No. 9 Original

In the Supreme Court of the United States

OCTOBER TERM, 1959

STATE OF ARIZONA, COMPLAINANT

v.

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

THE UNITED STATES OF AMERICA AND STATE OF NEVADA, INTERVENERS

STATE OF UTAH AND STATE OF NEW MEXICO, IMPLEADED DEFENDANTS

Before: Honorable Simon H. Rifkind, Special Master

BRIEF IN SUPPORT OF FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY THE UNITED STATES OF AMERICA

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In the Findings of Fact and Conclusions of Law Proposed by the United States we have endeavored to cover all points which, in our view of the case insofar as the main stream of the Colorado River is concerned, are needful of determination. In keeping with our understanding of the Special Master's suggestions regarding opening briefs in support of findings and conclusions proposed by the several parties, we make no attempt in this brief to present argument with respect to all

aspects of the case, or even as to all points which are presented by our Proposed Findings and Conclusions. Rather, our effort here is to explain further the points we have made where the reasoning in support, or the meaning or significance thereof, may not be self-evident. We, of course, reserve the right in subsequent briefs to argue in support of all points involved in our Proposed Findings and Conclusions even though not referred to in this brief when it appears that those points are challenged, either directly or indirectly, by the Proposed Findings and Conclusions, or briefs, of the other parties.

The portions of the Findings of Fact and Conclusions of Law Proposed by the United States to which the several sections of this brief are particularly pertinent are indicated at the beginning of the respective sections. The general pattern of the captions which precede the several sections is a summarized statement of the points involved in the designated conclusions with which the ensuing discussions are primarily concerned.

We open with a brief discussion of the one proposition which, more than any other, is decisive of the issues in this case respecting the claims of the several States of the Lower Basin to the use within their boundaries of the waters of the main stream of the Colorado River.

CONCLUSIONS 1.1 AND 1.2

The United States has constitutional power to construct and operate the Boulder Canyon Project and to control and allocate the use of the waters of the main stream of the Colorado River available in the Lower Basin.

The first paragraph of Section 4(a) of the Boulder Canyon Project Act (45 Stat. 1057) provided that the Act should not take effect, that no authority should be exercised thereunder, and that no work should be begun or money expended in connection with the works provided for under the Act unless and until certain conditions were satisfied. The conditions were (1) Ratification by all seven States of the Colorado River Basin of the Colorado River Compact or, in the alternative, (2) Ratification by six of such States, including California, and agreement by California "with the United States

and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming" that "the aggregate annual consumptive use of * * * water of and from the Colorado River for use in the State of California * * *, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the Lower Basin States by paragraph (a) of Article III of the Colorado River Compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, * * *."

By Section 5 of the Project Act, the Secretary of the Interior was authorized to contract for storage of water in the reservoir authorized to be constructed and for the delivery thereof under such regulations as he might prescribe. It was further provided that: "Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of Section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

As noted in United States' Proposed Finding 1.19, seven-state ratification of the Compact did not occur within the time specified in Section 4(a) of the Project Act and the State of California, by act of its legislature, agreed to the limitation upon consumptive use of Colorado River water for use in California embodied in the condition imposed by Section 4(a) upon the Act's becoming effective in the event of six-state ratification of the Compact.

We believe that the answers to substantially all questions before the Court in this case respecting the entitlements of the States of California, Arizona, and Nevada to the delivery for use within those States of the waters of the main stream of the Colorado River are to be found within the language of the first paragraph of Section 4(a) of the Project Act, construed in the light of its legislative history and of the Colorado River Compact, and in the water-delivery contracts made by the Secretary of the Interior under authority of Section 5. Brief discussion of Congress' power to require that California agree to the limitation upon uses within that State as a condition precedent to beginning construction of the authorized

works and to provide that no person shall be entitled to have the use for any purpose of the water stored except by contract with the Secretary of the Interior is, therefore, appropriate.

A. THE UNITED STATES HAS CONSTITUTIONAL POWER TO CONSTRUCT AND OPERATE THE BOULDER CANYON PROJECT.

In the first *Arizona* v. *California* case, 283 U.S. 423 (1931), the grant of authority to the Secretary of the Interior by the Boulder Canyon Project Act to construct Hoover Dam and Reservoir was upheld as a valid exercise of Congress' constitutional power to improve navigation. Subsequent decisions of the Supreme Court demonstrate the broad scope of Congress' powers with respect to the additional purposes for which the project works and the water stored thereby are authorized to be used.

