the United States (Ariz. Ex. 40), similar in character to the Metropolitan Water District contract (Ariz. Ex. 39), has been assigned to the Metropolitan Water District (Ariz. Ex. 42), and is subject to the same exception set forth in Exception 1. See also, note 6, *supra*.

¹⁶Report, p. 165.

¹⁷Report, p. 379, Appx. 3.

¹⁸Ariz. Ex. 14 (California Limitation Act, 1929, Tr. 232); Report, p. 397, Appx. 4.

¹⁹Report, pp. 180-83.

²⁰Report, p. 379, Appx. 3 at p. 382; Report, p. 397 at p. 398.

taries) do not carry their literal meanings but instead mean the first 7,500,000 acre-feet of "mainstream" water (exclusive of tributaries) available for use in the lower basin from Lake Mead and the river below Lake Mead.²¹

Exception No. 4:

The Special Master further errs in holding that the references in the Boulder Canyon Project Act (first paragraph of Section 4(a)), and in the corresponding language of the California Limitation Act, to "excess or surplus waters unapportioned by said compact"²² do not carry their literal meanings, but instead, mean water available for use in the lower basin from the mainstream (exclusive of tributaries), in excess of the first 7,500,000 acre-feet so available.²³

Exception No. 5:

The Special Master errs in defining the "mainstream" as "water stored in Lake Mead and flowing in the mainstream below Hoover Dam"²⁴ and in treating the river above Lake Mead as a "tributary".²⁵

Exception No. 6:

The Special Master errs in determining that the right of increase of use permitted to the lower basin by Article III(b) of the Compact²⁶ constitutes an apportionment of use of water with the same legal effect as the apportionments made by Article III(a)²⁷ and that,

²¹Report, pp. 167-85.

²²Report, p. 379, Appx. 3 at p. 382; Report, p. 397 at p. 398.

²³Report, pp. 168-70; 194-200.

²⁴Report, p. 173, 185.

²⁵Report, p. 202.

²⁶Report, p. 371, Appx. 2, at p. 373.

²⁷*Ibid.*

if the California Limitation Act derives its meaning from the Compact, California is excluded from participating in the use of water referred to in Article III(b).²⁸

Exception No. 7:

The Special Master errs in holding that the Colorado River Compact, the doctrine of equitable apportionment, and the law of appropriation are all irrelevant to the allocation of such water among the three states (Arizona, Nevada, and California).²⁹

Exception No. 8:

The Special Master errs in holding, (a) that in the Boulder Canyon Project Act, the Congress intended to or did delegate to the Secretary of the Interior the authority to allocate³⁰ (apportion) by a formula unrelated to water supply, among the three states of the lower basin having access thereto, use of the water from the mainstream of the Colorado River (defined as Lake Mead and the mainstream below Lake Mead) in perpetuity and on a parity regardless of use, time of use, or priority based on use (except as to present perfected rights as of 1929),³¹ and (b) that the successive Secretaries of the Interior by a series of contracts intended to or did so apportion such use of water in perpetuity or on a parity.³²

²⁸Report, pp. 169, 194-96.

²⁹Report, p. 138.

³⁰The Report uses the terms "allocate" and "apportion" and their derivatives interchangeably.

³¹Report, pp. 151-54, 173, 221-22, 233, 236.

³²Report, pp. 201-27, 237-47, 313-14, 162.

Exception No. 9:

The Special Master erroneously concludes (a) that the beneficial consumptive use of 7,500,000 acre-feet per annum apportioned in perpetuity to the upper basin by Article III(a) of the Colorado River Compact (subject only to the covenants of paragraphs (c), (d), and (e) of Article III of the Compact) constitutes a "ceiling on appropriations", and is irrelevant to the determination of the pending controversy;³³ (b) that the dependable water supply of the lower basin, hence the effect of the Recommended Decree, is not determinable within useful limits of accuracy;³⁴ and (c) that the dependable water supply available for consumptive use in the lower basin is irrelevant to the resolution of the issue in this suit.³⁵

Exception No. 10:

(a) The Special Master errs in holding that Arizona did effectively ratify the Colorado River Compact in 1944.³⁶

(b) The Special Master further errs in holding that the California Limitation Act is operative and binding on the State of California, despite his holding that Arizona effectively ratified the Colorado River Compact in 1944.³⁷

³³Report, pp. 140-42, 113-15, 147, 149.

³⁴Report, pp. 102-25.

³⁵Report, pp. 99-102.

³⁶Report, pp. 166-67.

³⁷Report, pp. 164-66.

Exception No. 11:

The Special Master errs in holding that the "Contract dated February 9, 1944, between the United States and the State of Arizona"³⁸ constitutes an apportionment in perpetuity of use of water of the Colorado River to Arizona by a formula unrelated to water supply and on a parity with contracts made in 1930-34³⁹ with users of water from the Colorado River in California.⁴⁰

Exception No. 12:

The Special Master errs in holding that the provisions of the Arizona and the Nevada Contracts⁴¹ diminishing deliveries to Arizona and Nevada, respectively, of water from Lake Mead in the quantity that upstream diversions in those states diminish the flow into Lake Mead, are invalid.⁴²

Exception No. 13:

The Special Master errs in holding that the Contract provisions referred to in Exception 12 are separable and can be invalidated without invalidating the said contracts in their entirety.⁴³

Wherefore, the defendant, The Metropolitan Water District of Southern California, respectfully requests that this Court reject the Report of the Special Mas-

³⁸Ariz. Ex. 32 (Water Delivery Contract between United States and Arizona, Feb. 9, 1944, Tr. 248); Report, p. 399, Appx. 5.

³⁹See note 6, *supra*.

⁴⁰Report, pp. 221-37.

⁴¹Report, p. 399, Appx. 5, Sec. 7(d) at p. 401; Report, p. 409, Appx. 6, Sec. 5(a), at p. 410.

⁴²Report, pp. 201 and n. 62; 204-210, 237-47.

⁴³Report, pp. 207, 210.

ter and Recommended Decree on file herein, and that in any decree entered herein, the right of this defendant to use of water of the Colorado River evidenced by its water delivery contracts with the United States and by appropriation under State law, and established by application of such water to beneficial use with diligence considered in relation to the magnitude of the project, be recognized and protected with a priority as against uses initiated later in time or not now in existence, subject to the Colorado River Compact, the Boulder Canyon Project Act, and the California Limitation Act if the latter be held to be still operative.

Respectfully submitted,

THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA

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Deputy General Counsel,

FRANK P. DOHERTY,
Special Counsel,

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