IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 29, Original

STATE OF TEXAS AND STATE OF NEW MEXICO,
Plaintiffs,

v.

THE STATE OF COLORADO, Defendant.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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SUBJECT INDEX

PAGES

PRELIMINARY STATEMENT 1

STATEMENT OF FACT 2

ARGUMENT:

I. The United States Is An Indispensable Party To This Litigation 13

A. Complete Equity Cannot Be Done In The Absence Of The United States 13

B. The United States Owns And Operates Facilities Sought To Be Controlled By Decree. Such A Decree Is Ineffective Against The United States Unless It Is A Party To These Proceedings 17

C. The United States, As Owner And Operator Of Reservoirs On The Rio Grande And Its Tributaries Is Vitally Interested In The Determination Of The Size Of Accumulated Debits, If Any, Owed By Colorado And Upper New Mexico. This Question Cannot Be Determined In The Absence Of The United States 24

D. The United States Is An Indispensable Party Because Of Rights And Interests Of The Indians 27

E. Equitable Consideration May Reduce Substantially Or Eliminate Colorado's Debit And New Mexico's Debit 33

F. The Case Must Be Dismissed Because The United States Is An Indispensable Party And It May Not Be Involuntarily Joined As A Defendant 37

PAGES

II. The Elephant Butte Irrigation District And The Middle Rio Grande Conservancy District Are Indispensable Parties Because Any Decree Entered In These Proceedings Will Determine The Relative Rights Of Water Users In Those Districts. These Districts Are The Real Parties In Interest But Cannot Be Joined Because Of The Eleventh Amendment 38

III. The Existence Of An Administrative Solution To The Problem Renders Litigation Unnecessary 47

CONCLUSION 51

CASES CITED

Arizona v. California, 298 U.S. 558 (1936) 14, 38

Barney v. Baltimore, 6 Wall. 280 (1867) 13

Caldwell v. Taggart, 4 Pet. 190 (1830) 14

California v. Southern Pacific Co., 157 U.S. 229 (1895) 15, 42

Colorado v. Kansas, 320 U.S. 383 (1943) 34, 35

Commonwealth Trust Co. v. Smith, 226 U.S. 152 (1924) 15

Cowles v. Mercer County, 7 Wall. 118 (1868) 41

Duhne v. New Jersey, 251 U.S. 311 (1920) 41

Fitts v. McGhee, 172 U.S. 516 (1899) 41

Hans v. Louisiana, 134 U.S. 1 (1890) 42

Hinderlider v. La Plata River and Cherry Creek Ditch Co., 304 U.S. 92 (1938) 33

CASES CITED (CONTINUED)

PAGES

Hudspeth County Conservation and Reclamation District, No. 1 v. Robbins, 213 F.2d 425 (5th Cir., 1954) 20

Ickes v. Fox, 300 U.S. 82 (1937) 45

Kansas v. Colorado, 320 U.S. 383 (1943) 34

Kansas v. United States, 204 U.S. 331 (1907) 37

Louisiana v. McAdoo, 234 U.S. 627 (1914) 38

Lumbermen's Mutual Casualty Co. v. Elbert, 348 U. S. 48 (1954) 15

Minnesota v. Northern Securities Co., 184 U.S. 199 (1902) 39, 45

Minnesota v. United States, 305 U.S. 382 (1939) 21

Missouri v. Illinois and the Sanitary District of Chicago, 200 U.S. 496 (1906) 33, 47

Nebraska v. Wyoming, 295 U.S. 40 (1935) 43, 44

Nebraska v. Wyoming, 325 U.S. 589 (1945) 35

New Hampshire v. Louisiana, 108 U.S. 76 (1883) 45

New Jersey v. New York, 345 U.S. 369 (1953) 44

New Mexico v. Backer, 199 F.2d 426 (10th Cir., 1952) 18

Niles-Bement-Pond Co. v. Iron Moulders Union, 254 U.S. 77 (1920) 15, 43

North Carolina v. Temple, 134 U.S. 22 (1890) 42

North Dakota v. Minnesota, 263 U.S. 365 (1923) 45, 48

Seattle v. Oregon & Washington R.R. Co., 255 U.S. 56 (1921) 41

Shields v. Barrow, 17 How. 129 (1854) 14, 15

Texas v. New Mexico, 308 U.S. 510 (1939) 47

CASES CITED (CONTINUED)

PAGES

Texas v. New Mexico, 350 U.S. 858 (1955) 22

Texas v. New Mexico, 352 U.S. 991 (1957) 23, 38, 47

United States v. Alabama, 313 U.S. 274 (1941) 22

United States v. Candelaria, 271 U.S. 432 (1926) 28

United States v. Sandoval, 231 U.S. 28 (1913) 28

Waterman v. The Canal-Louisiana Bank Co., 215 U.S. 33 (1909) 15

West Virginia ex rel Dyer v. Sims, 341 U.S. 22 (1951) 47

Winters v. United States, 207 U.S. 564 (1908) 29

CONSTITUTIONAL PROVISIONS CITED

New Mexico Constitution, Article XXI 28

United States Constitution

Article IV 17

Article XI 2, 40, 45, 47

STATUTES AND COMPACTS CITED

34 Stat. 2953 (1906 Convention with Mexico) 4, 5

36 Stat. 559 (New Mexico Enabling Act, Act of June 20, 1910) 28

43 Stat. 636 (Pueblo Lands Act, Act of June 7, 1934) 28

44 Stat. 1098 (Act of February 14, 1927) 29

45 Stat. 312 (Act of March 13, 1928) 29

46 Stat. 767 (Temporary Compact of 1929, Act of June 17, 1930) 8, 9, 37

STATUTES AND COMPACTS CITED (CONTINUED)

PAGES

53 Stat. 758 (Rio Grande Compact) 2, 9, 17, 20, 22,25, 28, 30, 31, 32, 33, 36, 37, 48

58 Stat. 887 (Flood Control Act of 1944) 50

62 Stat. 1171 (Flood Control Act of 1948) 10

House Document No. 693, 76th Cong., 3rd Sess. (1940) 37

Colo. Rev. Stat. 149-1-11 (1963) 49

MISCELLANEOUS

Plan for Development of Closed Basin Division, San Luis Valley Project, Colorado, Bureau of Reclamation (1963) 49

Rio Grande Joint Investigation, U.S. Government Printing Office, 1938 ..... 4, 29

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PRELIMINARY STATEMENT

This is the brief of the State of Colorado in opposition to the Motion made by the State of Texas and the State of New Mexico for Leave to File a Complaint against Colorado concerning waters of the Rio Grande, an interstate stream.

On October 3, 1966, the States of Texas and New Mexico jointly served on the State of Colorado a "Motion for Leave to File Complaint" and "Complaint". This Complaint alleges that Colorado has failed to make water deliveries that it agreed to make under the terms of the Rio Grande Compact. The Complaint requests the appointment of a Federal Water Master to administer the Rio Grande in order to see that Colorado performs its

obligations under the Compact. The proposed Federal Water Master is also asked to make additional deliveries of water to the two downstream states to compensate them for alleged under-deliveries in past years, although Colorado exceeded its scheduled deliveries in 1966.

Colorado asks the Supreme Court of the United States to dismiss this Motion and not allow the Complaint to be filed for three reasons, namely: (1), the United States is an indispensable party and has not given its consent to be sued nor has it intervened in these proceedings; (2), the Middle Rio Grande Conservancy District and Elephant Butte Irrigation District are indispensable parties, but have not been made parties and cannot be made parties because of the Eleventh Amendment, and, (3), the availability of an administrative solution to the problem renders litigation unnecessary.

STATEMENT OF FACT

The Rio Grande rises in the southern Rocky Mountains of Colorado, flows easterly and then southerly through the San Luis Valley of Colorado, and then flows south about 400 miles through New Mexico and finally proceeds southeasterly for about 1250 miles, forming the boundary between Texas and Mexico, before the river reaches the Gulf of Mexico.

The total drainage basin of the Rio Grande is approximately 175,000 square miles. This controversy relates to that portion of the Rio Grande Basin above Fort Quitman, Texas, known generally as the Upper Rio Grande Basin. The area of this drainage basin is approximately 34,000 square miles.

In the Upper Basin Colorado and New Mexico, in approximately equal amounts, supply more than 99 per cent of the total water supply. The Upper Basin is divided into three principal areas: the San Luis Valley section in Colorado, the middle section in New Mexico which lies above Elephant Butte Reservoir, and the Elephant Butte-Fort Quitman section in New Mexico, Texas and Mexico. Substantially all of the water is consumed by irrigation in Colorado, New Mexico, Texas and Mexico.

The San Luis Valley of Colorado is a broad plain of smooth topography surrounded by mountains except on the south near the Colorado-New Mexico state line where the river has cut an outlet which drains the southern portion of the valley. The northern portion of the valley is not thus drained and is known as the Closed Basin. The valley floor ranges in altitude from 7,440 feet to 8,000 feet and the surrounding mountains from 10,000 to more than 14,000 feet.

A middle section, southerly from the San Luis Valley, comprises the basin of the Rio Grande in New Mexico above San Marcial. Below the Colorado-New Mexico state line the Rio Grande flows through a canyon for about 70 miles to Embudo. The "middle valley" comprises the long narrow territory adjacent to the river from Embudo south to San Marcial, a distance of about 200 miles. It is a succession of narrow valleys, separated by rock canyons or short "narrows". These narrow valleys and subvalleys constitute the area of the Middle Rio Grande Conservancy District. Altitudes in the Middle Valley range from 5,590 feet at Espanola to 4,450 feet at San Marcial.

Elephant Butte Reservoir of the Rio Grande Project is owned and operated by the United States through its

Department of Interior, Bureau of Reclamation. This reservoir occupies the river valley from the San Marcial narrows to Elephant Butte, a distance of about 40 miles.

The Elephant Butte-Fort Quitman section includes the reservoir area and long strips of land adjacent to the river from Elephant Butte downstream to Fort Quitman, some 210 miles. This section comprises a succession of valleys separated by canyons and narrows. The water delivered from Elephant Butte Reservoir and Caballo Reservoir, which is located immediately below Elephant Butte Reservoir, is used for irrigation purposes.

The early settlers of the San Luis Valley began irrigating the land in 1850. The valley was extensively developed in the decade of 1880-1890. During the same decade water shortages began to occur along the Rio Grande which caused the Mexican Government to file a claim for damages against the United States, alleging that the water shortages were due to increased diversions from the river in Colorado and New Mexico. The Department of State of the United States instituted an investigation of the situation through the International Boundary Commission, and the outcome of said investigation was the "Embargo" of 1896 (Rio Grande Joint Investigation, p. 8, U. S. Govt. Printing Office, 1938), and the Rio Grande Convention, 1906 (34 Stat. 2953 and Treaty Series No. 455). The "Embargo" was an order by the Secretary of the Interior which had the effect of preventing further irrigation development of any magnitude in the Rio Grande Basin in Colorado and New Mexico through suspension by the United States of grants of new rights-of-way for ditches or reservoirs across public lands in those states for use of Rio Grande water. This embargo remained in effect until May of 1925.

Under the terms of the Rio Grande Convention of 1906, the United States, among other things, guaranteed Mexico, in return for relinquishment of all claims for damages, the delivery of 60,000 acre feet of water each year in perpetuity from the Rio Grande at the head of the Old Mexican Canal (Acequia Madre) near El Paso. The guarantee was tempered with a proviso that the delivery of water could be diminished in case of extraordinary drought or serious accident.

To insure fulfillment of this guarantee and to develop a reclamation project in the Elephant Butte-Fort Quitman section, the United States constructed Elephant Butte Reservoir with an original capacity of 2,639,000 acre feet, together with other works for the Rio Grande Project. Water is delivered out of Elephant Butte to the Elephant Butte Irrigation District in New Mexico and the El Paso County Water Improvement District No. 1 in Texas. In each instance, each district has entered into a contract with the United States to repay over a long period of years the cost of a part of the irrigation features of the Reservoir. In the case of the Elephant Butte Irrigation District, the contract is in the normal form provided by the reclamation law which requires the payment of a fixed amount each year, irrespective of how much water is delivered to the District. The contract with the El Paso County Water Improvement District No. 1 is a variable payment type of contract. The amount the District pays to the United States depends upon the amount of water delivered to the District by the United States.

Elephant Butte Reservoir has an installed electrical generating capacity of 24,300 K.W. The United States,

acting through its Bureau of Reclamation, sells all of the power generated at Elephant Butte to Plains Electric Generation and Transmission Cooperative, the city of Truth or Consequences, the White Sands Missle Range and Holloman Air Force Base. When more water is delivered at Elephant Butte Reservoir, there is a greater opportunity for the generation of electrical energy resulting in additional revenue for the United States.