Thus, in *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 426 (1940), the Court said:

> "In our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. * * * In truth the authority of the United States is the regulation of commerce on its waters. Navigability * * * is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control. * * * The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government. * * *"

And see *City of Tacoma* v. *Taxpayers*, 357 U.S. 320, 334 (1958). In *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508 (1941), it was held that construction by the United States of a flood control and power reservoir on the non-navigable portion of the Red River in Oklahoma was validly authorized under the commerce clause of the Constitution.

If there were ever a real question respecting the power of Congress, under Article IV, Section 3, Clause 2, of the Consti-

tution, to provide for the irrigation of the public and reserved lands of the United States (See *Arizona* v. *California, supra,* p. 457. But compare *United States* v. *Rio Grande Dam and Irrigation Co.,* 174 U.S. 690, 703 (1899)), that question has been laid to rest by *United States* v. *Gerlach Live Stock Co.,* 339 U.S. 725, 738 (1950), and *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275, 294 (1958). In *Gerlach* the Court declared "the power of Congress to promote the general welfare through large-scale projects for reclamation, irrigation, or other internal improvement" is "clear" and "ample." In *Ivanhoe,* "This power flows not only from the General Welfare Clause of Art. I, § 8, of the Constitution, but also from Art. IV, § 3, relating to the management and disposal of federal property."

B. THE UNITED STATES HAS CONSTITUTIONAL POWER TO REQUIRE AS A CONDITION PRECEDENT TO THE CONSTRUCTION OF THE WORKS AUTHORIZED BY THE PROJECT ACT THAT THE STATE OF CALIFORNIA AGREE TO LIMITATIONS UPON THE CONSUMPTIVE USE OF COLORADO RIVER WATER FOR USE WITHIN THAT STATE, AND TO OTHERWISE PROVIDE FOR THE ALLOCATION OF SUCH WATERS BY REQUIRING THAT NO PERSON SHALL HAVE THE USE THEREOF EXCEPT BY CONTRACT WITH THE UNITED STATES MADE AS STATED IN THE PROJECT ACT.

As it was within the constitutional power of Congress to provide for the construction of Hoover Dam, it was likewise within that body's power to impose conditions upon receipt of the benefits of the project. In *Ivanhoe,* p. 295, the Court held that "the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges" is "beyond challenge," and that "the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof."

Clearly relevant to the purpose of "providing for storage and for the delivery of the stored waters * * * for the reclamation of public lands and other beneficial uses exclusively within the United States" are the requirement by Section 4(a) of the Project Act that the State of California agree to

the limitation therein prescribed upon the consumptive use of Colorado River water for use within that State and the provision of Section 5 that "No person shall * * * be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

Just as clearly are those conditions related to the purposes of flood control, improvement of navigation, river regulation, and generation of electrical energy. But even if there were no such relationship, Congress' power to impose terms upon its grant of the privilege of diverting the waters of the Colorado River is on a parity with its power to impose terms upon its grant of the privilege of constructing an obstruction in the New River in Virginia. See *United States* v. *Appalachian Power Co., supra,* at p. 427. "The Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment."

The Fifth Amendment raises no question respecting the validity of either of the Congressionally imposed conditions under discussion. Without addressing questions respecting the validity or extent of rights to the use of Colorado River water which may be asserted as of the Project Act's effective date, it is sufficient in this connection to note, as did the Supreme Court in the *Ivanhoe* case, at p. 297, that if by operation of these conditions the United States takes, or has taken, "any compensable water or property right the courts are open for redress."

Neither is there any question here respecting the power of Congress to authorize, or the Secretary of the Interior's authority under Section 5 of the Project Act to contract for, the delivery of Colorado River water to areas outside the Colorado River Basin. The Colorado River Compact provides for use within the Lower Basin of the waters apportioned to that Basin. In conformity therewith and with Sections 5 and 8 of the Project Act, all of the contracts for the delivery of stored water which have been made by the Secretary are for use within the Lower Basin as defined by the Colorado River Compact. There is no suggestion or intimation that any contract providing otherwise is contemplated or may be attempted.

We believe that the validity of the limitation by Section 4(a) of the Project Act upon the annual quantity of consumptive use of Colorado River water for use in California and of the provision by Section 5 that no person shall be entitled to the use of stored water except by contract with the Secretary of the Interior made in conformity with Section 4(a) are clearly established by the authorities above reviewed. Accordingly, it would seem unnecessary here to consider whether they might also be supported as being related to the conservation and apportionment of the waters of the Colorado River "among the States equitably entitled thereto" or to a "purpose of performing international obligations." These were mentioned in the first *Arizona* v. *California* decision, *supra,* at p. 458, as possible additional grounds for upholding the constitutionality of the Project Act, but discussion of them was deemed unnecessary to decision of that case.

CONCLUSION 1.3

Valid contracts for the delivery of Colorado River water for consumptive use in California have been made by the United States with various agencies and persons in that State.

Each of the contracts between the United States and the Palo Verde Irrigation District, the Imperial Irrigation District, the Coachella Valley County Water District and the Metropolitan Water District of Southern California, provides that the United States' agreement to deliver water thereunder is "subject to the availability thereof for use in California under the Colorado River Compact and the Boulder Canyon Project Act." Accordingly, the agreement in each instance is subject to the condition that the aggregate annual consumptive use of Colorado River water for use in California shall not exceed the limitation provided for in the first paragraph of Section 4(a) of the Boulder Canyon Project Act.[1] The several contracts, therefore, conform to paragraph (a) of Section 4 of the Project Act as required by Section 5 and they are valid contracts under authority of that Act.

[1] The quantitative effect of this limitation is referred to in the United States' Proposed Conclusions 11.14 and 11.17 and is discussed *infra,* pages 70 and 73.

Each of the said contracts recognizes that of the Colorado River waters available for use within the State of California, such quantity as may be required for beneficial consumptive use upon a gross area not exceeding 25,000 acres of land in the Yuma Reclamation Project within California may be delivered for use upon such lands, subject only to the first priority accorded to Palo Verde Irrigation District with respect to the lands referred to in Section 1 of the California Seven-Party Agreement, which agreement is incorporated into each of the said water-delivery contracts. In view of this reference to the lands of the Yuma Project in each of the existing contracts with the California agencies, it is probably not necessary to go further in order to establish compliance with the last sentence of the first paragraph of Section 5 of the Project Act.

If such should be necessary, we submit that the water-right application contracts between the United States and the individual landowners in the non-Indian portion of the Reservation Division of the Yuma Project constitute compliance with the provisions of Section 5 of the Project Act. With respect to the Indian lands within the Reservation Division of the Yuma Project, which are under the jurisdiction of the Secretary of the Interior, the considerations hereinafter discussed at page 26 of this brief demonstrate that a contract made as stated in Section 5 of the Project Act is not necessary to establish the United States' right to use Colorado River water on such lands.

CONCLUSION 1.4

By reason of and in pursuance of such contracts, the State of California is entitled to the delivery from storage in Lake Mead of sufficient quantities of water to provide for the consumptive use for use in California of an annual quantity of 5,362,000 acre-feet, subject to the availability of water, the provisions of Section 4(a) of the Boulder Canyon Project Act and the California Limitation Act, and certain rights and obligations of the United States.

The United States' Proposed Conclusion 1.4 asserts that the State of California's entitlement to the delivery of water from storage in Lake Mead, as established by the several contracts for

the delivery of water in that State, is subject to, while including, certain rights of the United States and is subject to certain other rights, interests and obligations of the United States with respect to use of the waters of the Colorado River system which are not limited or restricted by the entitlements of the several Lower Basin States to the use of such waters. The several water-delivery contracts do, of course, contain additional provisions not referred to in our Proposed Findings or in our Proposed Conclusion 1.4 which bear upon the deliveries to be made under those contracts, but we believe consideration of such other provisions is not necessary to the decision of this case.

Under the United States' Proposed Conclusion 11.3, it would be determined that the rights of the United States in connection with its several reclamation projects utilizing the waters of the main stream of the Colorado River are included within the entitlements of the respective States to the use within those States of such waters. Under the United States' Proposed Conclusion 11.5, the same determination would be made respecting uses upon the Indian Reservations within the several States, although, as set forth in our Proposed Conclusion 11.6, the rights of the United States with respect to such Indian Reservations are not limited by the entitlements of the respective States in which such uses occur.

The statement in our Proposed Conclusion 1.4 that the California entitlement is subject to and includes the rights of the United States in connection with the Reservation Division of the Yuma Reclamation Project requires no explanation or support beyond reference to Section 2 of the California Seven-Party Agreement, incorporated into the existing water-delivery contracts with the several California agencies.

The statement that such entitlement includes the rights of the United States in connection with the Fort Mohave, Colorado River, and Chemehuevi Indian Reservations in California is explained by our Proposed Conclusion 11.5. The statement that such entitlement is subject to such rights is explained by our Proposed Conclusions 11.7 and 11.12 and by the argument hereinafter presented at pages 22 to 31 and 61 of this brief. That is, the California entitlement to the de-

livery of water from storage in Lake Mead, as established and evidenced by the several water-delivery contracts, is subject to the rights of the United States to use water on the enumerated Indian Reservations in California since such rights are not affected by the Colorado River Compact, the Boulder Canyon Project Act, or the several contracts which have been made by the United States respecting the use of Colorado River water in California. Neither are uses under such rights to be reduced in the event it becomes necessary for the several States to reduce their respective uses on account of the Mexican Treaty burden.