After the Middle Valley, i.e., the Otowi-San Marcial area, attained its maximum development of 124,800 acres in 1880, the general trend was downwards for 40 years because of increased upstream depletion, unstable river, increasing sediment, floods, and water logging of land, all of which conditions forced acreage out of production. This situation brought about community action which resulted in the formation of the Middle Rio Grande Conservancy District in 1925. This District, in the period 1929-1935, constructed on the Chama River El Vado Dam and Reservoir with an original capacity of about 197,500 acre feet. Precedent to the construction of El Vado Dam, the District entered into a contract with the United States which was dated December 14, 1928, and which pertained to Indian uses of water supplied by facilities of the District.

There are within the Middle Rio Grande Conservancy District irrigated lands belonging to six Indian Pueblos, viz., Cochiti, Isleta, Sandia, San Felipe, Santa Ana, and Santo Domingo. There are more than 3,000 Indians living within the District with aggregate land holdings greater than 300,000 acres. Their source of water supply is the Rio Grande.

On tributaries entering the Rio Grande in the area

between Otowi and San Marcial are the Indian Pueblos of Jemez, Zia, Acoma, and Laguna. They irrigate their lands with water from Rio Grande tributaries.

On the Rio Grande, and on tributaries entering the Rio Grande above Otowi, are the Jicarilla Apache Indian Reservation and the Pueblos of Taos, Picuris, San Juan, Santa Clara, San Ildefonso, Pojoaque, Nambe, and Tesuque, all of which have irrigated lands.

The Pueblo Indians of New Mexico use waters of the Rio Grande and its tributaries above San Marcial and have rights therein prior to all others in New Mexico. In 1955 these Indians were irrigating approximately 20,000 acres of land in the Middle Rio Grande Conservancy District and there has been no substantial increase in the amount of Indian irrigated acreage since that date.

With the interstate situation becoming increasingly aggravated, the three affected states in 1923 appointed commissioners to negotiate a compact. A temporary compact was concluded in 1929. This compact did not, however, set up an allocation of Rio Grande waters. It provided that during the period of the compact neither Colorado nor New Mexico would cause increased diversions or storage unless and until such depletion was offset by increases of drainage return; that the three states would maintain certain gaging stations and exchange records and information; and that before the compact terminated the states would attempt to conclude a permanent compact. The compact set forth the desirability of a drain to the river from the Closed Basin in San Luis Valley of Colorado.

Article II of the 1929 Compact as approved by Congress by the Act of June 17, 1930, (46 Stat. 767), provides:

"The States of Colorado, New Mexico, and Texas hereby declare:

"(a) That they recognize the paramount right and duty of the United States, in the interests of international peace and harmony, to determine and settle international controversies and claims by treaty, and that when those purposes are accomplished by that means the treaty becomes the supreme law of the Nation;

"(b) That since the benefits which flow from the wise exercise of that authority and the just performance of that duty accrue to all the people, it follows as a corollary that the Nation should defray the cost of the discharge of any obligation thus assumed;

"(c) That with respect to the Rio Grande, the United States, without obligation imposed by international law and 'being moved by considerations of international comity,' entered into a treaty dated May 21, 1906 (Thirty-fourth Statutes, page 2953), with the United States of Mexico which obligated the United States of America to deliver from the Rio Grande to the United States of Mexico sixty thousand acre-feet of water annually and forever, whereby in order to fulfill that promise the United States of America, in effect drew upon the States of Colorado, New Mexico, and Texas a draft worth to them many millions of dollars, and thereby there was cast upon them an obligation which should be borne by the Nation;

"(d) That for the economic development and conser-

vation of the waters of the Rio Grande Basin and for the fullest realization of the purposes recited in the preamble to this compact it is of primary importance that the area in Colorado known as the Closed Basin be drained and the water thus recovered be added to the flow of the river, and that a reservoir be constructed in Colorado upon the river at or near the site generally described as the State Line Reservoir site. The installation of the drain will materially augment the flow of the river, and the construction of the reservoir will so regulate the flow as to remove forever the principal causes of the difficulties between the States signatory hereto; and

"(e) That in allevation of the heavy burden so placed upon them it is the earnest conviction of these States that without cost to them the United States should construct the Closed Basin Drain and the State Line Reservoir described in paragraph (d).

"The signatory States agree that approval by Congress of this compact shall not be construed as constituting an acceptance or approval, directly, indirectly, or impliedly, of any statement or conclusion appearing in this article."

The temporary Compact expired June 1, 1935, and was thereafter extended from time to time. On March 18, 1938, a new Compact was entered into by Colorado, New Mexico and Texas and approved by Congress by the Act of May 31, 1939 (53 Stat. 785). Said Compact is included as Exhibit "A" of the Complaint of the States of Texas and New Mexico.

In the 1940's and early 1950's there was a shortage in upper New Mexico's delivery of water under the terms

of the Compact to Elephant Butte Reservoir. To help alleviate this situation, Colorado, in 1950, voluntarily released 60,000 acre-feet of its accrued credit water stored in Elephant Butte Reservoir for use by New Mexico and Texas water users. The shortage that had developed was due partly to prolonged drought and partly to deterioration of the Middle Rio Grande Conservancy District's irrigation and drainage ditches in New Mexico, aggradation of the river bed impairing return flow, drainage, and excessive growth of water consuming riparian vegetation. To correct this situation, the United States undertook the Middle Rio Grande Reclamation Project designed to bring about the fiscal and physical rehabilitation of the Middle Rio Grande Conservancy District (Act of June 30, 1948, 62 Stat. 1171, 1179). The United States acquired title to all of the works of that district including El Vado Reservoir. Substantial rehabilitation and construction work was undertaken with the result that now Upper New Mexico is better able to comply with the terms of the Compact. It would appear that New Mexico has been able to reduce its debit from 529,400 acre feet in 1956 to 445,600 acre feet in 1965.

In addition to Elephant Butte and Caballo Reservoirs the following is a list of reservoirs constructed or under construction and owned by the United States on the river or its tributaries in Colorado and New Mexico:

	Reservoir	Location	Approximate Completion Date
Colorado:			
	Platoro	Conejos River	1951
New Mexico:			
	Jemez Canyon	Jemez River	1953
	Abiquiu	Rio Chama	1963
	Cochiti	Rio Grande (under construction)	1970
	Galisteo	Galisteo Creek (under construction)	1969
	El Vado	Rio Chama	1935

Each reservoir is or will be operated by the United States and is constructed in part for flood control purposes except El Vado, and El Vado, in fact, catches flood crests.

The United States built Platoro Reservoir at the headwaters of the Conejos River in Colorado to act as a flood control reservoir and to supply irrigation water to the Conejos Water Conservancy District, a state agency distributing water to the irrigators within the District. The District entered into a repayment contract with the United States under which the District agreed to pay $2,327,739.91 over a forty-year period of time and also to pay the operation and maintenance costs of the reservoir. In 1960 this contract was changed to a variable type payment contract, the amount paid varying directly with the amount of water delivered. The reservoir was completed in 1951 and has a capacity of 60,000 acre feet. Under the conditions described in Article VIII of the Compact, all water captured in this reservoir is subject to call by the downstream states. This water has been subject to call every year

since 1952 except for a small amount left in the reservoir to protect the works, and except for water distributed to the Conejos Water Conservancy District. The water delivered to the District is as follows:

Year	Acre Feet
1952	37,000
1953	1,000
1958	20,000
1959	30,000

No water has been delivered to the District since 1959. By resolution of the Rio Grande Compact Commissioners and in order to prevent loss of water because of ice conditions in the channel, the practice has been adopted to run the water down to the lower states in November.

In addition to Platoro Reservoir, the United States has other interests in the Rio Grande drainage basin in Colorado. One is the Monte Vista Wildlife Refuge (13,674 acres) located near Monte Vista in the San Luis Valley and the other is the Alamosa Wildlife Refuge (1,774 acres) located near Alamosa, Colorado. A list of the water rights owned by the United States and the priority dates of said rights is found in Appendix No. 1.

In addition, the United States owns many thousands of acres of national forest in the San Luis Valley in which the waters of the Rio Grande River and its tributaries arise. These forests are used for recreation, grazing, lumbering, mining and other forest uses.

ARGUMENT

I.

The United States Is An Indispensable Party To This Litigation

A. COMPLETE EQUITY CANNOT BE DONE IN THE ABSENCE OF THE UNITED STATES.

In its decision in *Barney v. Baltimore,* 6 Wall. 280, (1867) the United States Supreme Court summarized the subject of parties to equity suits. The court stated (6 Wall 284):

> "The learning on the subject of parties to suits in chancery is copious, and within a limited extent, the principles which govern their introduction are flexible. There is a class of persons having such relations to the matter in controversy, merely formal or otherwise, that while they may be called proper parties, the court will take no account of the omission to make them parties. There is another class of persons whose relations to the suit are such, that if their interest and their absence are formally brought to the attention of the court, it will require them to be made parties if within its jurisdiction, before deciding the case. But if this cannot be done, it will proceed to administer such relief as may be in its power, between the parties before it. *And there is a third class, whose interests in the subject-matter of the suit, and in the relief sought, are so bound up with that of the other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit, when these parties cannot be subjected to its jurisdiction.*" (Emphasis supplied)

This court in *Caldwell v. Taggart,* 4 Pet. 190 (1830), said at page 201:

> "* * * The general rule is laid down thus: 'however numerous the persons interested in the subject of a suit, they must all be made parties, plaintiffs or defendants, in order that a complete decree may be made; it being the constant aim of a court of equity to do complete justice, by embracing the whole subject, deciding upon and settling the rights of all persons interested in the subject of the suit; to make the performance of the order perfectly safe to those who have to obey it, and to prevent future litigation'."

In *Arizona v. California,* 298 U.S. 558 (1936) this Court said at page 571, concerning the United States:

> "* * * Although no decree rendered in its absence can bind or affect the United States, that fact is not an inducement for this Court to decide the rights of the states which are before it by a decree which, because of the absence of the United States, could have no finality. *California v. Southern Pacific Co.,* 157 U.S. 229, 251, 257; *Minnesota v. Northern Securities Co.,* 184 U.S. 199, 235, 245-247; *International Postal Supply Co. v. Bruce,* 194 U.S. 601, 606; *Texas v. Interstate Commerce Comm'n,* 258 U.S. 158, 163. A bill of complaint will not be entertained which, if filed, could only be dismissed because of the absence of the United States as a party. *Louisiana v. McAdoo,* 234 U.S. 627."

The classic definition of indispensable parties is that found in *Shields v. Barrow,* 17 How. 129, 139 (1854):

"Persons who not only have an interest in the con-

troversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

The *Shields v. Barrow* (supra) definition is clearly recognized in the following cases:

Lumbermen's Mutual Casualty Co. v. Elbert, 348 U.S. 48, 52 (1954);

Commonwealth Trust Co. v. Smith, 266 U.S. 152, 159 (1924);

Niles-Bement-Pond Co. v. Iron Moulders Union, 254 U.S. 77, 80 (1920);

Waterman v. The Canal-Louisiana Bank Co., 215 U.S. 33, 48 (1909).

A pertinent application of this test was made in the case of *California v. Southern Pacific Co.,* 157 U.S. 229 (1895). That was an original action in equity affecting the title to certain water front property claimed by the state. The answer averred that the state had granted the property to the town of Oakland and that the defendant held under mesne conveyances therefrom. An application by Oakland to intervene was denied. The Court said (157 U.S. 257):

"We have no hesitation in holding that when an original cause is pending in this court to be disposed of here in the first instance and in the exercise of an exceptional jurisdiction, it does not comport with the gravity and finality which should characterize such an adjudication to proceed in the absence of parties whose rights would be in effect determined, even

though they might not be technically bound in subsequent litigation in some other tribunal."

In Colorado the United States has interests at Platoro and in its wildlife refuges. In the New Mexico portion of the basin the interests of the United States include water uses by the Indians, by the Atomic Energy Commission, by the Air Force, by the Veterans Administration, by the Fish and Wildlife Service, by the Bureau of Reclamation and by other Federal agencies. Below Elephant Butte the United States is interested in the generation of hydroelectric power, in its treaty obligations to Mexico and in the performance of its water delivery contracts with the two districts which compose the Rio Grande Project of the Bureau of Reclamation. Overall interests of the United States encompass flood control and navigation. The United States must be heard on all these various matters before any decree is entered herein.

It is not compatible with equity and good conscience to subject Colorado to a decree which places it in the position of liability to suit by the United States if it enforces the decree so as to deny rights claimed by the United States, or liability to a contempt citation if, in enforcing the decree, it recognizes rights in the United States and such rights are denied by the plaintiffs. Yet, the only way in which such an unfortunate conclusion may be avoided is through the presence of the United States as a party.

In the present case, the interests of the United States are such that the decree sought necessarily would affect those interests and would leave the controversy in a condition inconsistent with equity and good conscience.