The "other rights" of the United States, referred to in the first subdivision (3) of our Proposed Conclusion 1.4, comprise the rights of the United States to release from Lake Mead and to deliver from the Colorado River into the All-American Canal at Imperial Dam so much water as may be necessary to supply the Imperial Irrigation District and the Coachella Valley County Water District total quantities, including all other waters diverted from the Colorado River for use within said Districts, in accordance with the water-delivery contracts with said Districts. See United States' Proposed Conclusions 7.24 and 4.9.

The rights, interests and obligations of the United States which are not limited or restricted by the entitlements of the several Lower Basin States to the use of Colorado River system water available for use in the Lower Basin which are referred to in the second subdivision (1) of United States' Proposed Conclusion 1.4 and to which the California entitlement is subject, are the following:

> (1) The right of the United States to operate Hoover Dam and the other main stream structures and to release the waters impounded thereby for purposes of flood control, improvement of navigation and river regulation. See United States' Proposed Conclusions 2.1, 11.9, and 11.10.
>
> (2) The right of the United States to use the waters of the Colorado River system for satisfaction of its obligations under the 1944 Mexican Water Treaty. See

United States' Proposed Conclusions 5.1, 11.9, 11.11 and 11.12.

(3) The right of the United States to use the waters of the Colorado River system for maintenance of the wildlife refuge areas referred to in Section VI of the United States' Proposed Findings and Conclusions. See Conclusions 6.1–6.4, inclusive, 11.9 and 11.13.

(4) The right of the United States (a) to use the waters of the tributaries which join the main stream above the California points of diversion upon the lands of the Indian Reservations which utilize the waters of such tributaries and (b) to use the waters of the main stream upon the lands of the Fort Mohave Indian Reservation in Arizona and Nevada (See United States' Proposed Conclusions 4.5.1 and, in the alternative, 4.5.101) and the Colorado River Indian Reservation in Arizona (See United States' Proposed Finding 4.4.19 and Conclusion 4.4.4 and, in the alternative, Finding 4.4.110 and Conclusion 4.4.106). See United States' Proposed Conclusion 11.6(3). The Indian Reservations referred to in part (a) of the preceding sentence are the Moapa Reservation in Nevada (Conclusion 4.13), the Havasupai (Conclusion 4.10), the Hualapai (Conclusion 4.11), the Kaibab (Conclusion 4.12), the Navajo (Conclusion 4.2) and the Hopi (Conclusion 4.3) Reservations in Arizona, and the Navajo Reservation (Conclusion 4.2) and the Zuni Pueblo and Reservation (Conclusion 4.1) in New Mexico. Notwithstanding the California entitlement is subject to the rights of the United States to the use of Colorado River system water on the several Indian Reservations referred to in this paragraph, by our Proposed Conclusions 11.7 and 11.8, it would be determined that in all probability the quantities of water available for use in California under the Colorado River Compact and the Boulder Canyon Project Act will not be diminished by reason of such uses.

The ultimate quantitative effect of the limitation in pursuance of Section 4(a) of the Project Act and the California Limitation Act upon consumptive use of Colorado River water

for use in California would be determined by the United States' Proposed Conclusion 11.17 and is discussed hereinafter at pages 73 to 92, inclusive, of this brief.

The other matters affecting the physical and legal availability of Colorado River water for use in California under the Colorado River Compact and the Project Act referred to in the second subdivision (3) of our Proposed Conclusion 1.4, which in our estimation need be determined for purposes of decision of this case, are considered in our Proposed Findings 11.1 and 11.2 and in our Proposed Conclusions 11.14, 11.15, 11.16 and 11.17. In summary, by those Conclusions it would be determined that when the several States' proportionate shares of the reservoir losses on the main stream are treated as being in partial satisfaction of the several contract entitlements an insufficiency of the net water supply available in the main stream for use in the Lower Basin for delivery of the basic contract entitlements of California, Nevada, and Arizona, is not sufficiently likely within the predictable future that there is a present necessity for decision how such shortage should be borne. It would further be determined, however, that if such a shortage should occur, it would be by reason of the burden upon the several States to contribute to satisfaction of the Mexican Treaty obligation and a formula for the sharing of that burden is specified in our Proposed Conclusions 11.11 and 11.12. The right of California under Section 4(a) of the Project Act and under the California Limitation Act to share in surplus waters and the methods to be employed in determining the existence of such are dealt with in our Proposed Conclusion 11.17 and are hereinafter discussed at pages 73 to 92, inclusive, of this brief.

CONCLUSION 1.5

The contract of February 9, 1944, between the United States and the State of Arizona relating to the delivery of water from storage in Lake Mead was made in pursuance of Section 5 of the Boulder Canyon Project Act and in conformity with subdivision (a) of Section 4 of that Act. It is a valid contract.

The Arizona water-delivery contract was made by the Secretary of the Interior in pursuance of the authority conferred

upon him by the Boulder Canyon Project Act and it conforms to the provisions of that Act. It effectively establishes the aggregate quantity of the Colorado River water from storage in Lake Mead which shall be delivered annually for consumptive use in Arizona.

The quantities specified for delivery in paragraphs (a) and (b) of Article 7 of said contract are controlled by other provisions thereof, and attention is invited particularly to paragraphs (d) and (l) of the same Article. Among other things, paragraph (d) recognizes that the United States' obligation to deliver stored water under the contract shall be diminished to the extent that consumptive uses in Arizona above Lake Mead diminish the flow into Lake Mead. Paragraph (l) recognizes and provides, in conformity with the provisions of Section 5 of the Project Act, that deliveries of main stream water under the contract are to be made to such individuals, irrigation districts, corporations, or political subdivisions of Arizona as may contract therefor with the Secretary of the Interior, and as may qualify under the Reclamation Law or other laws of the United States, or to lands of the United States within Arizona. Various contracts have been made within the provisions of paragraph (l) of Article 7, as reviewed in Section VII of the United States' Proposed Findings and Conclusions and the quantities of main stream water required to be delivered for use on the Fort Mohave, Colorado River, and Cocopah Indian Reservations in Arizona are likewise within the contemplation of said paragraph (l).

CONCLUSIONS 1.6 AND 11.19

By reason of and in pursuance of the Arizona 1944 water-delivery contract, the State of Arizona is entitled to have delivered from storage in Lake Mead to qualified agencies or other water users or for use on lands of the United States, within the State of Arizona as specified in paragraph (l) of Article 7 of the 1944 contract, such quantities of water as may be necessary to provide for the beneficial consumptive use for irrigation and domestic uses in Arizona of a maximum of 2,800,000 acre-feet each calendar year, less the quantity by which consumptive uses in Arizona above Lake Mead diminish the flow into Lake Mead, together with such part of one-half of any excess or surplus waters unapportioned by the Colorado River Compact which is not used by the States of New Mexico and Utah within their equitable shares of Colorado River system water or by Nevada to the extent of 1/25 of such unapportioned water. Such entitlement of the State of Arizona is subject to the availability of water, certain rights and obligations of the United States, and the other provisions of said contract, and particularly the provisions of Article 7(l).

The United States' Proposed Conclusion 1.6 asserts that the State of Arizona's entitlement to the delivery of water from storage in Lake Mead is subject to, while including, certain rights of the United States, and is subject to certain other rights, interests and obligations of the United States with respect to use of the waters of the Colorado River system which are not limited or restricted by the entitlements of the several Lower Basin States to the use of such waters. Other conditions and provisions of the contract are also referred to in that Conclusion and those references are hereinafter briefly considered.

The statement in our Proposed Conclusion 1.6 that the Arizona entitlement includes the rights of the United States in connection with the Navajo, Hopi, Kaibab, Havasupai, Hualapai, Fort Mohave, Colorado River and Cocopah Indian Reservations in Arizona is explained by our Proposed Conclusion 11.5. The statement that such entitlement is subject to such

rights is explained by our Proposed Conclusions 11.7 and 11.12, by the argument at pp. 22 to 31, and 61, *infra,* and by the reference in subdivision (1) of Article 7 of the 1944 contract to deliveries of stored water for use on lands of the United States within Arizona. And see *supra,* p. 13.

The "other rights" of the United States, referred to in the first subdivision (2) of our Proposed Conclusion 1.6, comprise the rights of the United States to release from Lake Mead and to deliver from the Colorado River at Imperial Dam so much water, including all other water diverted from the Colorado River for use within the respective projects, as may be reasonably required and beneficially used for irrigation of the irrigable lands situated within the Valley Division of the Yuma Reclamation Project (see Conclusions 7.5 and 7.6), within the Yuma Auxiliary Reclamation Project (see Conclusions 7.8 and 7.9), and within the Yuma Mesa Division (see Conclusions 7.11, 7.12, 7.13, 7.14, 7.15, 7.16 and 7.19) and the Wellton-Mohawk Division (see Conclusions 7.17, 7.18 and 7.19) of the Gila Project. Also included within this category are the rights of the United States to release from Lake Mead and to deliver from the Colorado River at Imperial Dam such quantities of water as may be reasonably required and beneficially used under the several Warren Act and Special Use Contracts referred to in the United States Proposed Conclusions 7.20 and 7.21. The rights of the United States to make uses of the main stream waters within national park areas in Arizona (see United States' Proposed Finding 9.15 and Conclusion 9.1) and to use the waters of the tributaries above Lake Mead in the national parks, national forests, and areas under the jurisdiction of the Bureau of Land Management within Arizona are likewise within this group of rights (See United States' Proposed Finding 9.15, Conclusion 9.1, Finding 8.42, Conclusion 8.1, Finding 10.13 and Conclusion 10.1). See United States' Proposed Conclusions 11.3 and 11.4.