B. THE UNITED STATES OWNS AND OPERATES FACILITIES SOUGHT TO BE CONTROLLED BY DECREE. SUCH A DECREE IS INEFFECTIVE AGAINST THE UNITED STATES UNLESS IT IS A PARTY TO THESE PROCEEDINGS.

Paragraph (2) of Section 3 of Article IV of the United States Constitution provides:

> "The congress shall have power to dispose of, and make all needful rules and regulations respecting the * * * property belonging to the United States * * *."

The United States owns and operates Platoro Reservoir located on the headwaters of the Conejos River in Colorado. This reservoir was constructed by the Bureau of Reclamation and is operated for flood control and irrigation purposes in conformity with the Rio Grande Compact. Under Article VIII of the Rio Grande Compact, the United States, as owner and operator of Platoro Reservoir is obligated to make releases to Texas and New Mexico when Colorado is in a debit position. It makes releases of irrigation water to the Conejos Water Conservancy District when Colorado is in a credit position. In the absence of the United States, instructions by the proposed Water Master to the United States as to how to operate its reservoir would not be binding upon the United States. It would be even more abhorrent to the United States if the Water Master himself, or his agents, attempts to take over the operation of the reservoir from the United States. Again, this cannot be done by a decree issued in the absence of the United States. Any differences that the United States has with any of the three states as to how the reservoir is to be operated under the Compact would

not be resolved. It would be the proposed Water Master or this Court who would be making the "rules and regulations respecting the * * * property belonging to the United States", not Congress.

It has been judicially determined that the courts may not enter a decree affecting the water level in Elephant Butte Reservoir in the absence of the United States. *New Mexico v. Backer,* 199 F.2d 426 (10th Cir., 1952) was an action by New Mexico and the city of Truth and Consequences to enjoin Backer, an employee of the United States in charge of Elephant Butte Reservoir's operations, from lowering the water level in the reservoir. Said the court, page 427:

> "* * * We have no doubt but that the enjoining of government officials in this case interferes with the management and control of property of the United States and raises questions of law and fact upon which the United States would have to be heard.
>
> "It is settled law that the United States cannot be sued without its consent. *United States v. Sherwood,* 312 U.S. 584, 61 S.Ct. 767, 85 L.Ed 1058; *United States v. Shaw,* 309 U.S. 495, 60 S.Ct. 659, 84 L.Ed. 888; *Moody v. Wickard,* C.A.D.C., 78 U.S. App. D.C. 80, 136 F.2d 801, certiorari denied 320 U.S. 775, 64 S.Ct. 89, 88 L.Ed. 465. It is equally well settled that whether an action is one against the sovereign is determined not by the party named as defendant, but by the result of the judgment or decree which may be entered. *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed 1628; *State of Louisiana v. Garfield,* 211 U.S. 70, 29 S.Ct. 31, 53 L.Ed 92; *State of Louisiana v. McAdoo,* 234

U.S. 627, 34 S.Ct. 938, 58 L.Ed. 1506; *State of Oregon v. Hitchcock,* 202 U.S. 60, 26 S.Ct. 568, 50 L.Ed. 935; *State of Minnesota v. Hitchcock,* 185 U.S. 373, 22 S.Ct. 650, 46 L.Ed. 954.

"The Rio Grande Reclamation Project was constructed and operated in the exercise of a proper governmental function and in accordance with valid statutes of the United States. The facilities were owned by the United States and the waters were stored in the reservoir to be withdrawn by the United States for authorized governmental purposes. The management, control and operation of such facilities are given the Secretary of the Interior in broad terms, 43 U.S. C.A. § 373. The United States could not hold or operate this vast project except through its officials and agents. Backer was performing these functions for the Secretary of the Interior and under his instructions. Whatever he did, he did for the Secretary under authority of the reclamation laws of the United States. The operation of the project and facilities depended upon the flow of water from the reservoir. If this flow could be enjoined or affected by court decree or order directed to Backer, he would be under the direction of the court and not his superiors as representatives of the United States. It would be a complete ouster of the United States over the control and management of its own property and facilities."

The decree sought by Texas and New Mexico would require this Court by use of a Water Master to substitute itself for the agency designated by Congress in the management and operation of Platoro reservoir and the water rights of the United States. If New Mexico and Texas are entitled to have a Water Master run the river to eliminate

Colorado debits, Colorado is entitled to have that same Water Master run the river in upper New Mexico to eliminate the New Mexico debit so that Colorado can obtain relief through actual spill. (Rio Grande Compact, Art. VI). This affects operation of the Middle Rio Grande Project works which are owned by the United States. We submit that the Court has no jurisdiction to enter a decree which would substitute itself as manager for the dams and works of the United States in litigation in which the United States is not a party.

In *Hudspeth County Conservation and Reclamation District, No. 1 v. Robbins,* 213 F.2d 425, 432 (5th Cir., 1954) the United States Court of Appeals, Fifth Circuit, said:

> "Since *Larson v. Domestic & Foreign Corp.,* supra, a very strict test must be applied when the suit is one not for damage but for specific relief, such as injunction either directing or restraining the defendant officers' actions, see 337 U.S. 688, 69 S.Ct. 1457. These dams, reservoirs and all other project facilities are owned by the United States, which operates them through the Bureau of Reclamation. See 43 U.S.C.A. § 498. Their operation depends upon the flow of water. Whatever may be the merits of the plaintiffs' contentions, the court would have no jurisdiction by declaratory judgment, see Lynn v. United States, 5 Cir., 110 F.2d 586, 588, or by injunction against Government officers to substitute itself in any part of the management and operation of the dams, reservoirs and facilities for the agency designated by Congress. In a case involving this same project, the Tenth Circuit arrived at the conclusion that the action was in essence a suit against the United States to which

it had not consented and that it, therefore, must fail. *State of New Mexico v. Backer,* 10 Cir., 199 F.2d 426. We entertain the same opinion here. * * *"

Any Water Master appointed to run the river and make Colorado and Upper New Mexico debit deliveries to Elephant Butte Reservoir will be affecting the level of water in that reservoir. Even this in itself, in the absence of the United States, is not proper.

The United States owns water rights out of the Rio Grande and its tributaries in Colorado. A list of these is presented in Appendix No. 1. If a Water Master is appointed by this Court to make water deliveries to downstream states, will that Water Master deprive the United States of its water? Will the Water Master follow the appropriation doctrine of Colorado and require the United States to shut down its water rights by date of decree? Will the Water Master require the United States to reduce its appropriations on a prorata basis or will he follow some other method concerning the United States? These questions cannot be determined in the absence of the United States.

In *Minnesota v. United States,* 305 U.S. 382, 386 (1939) this court said:

"The United States is an indispensable party defendant to the condemnation proceedings. A proceeding against property in which the United States has an interest is a suit against the United States. *The Siren,* 7 Wall. 152, 154; *Carr v. United States,* 98 U.S. 433, 437; *Stanley v. Schwalby,* 162 U.S. 255. Compare *Utah Power & Light Co. v. United States,* 243 U.S. 389. It is confessedly the owner of the fee of the Indian allotted lands and holds the same in trust for

the allottees. As the United States owns the fee of these parcels, the right of way cannot be condemned without making it a party."

A very similar statement is found in *United States v. Alabama,* 313 U.S. 274, 282 (1941):

> "With respect to the tax sales the case has a different aspect. The proceedings in the county court for the sale of the lands were taken and the decrees were rendered after the United States had become the owner of the tracts. A proceeding against property in which the United States has an interest is a suit against the United States. *The Siren,* 7 Wall. 152, 154. The United States was an indispensable party to proceedings for the sale of the lands, and in the absence of its consent to the prosecution of such proceedings, the county court was without jurisdiction and its decrees, the tax sales and the certificates of purchase issued to the State were void. *Minnesota v. United States,* 305 U.S. 382, 386."

The United States owns and operates or will operate eight reservoirs on the Rio Grande which are available in part for flood control. How these reservoirs are operated affects the likelihood of actual spill at Elephant Butte which would serve to wipe out completely any debit of Colorado (Rio Grande Compact, Article VI). In the absence of the United States, no decree determining the method of operation of these reservoirs would be binding upon the United States.

The position of the United States as to these matters is set out in its "Memorandum for the United States under Order of October 17, 1955," 350 U.S. 858 (1955) in the

proceedings leading up to the decision in *Texas v. New Mexico,* 352 U.S. 991 (1957). On pages 10 and 11 of that memorandum the United States said:

> "The Special Master relied on the rule of *Nebraska v. Wyoming,* 295 U.S. 40, as affording a second reason why the interest of the United States in the District's works did not make it an indispensable party. 1954 Report, page 30. That reliance is unjustified. *Nebraska v. Wyoming,* was a suit to determine the relative rights of the States in the waters of the North Platte river. The Court held that the Secretary of the Interior, claiming appropriative rights under the law of Wyoming, was not a necessary party, since the State would stand in judgment for him as for all appropriators under its law. 295 U.S. at 43. Although the United States later intervened in that case, the judgment ultimately entered included the provision, 'nor will the decree in any way interfere with the ownership and operation by the United States of the various federal storage and power plants, works and facilities.' *Nebraska v. Wyoming,* 325 U.S. 589, 671. The present suit is not one to apportion the waters of the Rio Grande, but is rather one to compel operation of dams and other works in accordance with rights asserted under the Compact. It seeks to do, in the absence of the United States, precisely what the court declined to do even where the United States was a party in *Nebraska v. Wyoming* that is, interfere with the operation by the United States of federally owned storage, distribution and drainage works and facilities. *Nebraska v. Wyoming* affords no justification for such a proceeding."

C. THE UNITED STATES, AS OWNER AND OPERATOR OF RESERVOIRS ON THE RIO GRANDE AND ITS TRIBUTARIES IS VITALLY INTERESTED IN THE DETERMINATION OF THE SIZE OF ACCUMULATED DEBITS, IF ANY, OWED BY COLORADO AND UPPER NEW MEXICO. THIS QUESTION CANNOT BE DETERMINED IN THE ABSENCE OF THE UNITED STATES.

The yearly payment to the United States by El Paso County Water Improvement District No. 1 for water delivered from Elephant Butte Reservoir is dependent upon the amount of water available for delivery. The amount paid each year by Conejos Water Conservancy District to the United States for irrigation water out of Platoro Reservoir is dependent upon the amount of water delivered to the District the preceding year. In addition, the amount of electricity which is generated at Elephant Butte Reservoir power plant is directly dependent upon the amount of water delivered from Elephant Butte Reservoir and the size of the payment for the energy depends upon the amount of electricity generated.

So long as Colorado is in an alleged debit position under the Compact, the United States cannot deliver irrigation water out of Platoro. It is therefore to the interest of the United States at this reservoir to have a determination that Colorado's debit, if any, is nonexistent or exceedingly small.

By reason of the repayment contract with the El Paso District and the power generation features of Elephant Butte Reservoir, the United States' interest at this loca-

tion on the river is to obtain a finding of the largest possible debit owed by both Colorado and New Mexico so that more water can be delivered to the El Paso District and more energy generated.

The United States thus finds itself on both sides of this issue. It would be presumptuous of Colorado to attempt to determine upon which side the balance of the interests of the United States lie.

The issue of debit size, if any, arises in several ways and under several interpretations of the Compact, not all of which are consistent.

Article VI of the Compact provides that if there is an actual spill of usable water from project storage, i.e., storage in Elephant Butte Reservoir and Caballo Reservoir located below Elephant Butte, the accrued debits of Colorado and New Mexico shall be cancelled. In addition, whenever the accrued debits of Colorado and New Mexico are larger than the unfilled capacity of project storage, such debits are reduced. Colorado thus becomes vitally concerned with New Mexico's debit position and the rate at which New Mexico will be required to deliver water to Elephant Butte Reservoir to eliminate the New Mexico debit position. Obviously, the more water New Mexico delivers to Elephant Butte the more likely it is that Colorado will achieve relief through these provisions. It is also Colorado's position that any debit deliveries are to be transmitted directly to project storage available at Elephant Butte without use of the "debit" water by New Mexico users above Elephant Butte.

Colorado thus has a vital interest in determining both the size of the New Mexico debit and the schedule for its

repayment. The only water distributor in New Mexico above Elephant Butte Reservoir of any consequence is the United States, which owns and operates the water distribution works, the headgates and canals and distribution laterals of the Middle Rio Grande Reclamation Project. In order for the debit to be eliminated it will be necessary for the United States to operate that project on whatever schedule of debit deliveries the Court decrees. The United States is not bound by any such decree unless it is present.

In addition, the United States, if not present, will not be bound by any provisions of the decree relating to non-use of Colorado and New Mexico debit water being delivered to Elephant Butte Reservoir.