The rights, interests and obligations of the United States which are not limited or restricted by the entitlements of the several Lower Basin States to the use of Colorado River system water available for use in the Lower Basin which are referred to in the second subdivision (1) of the United States'

Proposed Conclusion 1.6 and to which the Arizona entitlement is subject, include the rights and obligations of the United States with respect to use of the waters of the Colorado River for purposes of flood control, improvement of navigation, river regulation, satisfaction of the Mexican Treaty requirements and the maintenance of wildlife refuge areas, *supra*, pp. 10–11. They also include the rights of the United States to use the waters of the Muddy River on the Moapa Indian Reservation in Nevada (see United States' Proposed Conclusion 4.13), the waters of the tributaries of the Little Colorado on the Navajo and Zuni Reservations in New Mexico (see United States' Proposed Conclusions 4.1 and 4.2), and the waters of the main stream on the Fort Mohave Indian Reservation in California and Nevada (see United States' Proposed Conclusion 4.5.1 and, in the alternative, 4.5.101) and on the Colorado River (see United States' Proposed Finding 4.4.21 and Conclusion 4.4.4, and, in the alternative, Finding 4.4.109 and Conclusion 4.4.106), the Chemehuevi (see United States' Proposed Conclusion 4.6) and the Yuma (see United States' Proposed Conclusion 4.8) Indian Reservations in California. See United States' Proposed Conclusion 11.6(2). Notwithstanding the Arizona entitlement is subject to the rights of the United States to the use of Colorado River system water on the several Indian Reservations outside Arizona referred to in this paragraph, by our Proposed Conclusions 11.7 and 11.8 it would be determined that in all probability the quantities of water available for use in Arizona will not be diminished by reason of such uses.

The rights of New Mexico and Utah to equitable shares of the waters of the tributaries within those States which join the main stream of the Colorado River below Lee Ferry and above Hoover Dam are referred to in paragraph (g) of Article 7 of the 1944 water-delivery contract (and see paragraph (b) of the same Article), and it is believed that further explanation of the reference in the second subdivision numbered (2) of our Proposed Conclusion 1.6 is not necessary, at least in this connection.

The other matters affecting the physical and legal availability of water stored in Lake Mead for use in Arizona under

the Colorado River Compact and the Project Act referred to in the second subdivision (3) of our Proposed Conclusion 1.6, which in our estimation need be determined for decision of this case, are considered in our Proposed Findings 11.1 and 11.2, and in our Proposed Conclusions 11.14, 11.15, 11.16, 11.17 and 11.19. In summary, by those Conclusions it would be determined that when the several States' proportionate shares of the reservoir losses on the main stream are treated as being in partial satisfaction of the several contract entitlements an insufficiency of the net water supply available in the main stream for use in the Lower Basin for delivery of the basic contract entitlements of California, Nevada, and Arizona is not sufficiently likely within the predictable future that there is a present necessity for decision how such shortage should be borne. It would be further determined, however, that if such a shortage should occur, it would be by reason of the burden upon the several States to contribute to satisfaction of the Mexican Treaty obligation and a formula for the sharing of that burden is specified in our Proposed Conclusions 11.11 and 11.12. The right of California under Section 4(a) of the Project Act and under the Cailfornia Limitation Act to share in surplus waters, and correlatively the rights of Arizona and Nevada to share therein, and the methods to be employed in determining the existence of such surplus are dealt with in our Proposed Conclusions 11.17, 11.18 and 11.19, and are discussed at pages 73 to 92, *infra.*

The Arizona entitlement is, of course, subject to the other applicable provisions of her 1944 contract which have not already been specifically referred to. It is such matters that are contemplated by the subdivision numbered (4) of the "subject to" portion of our Proposed Conclusion 1.6. In this connection particular attention is invited to the requirement of paragraph (1) of Article 7 that deliveries of water under the contract shall be made to such individuals, irrigation districts, corporations or political subdivisions of Arizona as may contract therefor with the Secretary of the Interior, and as may qualify under the Reclamation Law or other laws of the United States, or to lands of the United States within Arizona.