In 1942 actual spill occurred at Elephant Butte. Since that time numerous reservoirs, with the exception of El Vado, have been built or are under construction which, among other functions, catch flood crests. These reservoirs have previously been listed on page 11 of this brief.

The best opportunity to obtain an actual spill from project storage occurs when a large flood delivers a large amount of water to Elephant Butte. If these flood crests are caught in flood control or silt retention reservoirs and later released over a period of several days or weeks, the opportunity of an actual spill is diminished. It is diminished because water users below the flood control reservoir will make use of part of the water which otherwise would have passed them quickly. In addition to this, larger stream losses due to evaporation and transpiration occur because of the increased length of time water surface is exposed to air and wind.

Colorado takes the position that the construction of

these reservoirs creates new and increased depletions and that appropriate adjustments must be made for these changes in the regimen of the river because the construction by the United States has reduced substantially Colorado's opportunity for relief by actual spill. Either the Compact is no longer enforceable because of these changes or there must be a recomputation of Colorado's alleged debit as though these flood control reservoirs had never been in operation.

These issues cannot be resolved in the absence of the United States because of its interest as the operator of all of the reservoirs in question.

In short, there is an issue as to the alleged size of the debit of both Colorado and New Mexico and the rate at which it should be reduced. The United States receives payment for water delivered measured by the amount of water so delivered from one district in Texas, and receives payment for electricity generated which depends on the amount of water that arrives at Elephant Butte Reservoir. The United States is an indispensable party because its interests in these payment contracts may be injured if an improper amount of debit water or an improper schedule of debit deliveries is decreed.

D. THE UNITED STATES IS AN INDISPENSABLE PARTY BECAUSE OF RIGHTS AND INTERESTS OF THE INDIANS.

As pointed out above if the complaint is filed, Colorado will ask that the entire controversy be settled and that a schedule of deliveries be imposed upon New Mexico to eliminate her debit to Elephant Butte Reservoir. The reason for requesting this relief is to increase the possi-

bility of actual or theoretical spill at Elephant Butte and thus eliminate in part or wholly Colorado's alleged debit. No schedule of deliveries can effectively be imposed upon New Mexico unless the quantity of water which must be delivered to the Indians is known.

There are within the basin of the Rio Grande and its tributaries in New Mexico above San Marcial eighteen Indian Pueblos and one Indian Reservation, each of which contains land irrigated either from the Rio Grande or from its tributaries.

These Indians are wards of, and under the plenary control of, the United States. They are not under the jurisdiction of the State of New Mexico but are under the protection of the United States (New Mexico Enabling Act, Act of June 20, 1910, 36 Stat. 559; Constitution of New Mexico, Art XXI, Section 2; Pueblo Lands Act, Act of June 7, 1934, 43 Stat. 636; United States v. Sandoval, 231 U. S. 28 (1913); United States v. Candelaria, 271 U. S. 432 (1926)).

The Rio Grande Compact by its Article XVI expressly provides that it shall not affect the obligation of the United States to the Indian Tribes nor impair the rights of the Indian Tribes.

Six of the Indian Pueblos, viz., Cochiti, Isleta, Sandia, San Felipe, Santa Ana, and Santo Domingo, have irrigated lands within the Middle Rio Grande Conservancy District.

The situation of the Indians of the Middle Valley, so far as their water rights and claims are concerned, is thus

summarized in the report of the Rio Grande Joint Investigation, supra, pp. 310-311.

> "The water rights for the Pueblo Indians of New Mexico are the oldest on the Rio Grande and its tributaries, and *the United States claims priorities for such rights over any other claims whatsoever.*
>
> "When the Spanish Conquistadores first arrived in this country, they found the Pueblo Indians diverting water from streams and cultivating the irrigated lands. Today the Indians are doing this, very much as their forefathers did it, using the same general methods, diverting the water in the same ditches and irrigating the same lands as in 1540. The Government, through the Indian Service, has assisted the Indian in improving his ditches and providing structures for the diversion and control of the water." (Emphasis supplied)

The Indians of the Pueblos of Cochiti, Santo Domingo, San Felipe, Santa Ana, Sandia, and Isleta have first and prior water rights under the decision of the Supreme Court in *Winters v. United States,* 207 U. S. 564 (1908), for the irrigation of their lands. The Indians of these Pueblos received their water through the works of the Middle Rio Grande Conservancy District. The district and the United States entered into a contract for this purpose pursuant to the Acts of Congress of February 14, 1927 (44 Stat. 1098) and March 13, 1928 (45 Stat. 312).

The Jicarilla Apache Reservation and the Pueblos of Taos, Picuris, San Juan, Santa Clara, San Ildefonso, Pojoaque, Nambe, Tesuque, Jemez, Zia, Acoma and Laguna, all of which have land irrigated from the Rio Grande

or its tributaries, are outside of the Middle Rio Grande Conservancy District and their water uses are covered by no such contracts as those for the benefit of the six Pueblos served by the District.

The Zia, San Jose, Laguna, and Acoma Pueblos have facilities for the storage of water for the irrigation of their lands.

There is a most important distinction between the extent of irrigated land and the quantities of water which must be diverted from a stream to irrigate the land. While there may have been a decision by the Secretary of the Interior as to the lands of the Pueblos within the Middle Rio Grande Conservancy District which are susceptible of economic irrigation and cultivation, there has been no such determination for the twelve Pueblos and one reservation which lie outside the District.

In any event the determination of an irrigated area does not constitute any determination of the headgate diversion requirement of the ditches by which it is irrigated. It is noteworthy that the Rio Grande Compact fixes quantities of water which shall be delivered at San Marcial. It does not fix the rights of the lower area in terms of irrigated acres.

Let us now apply the tests of indispensability to the United States so far as its rights and interests on behalf of the Indians are concerned in the context of New Mexico's accrued debit. Such rights and interests will be affected in the following particulars:

(1) The prohibition against the storage of water in El Vado Reservoir whenever and so long as there

is less than 400,000 acre feet of usable water in Project Storage (Rio Grande Compact, Art. VII) will adversely limit the storage of water in that reservoir and hence the availability of water therefrom. The United States for the benefit of the Indian paid part of the reservoir construction costs and is paying part of the operation and maintenance costs. The Indians claim a prior right to such storage water.

(2) An injunction that New Mexico be restrained from incurring further annual debits as defined by the Rio Grande Compact until the accrued debit of New Mexico is reduced below the maximum amount permitted by the terms of the Compact will adversely affect the Indians because:

(a) Such an injunction does not except Indian uses and hence will apply to them and limit or prohibit Indian uses above San Marcial until the New Mexico accrued debit is reduced below 200,000 acre feet.

(b) Indian lands within the Middle Rio Grande Conservancy District are served by canals that supply both Indian and non-Indian lands. In the absence of a determination of the existence and extent of the Indian rights, it is impossible to ascertain how much water must be diverted into the canals for Indian uses. The Indians should not be subjected to a determination of their rights by New Mexico.

(c) Indian lands without the Middle Rio Grande Conservancy District are served by canals that supply both Indian and non-Indian lands. The rights of the Indians may not be ascertained

without the presence of their guardian, the United States. In the absence of such a determination, New Mexico will either have to shut down Indian canals to assure compliance with the decree or will have to make their own determination of the existence and extent of the Indian rights.

(d) The quantities of water which the defendants may permit to be diverted by either canals serving only Indian lands or by canals serving both Indian and non-Indian lands has never been determined and so long as the Indians are asserting a claim of prior right to all water of the Rio Grande and its tributaries it is obvious that any limitation on the headgate diversions of any canal serving Indian lands adversely affects the interests of the Indians.

(3) Any order that water stored in reservoirs constructed after 1929, be released whenever Project Storage is less than 600,000 acre feet (Rio Grande Compact Article VIII) will adversely limit the storage of water in, and availability of water from, El Vado Reservoir. The Indians claim a prior right to such storage water.

In the absence of the United States as a party in its capacity as guardian of the Indians, any decree entered herein will leave the controversy between Colorado and New Mexico in such a condition that the final determination will be inconsistent with equity and good conscience because:

(a) Any decree will require New Mexico to make a unilateral determination of the rights of the Indians and thus place itself in jeopardy of a suit by the

United States for denial of Indian rights or of a citation for violation of the decree for recognizing Indian rights in excess of those acknowledged by Colorado.

(b) It will require New Mexico to abide by Article XVI of the Rio Grande Compact, which states that the Compact does not impair the obligations of the United States to the Indians, without any determination of the nature and extent of such obligations.

E. EQUITABLE CONSIDERATION MAY REDUCE SUBSTANTIALLY OR ELIMINATE COLORADO'S DEBIT AND NEW MEXICO'S DEBIT.

The reduction or elimination of the alleged debits will increase the amount of compensation the United States will receive for water delivered out of Platoro and decrease the amount the United States will be paid for water out of Elephant Butte Reservoir and it will reduce the amount of electricity generated at Elephant Butte.

There is a suggestion in *Hinderlider v. La Plata River and Cherry Creek Ditch Company,* 304 U. S. 92 (1938) at page 109, that an inequitable compact is not enforceable or at least is unenforceable to the extent of the inequity. In *Missouri v. Illinois and the Sanitary District of Chicago,* 200 U. S. 496 (1906), a case involving Chicago sewage being dumped into the Mississippi and flowing into the municipal water intakes of St. Louis, Mr. Justice Holmes said at page 522:

"* * * Where, as here, the plaintiff has sovereign powers and deliberately permits discharges similar to

those of which it complains, it not only offers a standard to which the defendant has the right to appeal, but, as some of those discharges are above the intake of St. Louis, it warrants the defendant in demanding the strictest proof that the plaintiff's own conduct does not produce the result, or at least so conduce to it that courts should not be curious to apportion the blame."

It should be noted that New Mexico, as previously pointed out, has been contributing and presently does contribute to the deficiencies in Elephant Butte Reservoir. If these shortages are to be eliminated, the water must be taken from the river above Elephant Butte in New Mexico, where the United States, as proprietor and as guardian of the rights of the Indians, is the chief party in interest and an indispensable litigant. In its absence, no decree can be enforced.

The Court, in *Colorado v. Kansas,* 320 U. S. 383 (1943) said at page 392:

"The reason for judicial caution in adjudicating the relative rights of States in such cases is that, while we have jurisdiction of such disputes, they involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the federal constitution. We say of this case, as the court has said of interstate differences of like nature, that such mutual accommodation and agreement should, if possible, be

the medium of settlement, instead of invocation of our adjudicatory power."

And at page 393:

"In such disputes as this, the court is conscious of the great and serious caution with which it is necessary to approach the inquiry whether a case is proved. Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the action of a State, for the burden on the complaining State is much greater than that generally required to be borne by private parties. Before the court will intervene the case must be of serious magnitude and fully and clearly proved. And in determining whether one state is using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one State or the other must be weighed as of the date when the controversy is mooted."

In *Nebraska v. Wyoming,* 325 U. S. 589 (1945) this court said of *Colorado v. Kansas,* supra, at page 610:

"* * * It is true that an apportionment of the water of an interstate river was denied in that case. But the downstream State (Kansas) did not sustain the burden of showing that since the earlier litigation between the States (see *Kansas v. Colorado,* 206 U. S. 46), there had been a material increase in the depletion of the river by Colorado. Improvements based upon irrigation had been made by Colorado while Kansas stood by for over twenty years without protest. We held that in those circumstances a plain showing was necessary of increased depletion and sub-

stantial injury to warrant a decree which would disrupt the economy of the upstream State built around irrigation. * * *"

If the complaint is filed, Colorado will take the position that it is inequitable to expect it to pay the entire debit claimed and ask the court to determine what, if any, part would be an equitable portion for it to pay. The alleged debit was built up during 15 years of unprecedented drought and it is not equitable for one state to ask another state to make water deliveries under these circumstances after all this delay. Latches and limitations serve to eliminate some or all of the debit.

Article VI of the Rio Grande Compact prohibits annual or accrued debits in excess of 100,000 acre feet on the part of Colorado and 200,000 acre feet on the part of New Mexico.

The debit claimed by Texas in its complaint to have been accrued by Colorado so far exceeds these figures as to raise instantly two questions: (1) Either the estimates of the available water supply on which the negotiators of the Compact relied were so inaccurate as to cause the entire agreement to be based on mutual mistake of fact, or (2) Conditions have so altered on the Rio Grande since the negotiation of the Compact as to make performance impossible or inequitable. In either instance, the Court would, of necessity, be required to reform the agreement, and, as pointed out above, the United States, because of its numerous interests, would clearly be an indispensable party to such a decree.

Another equitable basis for adjusting any alleged debit lies in the fact that neither the State Line Reservoir

—for which Wagon Wheel Gap Dam should be substituted —(See House Document Numbered 693, Seventy-sixth Congress, third session) nor the Closed Basin Drain were constructed as anticipated by the 1929 Compact. (See quotation of Article II on pages 8 and 9 of this brief.)