The implications of this requirement are, we believe, clear and further explanation or argument at this point seems unnecessary. The provision conforms to the requirement of Section 5 of the Project Act that no person shall be entitled to the use of stored water except by contract made as stated in that section.

CONCLUSION 1.8

The water-delivery contract dated March 30, 1942, as modified by the supplemental contract of January 3, 1944, by the United States with the State of Nevada is a valid contract made in pursuance of Section 5 of the Project Act and in conformity with paragraph (a) of Section 4 of that Act.

The Nevada water-delivery contract was made by the Secretary of the Interior in pursuance of the authority conferred upon him by the Boulder Canyon Project Act and it conforms to the provisions of that Act. It effectively establishes the aggregate quantity of Colorado River water from storage in Lake Mead which shall be delivered annually for consumptive use in Nevada subject only to the recognition under paragraph (f) of Article 7 of the 1944 Arizona contract that Nevada may contract with the United States for the consumptive use within that State of 1/25 of any surplus waters unapportioned by the Colorado River Compact available in the Lower Basin.

The quantity specified for delivery in paragraph (a) of Article 5 of the Nevada contract, as amended, is subject to diminution with respect to uses in Nevada of other waters diverted from the Colorado River system (see United States' Proposed Conclusions 11.3, 11.4, 11.5 and 11.14 and the following discussion herein of those Conclusions) and, even though not expressly stated therein, the delivery of stored water under the Nevada contract continues to be subject to the requirement of Section 5 of the Project Act that no person shall be entitled to use of such water except by contract made with the United States as stated in that Section.

CONCLUSION 1.9

By reason of and in pursuance of the Nevada water-delivery contract, as amended, the State of Nevada is entitled to have delivered from storage in Lake Mead, in accordance with the provisions of its said contract, such quantities of water as may be necessary to provide for beneficial use in Nevada a total annual quantity not to exceed 300,000 acre-feet each calendar year, including all other waters diverted for use within the State of Nevada from the Colorado River system. Such entitlement is subject to the availability of water, certain rights and obligations of the United States, and the provisions of the Boulder Canyon Project Act, and particularly the provisions of Section 5 thereof.

The United States' Proposed Conclusion 1.9 asserts that the State of Nevada's entitlement to the delivery of water from storage in Lake Mead is subject to, while including, certain rights of the United States, and is subject to certain other rights, interests and obligations of the United States with respect to use of the waters of the Colorado River system which are not limited or restricted by the entitlement of the several Lower Basin States to the use of such waters.

The statement in our Proposed Conclusion 1.9 that the Nevada entitlement includes the rights of the United States in connection with the Moapa and Fort Mohave Indian Reservations in Nevada is explained by our Proposed Conclusion 11.5. The statement that such entitlement is subject to such rights is explained by our Proposed Conclusions 11.7 and 11.12, and by the argument at pages 22 to 31 and 61, *infra*. And see, *supra*, pages 9–10.

The "other rights" of the United States referred to in the first subdivision (2) of our Proposed Conclusion 1.9 include the right of the United States to divert from storage in Lake Mead and to deliver to the Boulder City water supply system the water needed for governmental, municipal, industrial and domestic purposes in the area served by that system. See United States' Proposed Conclusions 7.26, 7.27 and 11.3. Also included within such "other rights" are the rights of the United States to make uses of the main stream waters within

national park areas in Nevada (See United States' Proposed Finding 9.15 and Conclusion 9.1) and to use the waters of the tributaries above Lake Mead in the national parks, national forests, and areas under the jurisdiction of the Bureau of Land Management within Nevada. See United States' Proposed Finding 9.15, Conclusion 9.1, Finding 8.42, Conclusion 8.1, Finding 10.13, and Conclusion 10.1. See also our Proposed Conclusion 11.4.