As matters now stand, Colorado is bearing the burden of the international obligation to the Republic of Mexico without the aid of physical works to assist in the delivery of water under the Compact, contrary to the intention of the three states as expressed in the 1929 Compact.

This again requires an equitable readjustment of the obligation of Colorado, and, as pointed out above, the United States is a necessary and indispensable party to any such readjustment.

F. THE CASE MUST BE DISMISSED BECAUSE THE UNITED STATES IS AN INDISPENSABLE PARTY AND IT MAY NOT BE INVOLUNTARILY JOINED AS A DEFENDANT.

We have shown that the United States is an indispensable party because its rights will be affected, because in its absence a decree may not be entered which is compatible with equity and good conscience, and because the case and the relief sought involve the relative rights of the United States and other water users.

The immunity of the United States to suit, without consent, is well established. This rule applies to a suit against the United States by a state (see *Kansas v. United States,* 204 U. S. 331 (1907)).

In *Arizona v. California,* supra, the Court said (298 U. S. 572):

> "* * * A bill of complaint will not be entertained which, if filed, could only be dismissed because of the absence of the United States as a party."

To the same effect is *Louisiana v. McAdoo,* 234 U. S. 627 (1914), and *Texas v. New Mexico,* 352 U.S. 991 (1957).

II.

The Elephant Butte Irrigation District And The Middle Rio Grande Conservancy District Are Indispensable Parties Because Any Decree Entered In These Proceedings Will Determine The Relative Rights Of Water Users In Those Districts. These Districts Are The Real Parties In Interest But Cannot Be Joined Because Of The Eleventh Amendment.

As has been previously stated, Colorado will ask the Court to determine the size of the New Mexico debit and enter an order creating a repayment schedule for this debit in order that relief to Colorado may be obtained through actual spill. It is, of course, to the interest of the Elephant Butte Irrigation District to have a finding of the largest possible New Mexico debit and it is to the interest of the Middle Rio Grande District to have a finding of no debit at at all. Under these circumstances, New Mexico is not in a position on a *parens patriae* basis to represent both districts. It should be pointed out that in previous litigation, *Texas v. New Mexico,* 352 U. S. 991 (1957), New Mexico took the position of the Rio Grande Conservancy District and vigorously pursued the proposition that the New Mexico accrued debit was either small or

non-existent. New Mexico now takes the side of the Elephant Butte Irrigation District against Colorado and presumably will stand against upper New Mexico on the New Mexico debit question.

A situation somewhat similar to this is found in the suit *Minnesota v. Northern Securities Co.*, 184 U.S. 199 (1902). This was an original suit by Minnesota against a corporation of another state to restrain interference with domestic corporations. The Supreme Court held that the domestic corporations were indispensable parties and dismissed the bill saying among other things (184 U. S. 246):

> "* * * It is not sufficient to say that the Attorney General, or the Governor, or even the Legislature of the State, can be conclusively deemed to represent the public interests in such a controversy as that presented by the bill. Even a State, when it voluntarily becomes a complainant in a court of equity, cannot claim to represent both sides of the controversy. Not only have the stockholders, be they few or many, a right to be heard, through the officers and directors whom they have legally selected to represent them, but the general interests of the public, which might be deeply affected by the decree of the court, are entitled to be heard; and that, when the state is the complainant, and in a case like the present, can only be effected by the presence of the railroad companies as parties defendant.
>
> "Upon investigation it might turn out that the allegations of the bill are well founded, and that the State is entitled to relief; or it might turn out that there is no intention or design on the part of the railroad companies to form any combination in disregard

of the policy of the State, but that what is proposed is consistent with that policy and advantageous to the communities affected. *But, in making such investigation, a court of equity must insist that both sides of the controversy shall be adequately represented and fully heard.*" (Emphasis supplied)

The Middle Rio Grande Conservancy District becomes an indispensable party to protect the interests of the water users in that district. Once this district is in the litigation it is in the position of suing Colorado in an original proceeding in the United States Supreme Court to force Colorado to make debit deliveries and defending against Texas and Colorado's assertions as to New Mexico debit deliveries. Whether at this stage New Mexico will take the side of the Middle Rio Grande District or take the side of the Elephant Butte Irrigation District cannot be forecast. It would therefore appear the Elephant Butte Irrigation District is a necessary party to protect its own interests and that it gets into the litigation as a plaintiff against Colorado and the Middle Rio Grande District. Neither District can sue Colorado in the courts of the United States.

Article XI of the United States Constitution provides:

"States may not be sued by individual.—The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

The Elephant Butte Irrigation District and Middle Rio Grande Conservancy District are indispensable parties

because a decree will necessarily require the determination of the relative rights of the Elephant Butte Irrigation District on the one hand and of the Middle Rio Grande Conservancy District, the Indians, and other New Mexico water users above San Marcial on the other hand.

In fact a part of the controversy will be between the New Mexico area above San Marcial and the New Mexico area below that point.

For purposes of determining citizenship, the Elephant Butte Irrigation District and Middle Rio Grande Conservancy District are considered New Mexico citizens. To this effect are *Cowles v. Mercer County,* 7 Wall. 118 (1868), and *Seattle v. Oregon & Washington R. R. Co.,* 255 U. S. 56 (1921). The rule is that a state may not be sued by one of its citizens without its consent. A leading case on the matter is *Fitts v. McGhee,* 172 U. S. 516 (1899), from which we quote (172 U. S. 524):

> "* * * It is true that the Eleventh Amendment of the Constitution of the United States does not in terms declare that the judicial power of the United States shall not extend to suits against a State by citizens of such State. But it has been adjudged by this court upon full consideration that a suit against a State by one of its own citizens, the State not having consented to be sued, was unknown to and forbidden by the law, as much so as suits against a State by citizens of another State of the Union, or by citizens or subjects of foreign States."

In *Duhne v. New Jersey,* 251 U. S. 311, 313 (1920) the Court said:

> "* * * But it has been long since settled that the whole

sum of the judicial power granted by the Constitution of the United States does not embrace the authority to entertain a suit brought by a citizen against his own State without its consent."

To the same effect are *Hans v. Louisiana,* 134 U. S. 1 (1890), and *North Carolina v. Temple,* 134 U. S. 22 (1890).

The very question involved here was before the court in the original action of *California v. Southern Pacific Co.,* supra. There the court held that the city of Oakland, a California municipality, was an indispensable party. The Court dismissed the case, saying (157 U. S. 261):

"If, by virtue of the subject-matter, a case comes within the judicial power of the United States, it does not follow that it comes within the original jurisdiction of this court. That jurisdiction does not obtain simply because a State is a party. Suits between a State and its own citizens are not included within it by the Constitution; nor are controversies between citizens of different States.

"It was held at an early day that Congress could neither enlarge nor restrict the original jurisdiction of this court. * * * The jurisdiction is limited, and manifestly intended to be sparingly exercised, and should not be extended by construction. What Congress may have power to do in relation to the jurisdiction of Circuit Courts of the United States is not the question, but whether, where the Constitution provides that this court shall have original jurisdiction in cases in which the State is plaintiff and citizens of another State defendants, that jurisdiction can be held to embrace a suit between a State and citizens of another

State and of the same State. *We are of the opinion that our original jurisdiction cannot be thus extended, and that the bill must be dismissed for want of parties who should be joined, but cannot be without ousting the jurisdiction.''* (Emphasis supplied).

In *Niles-Bement-Pond Co. v. Iron Moulders Union,* supra, the Court affirmed an order of dismissal because an indispensable party, which had not been joined, had to be aligned with the plaintiff and, when so aligned, the necessary diversity of citizenship was destroyed. We quote from 254 U. S. 81-82:

> ''Looking, as the court must, beyond the pleadings, and arranging the parties according to their real interest in the dispute involved in the case, * * * it is clear that the identity of interest of the Tool Company with the petitioner required that the two be aligned as plaintiffs, and that with them so classified, the case did not present a controversy wholly between citizens of different States, within the jurisdiction of the District Court.''

This is not a case in which New Mexico must be deemed to represent all of its water users.

In *Nebraska v. Wyoming,* 295 U. S. 40 (1935), the Court held that the Secretary of the Interior was not an indispensable party because his actions under the Reclamation Act required compliance with state law and Wyoming would stand in judgment for him as for any other appropriator in that state. That principle does not apply here because:

(1) The Indians are wards of the United States and

their lands and waters are not under the jurisdiction of New Mexico but are under the protection of the United States.

(2) The issues in this case involve the relative rights of appropriators *inter sese,* a factor which was not present in the *Nebraska v. Wyoming,* supra, case.

(3) The interests of the Elephant Butte Irrigation District are exactly opposite from the interests of Middle Rio Grande Conservancy District in the New Mexico debit situation.

Likewise the *parens patriae* doctrine that a state must be deemed to represent all of its citizens does not apply to the Elephant Butte Irrigation District and Middle Rio Grande Conservancy District. In *New Jersey v. New York,* 345 U. S. 369 (1953), the Court denied the petition of Philadelphia to intervene in the Delaware River case. However, the Court said (345 U. S. 373):

"Our original jurisdiction should not be thus expanded to the dimensions of ordinary class actions. An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, *which interest is not properly represented by the state.* * * * Philadelphia has not met that burden and, therefore, even if her intervention would not amount to a suit against a state within the prescription of the Eleventh Amendment (and we do not intend to give any basis for implying that it does), leave to intervene must be denied." (Emphasis supplied)

The interests of both districts cannot be represented

by the state. The only way to be sure that the interests of both districts are protected is to have them before the court. It is certain that as to the Upper New Mexico debit one district is in the position of plaintiff and the other is in the position of defendant. On the question of whether the upstream district can use Colorado debit deliveries, the districts also are on opposite sides. So we have a situation where the citizens of New Mexico are suing citizens of New Mexico. This is not a situation for exercise of original jurisdiction and the motion to file the complaint should be dismissed.

The United States might attempt to act on a *parens patriae* basis. *Ickes v. Fox,* 300 U. S. 82 (1937). But it cannot because of its own conflicting interests and those of its beneficiaries. *Minnesota v. Northern Securities Company,* supra.

With respect to the alleged Colorado debit, this case is not unlike *New Hampshire v. Louisiana,* 108 U. S. 76 (1883). In that case New Hampshire bond holders assigned Louisiana bonds which were in default to the state and the state brought an action against Louisiana. This technique was adopted because the Eleventh Amendment prevented the bond holders from suing Louisiana directly. The Court held that the Eleventh Amendment prevented the suit because, page 84:

> "* * * It is a vicarious controversy between individuals"

A similar holding is found in *North Dakota v. Minnesota,* 263 U. S. 365 (1923), where North Dakota brought an action to enjoin Minnesota from flooding North Dakota lands by means of drainage works and also for money

damages for North Dakota inhabitants whose farms were injured and whose crops were lost. This Court said, page 374-375:

> "* * * It is difficult to see how we can grant a decree in favor of North Dakota for the benefit of individuals against the State of Minnesota in view of the Eleventh Amendment to the Constitution, which forbids the extension of the judicial power of the United States to any suit in law or equity prosecuted against any one of the United States by citizens of another State or by citizens and subjects of a foreign State.
>
> * * * It was argued that as a sovereign the State might press the claims of its citizens against another State, but it was answered by this Court that such right of sovereignty was parted with by virtue of the original Constitution in which, as a substitute therefor, citizens of one State were permitted to sue another State in their own names, and that when the Eleventh Amendment took away this individual right, it did not restore the privilege of state sovereignty to press such claims. The right of a State as *parens patriae* to bring suit to protect the general comfort, health, or property rights of its inhabitants threatened by the proposed or continued action of another State, by prayer for injunction, is to be differentiated from its lost power as a sovereign to present and enforce individual claims of its citizens as their trustee against a sister State. For this reason the prayer for a money decree for the damage done by the floods of 1915 and 1916 to the farms of individuals in the Bois de Sioux Valley, is denied, for lack of jurisdiction."

In this case New Mexico cannot act for the Elephant

Butte Irrigation District against Colorado, and thus initiate an action in violation of the protection of the Eleventh Amendment. The same rule is found in *West Virginia ex rel Dyer v. Sims,* 341 U. S. 22 (1951).

The real parties in interest in New Mexico are the two districts. They are indispensable to a determination of this litigation. Until they become parties, this Court does not have jurisdiction to proceed. If they become parties, the Eleventh Amendment prevents suit in the Federal Courts.

III.

The Existence Of An Administrative Solution To The Problem Renders Litigation Unnecessary.

As this Court has frequently held, not every matter which would be cognizeable in equity if between private citizens in the same jurisdiction would warrant the United States Supreme Court in accepting jurisdiction (*Missouri v. Illinois and the Sanitary District of Chicago,* supra p. 521), citing the language of Mr. Justice Holmes:

> "Before this court ought to intervene the case should be of serious magnitude clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the side. See *Kansas v. Colorado,* 185 U. S. 125."

Litigation between sister states was avoided by administrative means in *Texas v. New Mexico,* 308 U. S. 510 (1939) and *Texas v. New Mexico,* 352 U. S. 991 (1957).

In 1936, Texas instituted a suit against New Mexico

which was resolved by the administrative solution afforded when the Rio Grande Compact was signed.

In 1951 Texas commenced another proceeding against New Mexico asking that New Mexico be required to make good its debits under the Compact. This proceeding was dismissed because the United States was an indispensable party and refused to intervene because an administrative solution existed, this being the construction of the Middle Rio Grande Reclamation Project as has been recounted earlier in this Brief. In *North Dakota v. Minnesota,* supra, a case involving a charge that Minnesota drainage works caused floods in North Dakota, this court ordered extended hearings (256 U. S. 220) on whether there was any solution within "reasonable expenditure" by the construction of works. The court suggested five alternatives itself including detaining basins, dams, and channel improvements.

A similar administrative solution exists in the present controversy, and this administrative solution should be employed to prevent litigation between the three states.

For many years the water users of the San Luis Valley and the officials of the State of Colorado, charged with responsibility in connection with deliveries which have occurred, have endeavored to find a solution to the problem which would not destroy the economy of the area, one of the most productive high altitude farming and ranching areas in the country.

The northern portion of the San Luis Valley, which constitutes the Closed Basin, is separated from the Rio Grande watershed by a low alluvial divide. Into this Closed Basin, over 600,000 acre feet of water flows each year, almost half from diversions from the Rio Grande.

That part of the water delivered to the Closed Basin not beneficially consumed is now dissipated by nonbeneficial evapotranspiration, and none returns to the Rio Grande.

Supported, in part, by substantial contributions from the State of Colorado and the local water users, the Bureau of Reclamation made a reconnaissance report dated August 1956, which was endorsed by the local conservancy districts and the Colorado Water Conservation Board, the state agency charged with responsibility in interstate water matters (Sec. 149-1-11, C.R.S. 1963).

This reconnaissance report was reviewed and refined and a report entitled, "Plan for Development of Closed Basin Division, San Luis Valley Project, Colorado", was issued by the United States Department of the Interior through the Bureau of Reclamation, in 1963. This report has been approved, with certain reservations, by Texas, New Mexico, Colorado, by the Department of the Interior, and has been released by the Bureau of the Budget for transmittal to the Congress. The construction of the project described in this report will, we believe, obviate the necessity for any litigation.

The principal purpose of the project, as described in the report by the Regional Director of Region 5 of the Bureau of Reclamation is:

> "to salvage, without adverse effect on surrounding irrigated areas, shallow ground waters which presently are non beneficially consumed by evaporation and transpiration. It contemplates deliverance of salvaged waters to the Rio Grande to improve Colorado's debit status under the Rio Grande Compact . . ."

"The plan provides for maintaining, by year-round pumping, ground water levels at least 8 feet below the ground surface over selected areas totaling about 108,600 acres, with resultant water salvage of about 86,500 acre feet annually. An average 15,200 acre feet also would be salvaged annually by providing outlets for surface waters . . ."

A complete copy of the Regional Director's letter of transmittal describing the project in more detail, including substantial fish and wildlife benefits, is attached as Appendix 2. The comments of the States of Texas and New Mexico submitted under the provisions of the Flood Control Act of 1944 (58 Stat. 887) are attached as Appendices 3 and 4.

There are two water conservancy districts in the San Luis Valley, the San Luis Valley Water Conservancy District and the Conejos Water Conservancy District. Each of these districts, through their respective Boards of Directors, approved the project, with certain qualifications. Their comments are attached as Appendices 5 and 6.

On April 14, 1965, the Colorado Water Conservation Board authorized its director to transmit to the Secretary of the Interior the concurrence of the Board. A copy of that letter of transmittal is attached as Appendix 7.

In 1964 another report, this one entitled, "Reconnaissance Report on Rio Grande Water Salvage Project", was issued by the Bureau of Reclamation. This reports additional possibilities for water salvage, over and above that salvage contemplated by the Closed Basin Water Salvage Plan, reaching a potential of 87,130 acre feet per annum.

Certainly all of these practical and administrative solutions to the vexing problems arising out of the Rio

Grande Compact should be explored before the economic waste of interstate litigation is permitted.

CONCLUSION

Colorado, therefore, respectfully submits that the United States, the Elephant Butte Irrigation District and the Middle Rio Grande Conservancy District are indispensable parties to the lawsuit, and Colorado urges this court to determine the motion and not allow a complaint to be filed. Colorado's grounds are that this court should not entertain litigation in the absence of necessary parties, should not permit the citizens of New Mexico to sue Colorado, and this court should not lend aid to the settlement of interstate controversies when an administrative solution exists.

If the court cannot dispose of this matter on briefs and arguments, it is suggested that a special master be appointed to take evidence and prepare a report on the question of whether leave to file the complaint should be granted.

Respectfully submitted,

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Proof Of Service

I, DUKE W. DUNBAR, Attorney General of Colorado, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 27th day of January, 1967, I served copies of the foregoing Brief in Opposition to Motion For Leave to File Complaint on the Governor of the State of Texas and the Attorney General of Texas and on the Governor of the State of New Mexico and the Attorney General of New Mexico, by mailing a copy in duly addressed envelopes with first-class postage pre-paid, to each of the following in this cause:

Honorable John B. Connally — Governor of the State
Governor of Texas
Capitol Building
Austin, Texas

Honorable David F. Cargo — Governor of the State
Governor of New Mexico
Capitol Building
Santa Fe, New Mexico

Honorable Crawford C. Martin — Attorney General of the State
Attorney General of Texas
Capitol Station
Austin, Texas 78711

Honorable Boston E. Witt — Attorney General of the State
Attorney General of New Mexico
State Capitol
Santa Fe, New Mexico 87501

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DUKE W. DUNBAR

APPENDICES

APPENDIX 1

WATER RIGHTS OWNED BY U.S. WILDLIFE REFUGE

Name of Ditch	Stream	Priority No.	Priority Date	Amt. of Decree In CFS.	Approximate Amt. in CFS. Owned by U.S. Wildlife Service
Chicago	Rio Grande	174	July 15, 1879	23.20	46.8
		196	Dec. 31, 1880	3.20	
		1916-100		40.00	
		1934-14	April 24, 1924	40.00	
Costillo	Rio Grande	293	Aug. 11, 1886	103.30	3.5
Empire Canal	Rio Grande	71	Dec. 3, 1874	1.80	4.7
		211	May 1, 1881	4.28	
		236-A	Aug. 10, 1882	312.30	
		310-A	May 16, 1887	6.00	
		335-A	May 16, 1888	2.30	
		361-A	Oct. 30, 1889	92.00	
		361-B	Jan. 31, 1890	93.32	

Monte Vista Canal	Rio Grande	224	May 31, 1882	132.20	
		358	May 24, 1889	125.30	
		1903-24A	June 30, 1891	13.35	
		1903-30A	June 30, 1892	20.58	
		1903-34A	June 30, 1893	9.44	
		1903-37	June 30, 1894	3.75	31.8
		1903-41	June 30, 1895	1.63	
		1903-45A	June 30, 1896	10.42	
		1903-46A	June 30, 1897	5.21	
		1903-49B	June 30, 1898	14.33	
		1903-52A	June 30, 1899	4.56	
New	Rio Grande	1903-22	June 30, 1890	2.61	2.61
		1903-49A	June 30, 1898	2.61	2.61
		1903-62	June 30, 1902	5.21	5.21
		1959-25	May 15, 1936	20.00	20.00
Stewart	Rio Grande	1959-34	1951	20.00	20.00

WATER RIGHTS OWNED BY U.S. WILDLIFE REFUGE

Name of Ditch	Stream	Priority No.	Priority Date	Amt. of Decree In CFS.	Approximate Amt. in CFS. Owned by U.S. Wildlife Service
San Luis Valley	Rio Grande	270	Jan. 5, 1885	92.90	
		357	April 1, 1889	0.70	
		362	April 1, 1890	3.40	
		1903-22B	June 30, 1890	161.46	
		1903-22F	June 30, 1890	5.21	
		1903-24D	June 30, 1891	44.27	
		1903-24G	June 30, 1891	11.07	
		1903-34D	June 30, 1893	31.25	
		1903-34H	June 30, 1893	15.63	
		1903-37C	June 30, 1894	10.42	2.6
		1903-37F	June 30, 1894	13.02	
		1903-41C	June 30, 1895	7.81	
		1903-45D	June 30, 1896	18.25	
		1903-45G	June 30, 1896	14.33	
		1903-46D	June 30, 1897	20.84	
		1903-49E	June 30, 1898	26.04	
		1903-49H	June 30, 1898	10.42	
		1903-52D	June 30, 1899	10.42	
		1903-57B	June 30, 1900	27.34	
		1916-30	Dec. 15, 1890	50.00	

McNeil No. 1	Rock Creek	1903-47	April 15, 1898	1.20	1.20
McNeil No. 2	Rock Creek	1903-47A	April 15, 1898	1.20	1.20
Parma	Rock Creek	1959-11	June 4, 1919	21.00	21.00
Getz Seepage No. 3	Seepage	1959-12	June 4, 1919	26.00	26.00
Getz Seepage No. 4	Seepage	1959-13	June 4, 1919	8.50	8.50
Deekman No. 1	Spring Creek	186	May 6, 1880	0.90	0.90
Deekman No. 2	Spring Creek	212	May 8, 1881	0.90	0.90
Meadow	Spring Creek	286	June 24, 1885	0.80	0.80
Meadow	Spring Creek	306	April 1, 1887	3.46	3.46
Resettlement	Spring Creek	254	March 20, 1884	6.30	6.30
		291	June 30, 1886	1.00	1.00
		311	Nov. 30, 1887	1.80	1.80
		315	Nov. 30, 1887	3.20	3.20
		326	April 1, 1888	3.52	3.52
		351	April 1, 1889	2.90	2.90
Sheridan North	Spring Creek	245	April 1, 1883	1.60	1.60
		303	April 1, 1887	0.40	0.40
Sheridan South	Spring Creek	238	Sept. 30, 1882	1.00	1.00
		299	March 31, 1887	1.00	1.00
		321	April 1, 1888	1.00	1.00
South Farm Meadow	Spring Creek	1903-7A	June 30, 1884	15.00	15.00
Spruce Lawn	Spring Creek	316	Feb. 10, 1888	1.00	1.00
		1903-53A	April 1, 1900	10.00	10.00
		1903-59	Oct. 15, 1900	6.00	6.00

APPENDIX 2

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Region 5
Amarillo, Texas
July 22, 1963

To: Commissioner, Washington, D.C.
From: Regional Director
Subject: Plan of Development of Closed Basin Division, San Luis Valley Project, Colorado

This letter, with its supporting reports, constitutes my report on the Closed Basin Division, San Luis Valley Project, Colorado. My report has been prepared under the general authority of Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and acts amendatory thereof or supplementary thereto) and under the specific authority of the Interior Appropriations Act of 1941 (Act of June 18, 1940, Ch. 395, 54 Stat. 406).

My report is transmitted as the basis for securing congressional authorization of the plan of development for the Closed Basin Division of the San Luis Valley Project, Colorado, described herein, and construction of the water salvage and related works contemplated by the plan. The plan would salvage for beneficial use an average of 101,700 acre-feet of water annually, which is now being lost by evaporation or consumed by salt grass, rabbit brush, greasewood, and other vegetation. It would permit delivery of additional Rio Grande flows to the States of New Mexico and Texas in accordance with the provisions of the Rio Grande Compact, provide for the establishment of two

national wildlife refuges for preservation and propagation of wildlife, and provide for development of available fishing and recreational opportunities. The completion of the investigations on which this report is based was facilitated by the contribution of funds therefor by the State of Colorado and the San Luis Valley Water Conservancy District.

The Rio Grand Compact, which provides for apportionment of the flows of the Rio Grande among the concerned States, recognized the potentialities for delivery of Closed Basin waters to the Rio Grande and provides that Colorado shall be credited with the amount of such water delivered to the Compact station at Lobatos if the proportion of sodium ions in the salvaged water shall be less than 45 percent of the total positive ions when the total dissolved solids in such water exceeds 350 parts per million.

Expanding water uses in the Rio Grande Basin, recent occurrence of an extreme and protracted drought, and the increasingly adverse debit status of Colorado under the Rio Grande Compact all emphasize the need for optimum salvage of nonbeneficially consumed waters in the San Luis Valley.

The Bureau of Reclamation in 1955 completed a supplemental report on a reservoir at the Wagon Wheel Gap site on the Rio Grande. This report reaffirmed a previous finding that construction of a reservoir at the site was merited to provide needed supplemental and regulated water supplies to about 271,000 acres of irrigated lands in the San Luis Valley. It proposed supplemental authorization of its construction as a unit of the San Luis Valley Project. The States of Texas and New Mexico, in their comments on the report, indicated unwillingness to concur

in its construction until Colorado is in full compliance with the Rio Grande Compact. Further processing of the report to Congress has been deferred for resolution of this matter. Accomplishment of debit-free status by Colorado is desirable to remove the expressed objections of Texas and New Mexico to construction of the Wagon Wheel Gap Dam and Reservoir.

The plan of development represents the culmination of investigations which were summarized in a report to the Colorado Water Conservation Board dated March 1939; reflected in the report of the Bureau of Reclamation entitled "Report on San Luis Valley Project, Colorado," dated January 1940, and published as House Document No. 693, 76th Congress, 3rd Session; and recognized in the authorization of the San Luis Valley Project by the Interior Appropriation Act of 1941 which included the proviso: "That commencement of construction of the Closed Basin Drain feature shall be contingent on (a) a conclusive finding of justification for the drain on the basis of cost and the quantity and quality of water to be secured,—." In line with this requirement further investigations of water salvage plans for the Closed Basin were undertaken and a revised plan developed. This plan was presented in a reconnaissance report dated August 1956, which was endorsed by the San Luis Valley Water Conservancy District and the Colorado Water Conservation Board. In turn, a partial draft of a feasibility report on the plan was forwarded to the Board, among others, in August 1960. The plan of development was then modified to conform to the views of the Board.

The plan of development provides for salvage of available surface flows as originally contemplated; but its

principal purpose is to salvage, without adverse effect on surrounding irrigated areas, shallow ground waters which presently are nonbeneficially consumed by evaporation and transpiration. It contemplates deliverance of salvaged waters to the Rio Grande to improve Colorado's debit status under the Rio Grande Compact. It recognizes the importance of the San Luis Valley in the National Migratory Bird Program. It includes measures for development of the optimum fish and wildlife and recreation benefits. It would authorize development of the proposed Mishak Lakes and Alamosa National Wildlife Refuges, the former as a part of the project construction.

The plan provides for maintaining, by year-round pumping, ground-water levels at least 8 feet below the ground surface over selected areas totaling about 108,600 acres, with resultant water salvage of about 86,500 acre-feet annually. An average 15,200 acre-feet also would be salvaged annually by providing outlets for surface waters. The hydrologic analyses indicate that, under the plan and on the basis of records to date, delivery of salvaged water to the Compact station at Lobatos over a 35-year period would permit Colorado to achieve a debit-free Compact status; but no firm forecast of the period which would be required can be made. The studies further indicate that, at the end of that period, unless Colorado's ability to deliver Rio Grande flows has improved, an average of 59,200 acre-feet annually of the salvaged water would be required to maintain Colorado in debit-free status.

The locations of the adopted water salvage areas, the proposed Mishak Lakes and Alamosa National Wildlife Refuges and the primary features of the water salvage

plan, are indicated on the perspective Drawing 253-504-1829.

The water salvage plan would include the following features:

1. About 129 deep wells and pumping plants located throughout the water salvage areas, each having continuous water yields averaging from 0.5 c.f.s. to 3.5 c.f.s. Transmission lines, substations, and other facilities required for operation of the pumping plants and control of the pumping operations. About 110 miles of transmission lines would be required.

2. A Main Conveyance Channel about 44 miles long, beginning at the east boundary of the proposed Mishak Lakes National Wildlife Refuge and running southeasterly to the west side of San Luis Lake and then south to the Rio Grande. The Main Conveyance Channel would have a design capacity of 34 c.f.s at the upper end, increase in size to 158 c.f.s near San Luis Lake, have that capacity to the junction with the East Side Conveyance Channel near U.S. Highway 160, and have a capacity of 210 c.f.s from the junction to its outlet into the Rio Grande.

3. A channel about one-half mile long to connect the Main Conveyance Channel with San Luis Lake to permit maintenance of the lake at essentially a constant level for fish and wildlife and recreation purposes and for temporary storage of salvaged waters in the lake when circumstances make such action desirable. The connecting channel would have a capacity of 158 c.f.s

4. An East Side Conveyance Channel, about 11 miles long, would collect the salvaged water from the salvage area lying on the east side of the Main Conveyance Chan-

nel and south of San Luis Lake and deliver it to the Main Conveyance Channel near U.S. Highway 160. The capacity of the channel would increase downstream from 10 c.f.s to 52 c.f.s.

5. Well field laterals to deliver the pumped ground water to the conveyance channels. These laterals would total about 92 miles in length and vary in capacity from 0.6 c.f.s to 20 c.f.s.

6. Highway and railroad crossings, county and farm bridges, surface drain and lateral inlet structures, and other miscellaneous structures, and access and operating roads.

7. Basic recreational facilities would be provided at San Luis Lake, and the Mishak Lakes National Wildlife Refuge would be developed as a project feature. Measures to improve fish habitat in the conveyance channels and to aerate the pumped ground waters would be provided in accordance with recommendations of the Bureau of Sport Fisheries and Wildlife and the Colorado Department of Game and Fish.

The plan contemplates use by the Alamosa National Wildlife Refuge of 5,300 acre-feet of salvaged waters annually, with diversion of such water to be provided for as part of development of that refuge. It also provides for nominal use of salvaged waters to provide water supplies for fish hatcheries which are being considered for construction in the Closed Basin.

The plan provides for stage development of the water salvage features to provide assurance to San Luis Valley irrigators and interests that pumping of the shallow

ground waters does not adversely affect ground-water conditions in the Valley.

The plan contemplates that construction, operation, and maintenance of the water salvage features would be nonreimbursable Federal expenses. Both the States of Colorado and New Mexico have strongly endorsed this position and cite the 1906 Treaty with the Unites States of Mexico and the Rio Grande Compact of 1929 as authority for this position. Article II of the 1929 Compact as approved by Congress by the Act of June 17, 1930, is quoted:

"The States of Colorado, New Mexico, and Texas hereby declare:

"(a) That they recognize the paramount right and duty of the United States, in the interests of international peace and harmony, to determine and settle international controversies and claims by treaty, and that when those purposes are accomplished by that means the treaty becomes the supreme law of the Nation;

"(b) That since the benefits which flow from the wise exercise of that authority and the just performance of that duty accrue to all the people, it follows as a corollary that the Nation should defray the cost of the discharge of any obligation thus assumed;

"(c) That with respect to the Rio Grande, the United States, without obligation imposed by international law and 'being moved by considerations of international comity,' entered into a treaty dated May 21, 1906 (Thirty-fourth Statutes, page 2953), with the United States of Mexico which obligated the United States of America to deliver from the Rio Grande to the United States of Mexico sixty thousand acre-feet of water annually and for-

ever, whereby in order to fulfill that promise the United States of America, in effect, drew upon the States of Colorado, New Mexico, and Texas a draft worth to them many millions of dollars, and thereby there was cast upon them an obligation which should be borne by the Nation;

"(d) That for the economic development and conservation of the waters of the Rio Grande Basin and for the fullest realization of the purposes recited in the preamble to this compact it is of primary importance that the area in Colorado known as the Closed Basin be drained and the water thus recovered be added to the flow of the river, and that a reservoir be constructed in Colorado upon the river at or near the site generally described as the State Line Reservoir site. The installation of the drain will materially augment the flow of the river, and the construction of the reservoir will so regulate the flow as to remove forever the principal causes of the difficulties between the States signatory hereto; and

"(e) That in alleviation of the heavy burden so placed upon them it is the earnest conviction of these States that without cost to them the United States should construct the Closed Basin Drain and the State Line Reservoir described in paragraph (d).

"The signatory States agree that approval by Congress of this compact shall not be construed as constituting an acceptance or approval, directly, indirectly, or impliedly, of any statement or conclusion apearing in this article."

A firm forecast of the period of time that would be required for Colorado to achieve debit-free status under the Compact by delivery of salvaged waters to the Rio

Grande cannot be made. However, on the basis of available data concerning historical streamflows, present hydrologic conditions, and operation of the Compact, a period of at least 35 years would be required; and continued annual delivery of about 59,200 acre-feet of salvaged waters to the Rio Grande for Compact credit would be required to maintain Colorado in a debit-free condition. In such event, pumping of ground waters could be reduced to result in salvage of only the amount of waters required to maintain Colorado in a debit-free status or additional uses of Rio Grande flows in Colorado in the amounts surplus to Compact requirements could be initiated to mitigate water shortages which currently are experienced in the San Luis Valley or for potential new developments. If such identifiable uses of salvaged waters in Colorado are undertaken, arrangements should be made with the identifiable beneficiaries for payment of appropriate portions of the costs of the Closed Basin water salvage features.

The plan provides that the water salvage features would be operated and maintained by the Bureau of Reclamation as a unit of the San Luis Valley Project.

The Mishak Lakes National Wildlife Refuge would be operated and maintained at Federal expense under the provisions of the Migratory Bird Conservation Act of February 18, 1929 (45 Stat. 1222), as amended. Operation and maintenance of the recreational facilities at San Luis Lake would be assumed by an appropriate local or State entity at non-Federal expense.

The Federal construction cost, as estimated on the basis of January 1963 prices, totals about $8,370,000, including $414,000 for the Mishak Lakes National Wildlife

Refuge and $180,000 for basic recreational facilities. These costs do not include any allowance for rights-of-way for project purposes on lands owned by the State of Colorado which will be furnished by Colorado as a contribution.

The annual operation, maintenance, and replacement costs of the water salvage features, including measures incorporated for improvement of fish habitat, are estimated on the basis of current prices to average $186,000 annually.

The annual economic costs are estimated to average $448,300 for a 100-year period of analysis.

The evaluated benefits are estimated to total $2,452,800 annually. The ratio of evaluated total annual benefits to estimated Federal costs is 5.47 to 1.0.

Of the $8,370,000 construction cost, $6,906,800 is allocated to water salvage, $832,400 to fishery enhancement, $205,000 to recreation and $425,800 to area redevelopment.

Construction of the proposed water salvage and related facilities as a Federal project in accordance with the plan of development presented herein is desirable to make available for beneficial use urgently needed additional water supplies, to provide desirable fishery, recreational, and area redevelopment benefits.

Recommendations

It is recommended that:

(a) This report be submitted to the Congress for its information and consideration.

LEON W. HILL
Regional Director

Rev. 3-17-64

APPENDIX 3

JOHN CONNALLY
Governor of Texas

April 14, 1965

The Honorable Stewart Udall
Secretary of the Interior
Office of the Interior
Washington, D.C.

Dear Mr. Secretary:

Transmitted herewith are the comments on the "Closed Basin Division, San Luis Valley Project, Colorado". You will note that the Texas Water Commission advises that the State of Texas waive any and all objections to authorization of said project and:

1. That all works shall be constructed and operated so as to produce the maximum net benefit as determined by the Secretary of Interior, and

2. That the delivery of water meeting Rio Grande Compact provisions from the Closed Basin into the Rio Grande above Lobatos shall be maintained at a rate which will eliminate Colorado's deficit in the minimum amount of time, as determined by the Rio Grande Compact Commission.

I hereby endorse and adopt the recommendations of the Texas Water Commission and recommend the action indicated therein.

Sincerely,
JOHN CONNALLY

A RESOLUTION Setting Forth Recommendations Relative to the Plan for Development of the Closed Basin Division, San Luis Valley Project in Colorado

WHEREAS, by letter dated December 2, 1964, the Secretary of the Interior submitted to the Honorable John B. Connally, Governor of Texas, a report from the Bureau of Reclamation entitled "Closed Basin Division, San Luis Valley Project, Colorado" for his comments under the provisions of Section 1(c) of the Flood Control Act of 1944, and

WHEREAS, on February 5, 1965, the Honorable John B. Connally transmitted said report to the Texas Water Commission for a review and suggestions relative to the effect said project may have on the public waters of the State of Texas, and

WHEREAS, the provisions of Article 7472e, V.A.C.S. are not applicable to this project due to its nature and location, but

WHEREAS, said project may affect the existing conditions and terms of the Rio Grande Compact to which the State of Texas is a party and under which the State of Colorado as of the end of the calendar year 1964, had an accrued deficit of 810,800 acre-feet of water:

NOW, THEREFORE, BE IT RESOLVED BY THE TEXAS WATER COMMISSION that the Honorable John B. Connally, Governor of the State of Texas, give consideration to advising the Department of Interior that the State of Texas waives any and all objections to authorization of said project provided:

1. That all works shall be constructed and operated so as to produce the maximum net benefit as determined by the Secretary of the Interior, and

2. That the delivery of water meeting Rio Grande Compact provisions from the Closed Basin into the Rio Grande above Lobatos shall be maintained at a rate which will eliminate Colorado's deficit in the minimum amount of time, as determined by the Rio Grande Compact Commission.

This resolution is adopted and approved by the Texas Water Commission on this 30th day of March, 1965, and the Secretary is directed to transmit a certified copy of the same to the Governor of the State of Texas.

TEXAS WATER COMMISSION
/s/ Joe D. Carter
JOE D. CARTER, *Chairman*
/s/ O. F. Dent
O. F. DENT, *Commissioner*
/s/ William E. Berger
WILLIAM E. BERGER, *Commissioner*

ATTEST:

/s/ Audrey Strandtman
AUDREY STRANDTMAN, *Secretary*

STATE OF TEXAS
COUNTY OF TRAVIS

I, Audrey Strandtman, Secretary of the Texas Water Commission, do hereby certify that the foregoing and attached is a true and correct copy of an order of said

Commission, the original of which is filed in the permanent records of said Commission.

Given under my hand and the seal of the Texas Water Commission, this the 30 day of March, A.D., 1965

/s/ Audrey Strandtman
AUDREY STRANDTMAN, *Secretary*

APPENDIX 4

STATE OF NEW MEXICO
State Engineer Office
Santa Fe

March 8, 1965

The Honorable Stewart L. Udall
Secretary of the Interior
U.S. Department of the Interior
Washington, D.C.

Dear Mr. Secretary:

By letter dated December 2, 1964, a copy of the proposed report of the Department of the Interior on the Closed Basin Division, San Luis Valley Project, Colorado, was transmitted to the State of New Mexico for views and recommendations in accordance with the Flood Control Act of 1944.

The report contemplates a staged development of the project over a period of eight years ". . . to reasonably establish prior to the installation of each stage development, that the preceding stage is being operated without adverse effect on the adjoining ownerships." Data in the report support that the water salvage features of the entire plan can be operated without adverse effects in Colorado; therefore it is strongly recommended that the staged development be reviewed with the objective of shortening as much as possible the period of time required to put the entire project in operation.

The attached letter of January 11, 1965 signed by Mr. Hubert Ball and the attached letter of January 12, 1965 signed by Mr. John L. Gregg set forth respectively the

views of the Middle Rio Grande Conservancy District and the Elephant Butte Irrigation District.

New Mexico concurs in your proposed report and requests that it be submitted to the Congress at the earliest possible date. New Mexico sincerely appreciates the opportunity to present these comments on your report.

Very truly yours,

S. E. Reynolds
State Engineer

Enclosures 2

ELEPHANT BUTTE IRRIGATION DISTRICT
OF NEW MEXICO

Las Cruces, New Mexico

January 12, 1965

Mr. S. E. Reynolds
State Engineer
State Capitol
Santa Fe, New Mexico

Dear Mr. Reynolds:

This will acknowledge receipt of your letter of December 22, 1964 and a copy of the Bureau of Reclamation report on the Closed Basin Division, San Luis Valley Project, Colorado, and requesting comments thereon. The matter has been considered by the Board of Directors of this District and the following comments have been authorized.

The proposed project is offered in order to salvage water that is now lost in the project area and to convey such water to the Rio Grande for delivery to New Mexico. The main purpose of the proposed project seems to be to enable Colorado to gradually extinguish its very substantial debit under the Rio Grande Compact. However, this would require a long period of time, estimated at 35 years. Additional purposes of the project would be to furnish water to proposed wildlife refuges to be established in the project area.

The proposed project would be non-reimbursable as to both construction and operation and maintenance costs. The only exception to this is that, at the end of the estimated 35 year period required to place Colorado on a debit free basis under the Rio Grande Compact, salvaged water, or its equivalent, would be usable in Colorado and those areas using such water, where identifiable, would be approached in regard to making some payment therefor. The authorization of this project on a completely non-reimbursable basis, both as to construction and operation and maintenance, would appear to establish a precedent in the reclamation program that has not yet been achieved.

If the primary purpose of the project is correct, as stated above, the somewhat indifferent attitude of Colorado toward the project appears to be rather peculiar. This attitude seems to be that Colorado is willing to have the project built, operated and maintained entirely at the expense of the Federal government in order to attempt to solve a Colorado problem, provided that it does not, in any way, deprive Colorado users of any water. Colorado so hedges its approval of the project with qualifications that we wonder whether or not they are very strongly in favor of the project.

The proposed project would be built in stages, and each stage would presumably be carefully checked for its effect upon water supply conditions in irrigated areas in Colorado before proceeding with the construction of the next stage. This would limit the volume of salvage for a considerable period of time until the project was entirely completed. Also, since Colorado insists that the use of salvaged water be permissive only, the contribution of the project to the solution of Colorado's debit problem under the Rio Grande Compact could presumably be withdrawn at any time that the internal situation in Colorado so required.

The proposed project, if authorized, should not be permitted to serve as an excuse for Colorado to continue to evade its obligations under the Rio Grande Compact. After all, the proposed project is not a satisfactory substitute for compliance, by Colorado, with the Compact, particularly in view of the fact that it is estimated that as long as 35 years might be required for Colorado to extinguish its debit by means of water salvaged in the Closed Basin.

Insofar as water users below Elephant Butte are concerned, if the proposed project should be built, and should produce the volume of water that it is estimated to be capable of producing, there would still remain a question as to how much of the water would actually be delivered to Elephant Butte. After delivery by Colorado at the state line, the water would still have to pass through that portion of New Mexico above Elephant Butte and would be subject to transportation losses and diversions.

In summary, the proposed project fails to arouse any

great amount of enthusiasm in this District because it does not present a reasonably prompt and satisfactory solution to the Colorado debit situation under the Rio Grande Compact.

Very truly yours,

JOHN L. GREGG
Treasurer-Manager

MIDDLE RIO GRANDE CONSERVANCY DISTRICT

Albuquerque, New Mexico 87103

January 11, 1965

Honorable S. E. Reynolds
State Engineer
State Capitol Building
Santa Fe, New Mexico

Re: Report of Mr. Floyd E. Dominy to Secretary of Interior, Mr. Stewart L. Udall, Closed Basin Division, San Luis Valley Project, Colorado

Dear Sir:

I have gone over the report of the Bureau of Reclamation which offers a plan to solve water lost problems in the lower basin areas and the possible effect it might have on the State of New Mexico and particularly the Middle Rio Grande Conservancy District.

I find that there are no adverse effects and believe that the benefits to New Mexico and our area could possibly be substantial.

I will concur in your recommendation to the Congress

and its various committees that this project be authorized and completed at the earliest possible date.

Respectfully submitted,

HUBERT BALL, Chief Engineer
Middle Rio Grande Conservancy
District

APPENDIX 5

The Hon. J. E. Whitten
State Engineer
State Services Building
Denver, Colorado 80203

March 9, 1965

Dear Gene:

At the request of the Board of Directors of the Conejos Water Conservancy District, I wish to advise you that they have again considered the proposals for the development of the Closed Basin Water Salvage plan and endorse this plan with the understanding that any of enacting legislation will be drawn with a view that no water owned by Colorado will become the property of any other Compact state, but will be used to offset any amounts of water which would be due to New Mexico and Texas under the Rio Grande Compact. In addition, they would want a provision in the legislation which would authorized the cessation of the plan in the event it should develop that the underground waters in the San Luis Valley are being damaged by the closed basin or that any irrigated farms are being injured by the operation of the Water Salvage plan.

I sincerely hope that the Colorado Water Conservation Board will be able to get this matter rolling and forestall any suit by Texas which would be difficult on the irrigators in the San Luis Valley.

Kindest personal regards.

Very truly yours,

HB:jrd

HENRY BLICKHAHN

cc: Mr. Felix L. Sparks
Mr. Raphael J. Moses
Mr. William O. DeSouchet
Mr. Leland Holman

APPENDIX 6

RESOLUTION

WHEREAS, Colorado's debt under the Rio Grande Compact has increased yearly to approximately 700,000 acre-feet and it appears that unless action is taken to reduce such debt the other compact states will institute legal action to force compliance with the compact;

AND WHEREAS the Bureau of Reclamation has completed its "Plan for Development of Closed Basin Division, San Luis Valley Project" which, when operated as planned, should erase the accumulated debt of Colorado under the Rio Grande Compact;

AND WHEREAS such plan provides that all construction and operation costs will be borne by the United States, and further provides for stage development and perimeter observation wells for regular measurement of ground water to insure that project operation will not adversely affect irrigation lands in the San Luis Valley;

AND WHEREAS with the safeguards provided in such plan and which can and should be included in the legislation authorizing such project, it appears that the approval of such plan would be in the best interests of the people of the San Luis Valley:

NOW, THEREFORE, BE IT RESOLVED that the Board of Directors of the San Luis Valley Water Conservancy District approves such Bureau of Reclamation Plan for Development of Closed Basin Drain with the safeguards included therein and with the understanding that the authorizing legislation therefor will provide for a

plan of operation which will insure that no adverse effects on existing water uses will occur and that no right to the waters of the Closed Basin or to demand continuation of importation of such ground water into the Rio Grande River will accrue to the other states or to the United States to the detriment of or against the wishes of water users in Colorado.

ADOPTED February 14, 1963, by the Board of Directors of San Luis Valley Water Conservancy District.

REAFFIRMED by the Board of Directors of San Luis Valley Water Conservancy District, March 11, 1965.

APPENDIX 7

COLORADO WATER CONSERVATION BOARD

215 State Services Building
1525 Sherman Street
Denver, Colorado 80203

May 5, 1965

Honorable Stewart L. Udall
Secretary of the Interior
Interior Building
Washington 25, D.C. 20240

Re: 738—Closed Basin Division, San Luis Valley Project, Colorado.

Dear Mr. Secretary:

Under date of December 2, 1964, there was transmitted to us a proposed report of the Department of the Interior on the Closed Basin Division, San Luis Valley Project, Colorado. The report was submitted to us for the views and recommendations of the State of Colorado pursuant to the provisions of the Flood Control Act of 1944. Acting on behalf of Governor Love as his designated representative under the Flood Control Act, this letter constitutes the views and recommendations of the State of Colorado upon the proposed project.

The proposed project would salvage for beneficial use approximately 101,700 acre-feet of water annually which is now being lost by evaporation and through transpiration from nonbeneficial vegetation. It would permit delivery of additional Rio Grande flows to the States of New Mexico and Texas in accordance with the provisions

of the Rio Grande Compact and partially compensate water users on the Rio Grande River in three states for deliveries to the Republic of Mexico pursuant to international treaty.

The State of Colorado, through the Colorado Water Conservation Board, has participated in the project studies from their inception. The state contributed the sum of $25,000 directly to the Bureau of Reclamation and additional sums to the United States Geological Survey. In 1961 a plan of development was submitted to us for our review by Region 5 of the Bureau of Reclamation. Under date of February 6, 1962, we submitted comments upon the proposed plan for development. Our comments and suggestions of that date have now been incorporated into the proposed report which we have just reviewed.

There has been some fear in Colorado that the importation of water from the Closed Basin into the Rio Grande for the benefit of other states might constitute a demand against the State of Colorado over and above the obligations set forth in the Rio Grande Compact. While the terms of the compact appear to be clear on this point and grant the State of Colorado the right to deliver water into the river from the Closed Basin, we nevertheless feel that the authorizing legislation should contain a provision that any deliveries from the Closed Basin constitute a credit to Colorado under the terms of the Rio Grande Compact.

In our previous comments we also urged that the salvage of ground waters be accomplished in such a manner as to preclude adverse effects on existing irrigation developments within the Closed Basin. To that end the project report has been modified to provide for develop-

ment in stages. In order to protect existing uses within the Basin, it is our recommendation that a committee be established to recommend the construction of the successive stages after stage 1, if it is determined that the successive stages will have no adverse effect on existing irrigation uses. The exact composition of this committee has not yet been determined, but it should consist of representatives from the United States Bureau of Reclamation, the Colorado Water Conservation Board, and local water users.

The preparation of the proposed report has been both difficult and time consuming. We are deeply indebted to the United States Bureau of Reclamation for its thorough and patient approach to a problem which has long seemed to be without solution. We particularly wish to commend the efforts of Mr. William H. Sweet of Region 5 of the Bureau of Reclamation for the many patient years that he has worked in developing the project plan. Without his persistence it is doubtful that the lengthy and perplexing investigations could have culminated in a successful project report.

The State of Colorado is in complete agreement with the project report and we therefore urge that the project be authorized at an early date. Our Department of Game, Fish and Parks concurs with the recreational analysis of the National Park Service and the appended report of the Bureau of Sports Fisheries and Wildlife.

Respectfully yours,

FELIX L. SPARKS, Director

FLS:lk