The rights, interests and obligations of the United States which are not limited or restricted by the entitlements of the several Lower Basin States to the use of Colorado River system water available for use in the Lower Basin which are referred to in the second subdivision (1) of the United States' Proposed Conclusion 1.9 and to which the Nevada entitlement is subject, include the rights and obligations of the United States with respect to use of the waters of the Colorado River for purposes of flood control, improvement of navigation, river regulation, satisfaction of the Mexican Treaty requirements and the maintenance of wildlife refuge areas, *supra,* pages 10–11. They also include the right of the United States (a) to use the waters of the tributaries in Arizona and New Mexico which join the main stream of the Colorado River above Hoover Dam upon the lands of the Indian Reservations which utilize the waters of such tributaries, and (b) to use the waters of the main stream upon the Fort Mohave Indian Reservation in California and Arizona (see United States' Proposed Conclusions 4.5.1 and, in the alternative, 4.5.101), the Colorado River Indian Reservation in Arizona and California (see United States' Proposed Findings 4.4.19 and 4.4.21 and Conclusion 4.4.4, and, in the alternative, Findings 4.4.109 and 4.4.110 and Conclusion 4.4.106), and the Chemehuevi (see United States' Proposed Conclusion 4.6), and the Yuma (see United States' Proposed Conclusion 4.8) Indian Reservations in California (see United States' Proposed Conclusion 11.6(1)). The Indian Reservations referred to in part (a) of the preceding sentence are the Havasupai (Conclusion 4.10), the Hualapai (Conclusion 4.11), the Kaibab (Conclusion 4.12), the Navajo (Conclusion 4.2) and the Hopi (Conclusion 4.3) Reservations in Arizona, and the Navajo Reservation (Con-

clusion 4.2) and the Zuni Pueblo and Reservation (Conclusion 4.1) in New Mexico. Notwithstanding the Nevada entitlement is subject to the rights of the United States to the use of Colorado River system water on the several Indian Reservations referred to in this paragraph, by our Proposed Conclusions 11.7 and 11.8, it would be determined that in all probability the quantities of water available for use in Nevada under the Colorado River Compact and the Boulder Canyon Project Act will not be diminished by reason of such uses.

The other matters affecting the physical and legal availability of water stored in Lake Mead for use in Nevada under the Colorado River Compact and the Project Act referred to in the second subdivision (3) of our Proposed Conclusion 1.9, which in our estimation need be determined for decision of this case, are considered in our Proposed Findings 11.1 and 11.2, and in our Proposed Conclusions 11.14, 11.15, 11.16, 11.17 and 11.19. In summary, by those Conclusions it would be determined that, when the several States' proportionate shares of the reservoir losses on the main stream are treated as being in partial satisfaction of the several contract entitlements, an insufficiency of the net water supply available in the main stream for use in the Lower Basin for delivery of the basic contract entitlements of California, Nevada and Arizona is not sufficiently likely within the predictable future that there is a present necessity for decision how such shortage should be borne. It would be further determined, however, that if such a shortage should occur, it would be by reason of the burden upon the several States to contribute to satisfaction of the Mexican Treaty obligation and a formula for sharing of that burden is specified in our Proposed Conclusions 11.11 and 11.12. The right of California under Section 4(a) of the Project Act and under the California Limitation Act to share in surplus waters, and correlatively the rights of Arizona and Nevada to share therein, and the methods to be employed in determining the existence of such surplus are dealt with in our Proposed Conclusions 11.17, 11.18 and 11.19, and are discussed at pages 73 to 92, *infra*.

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The Nevada contract does not contain an express provision comparable to paragraph (1) of Article 7 of the 1944 Arizona contract. Nevertheless, the provision of Section 5 of the Project Act that no person shall be entitled to the use of stored water, except by contract made as stated in that Section, controls the Secretary of the Interior in his delivery of stored water under the contract, except as Congress may provide to the contrary as has been done by the Act of September 2, 1958 (72 Stat. 1726) (see United States' Proposed Finding 7.7.7 and Conclusions 7.26 and 7.27) or as is necessary for satisfaction of the rights of the United States to use the waters of the Colorado River on the Fort Mohave Indian Reservation in Nevada.

CONCLUSIONS 4.1, 4.2, 4.3, 4.4.3, 4.4.4, 4.5.1, 4.6, 4.8, 4.10, 4.11, 4.12, 4.13, 11.6, 11.7, 12.2, AND 13.2

The United States has rights to the use of Colorado River system waters on the Indian Reservations on the main stream and on the tributaries above Lake Mead, such rights having the priorities enumerated in the United States' Proposed Conclusions above designated. The contract entitlements of the States of California, Arizona and Nevada to the delivery of Colorado River water are subject to such rights. The equitable share of Utah in the waters of the tributaries within that State is subject to such rights of the United States with respect to the main stream reservations. The equitable shares of New Mexico and Arizona in the waters of the Little Colorado River system are also subject to the rights of the United States to use the waters of that system on the Zuni, Navaho and Hopi Indian Reservations.

The rights of the United States to use water on the various Indian Reservations within the Lower Colorado River Basin were excluded from affect by the Colorado River Compact in its Article VII, "Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes" and, consequently, such rights are excluded from affect by the Boulder Canyon Project Act consenting to the Compact. Such disclaimer follows from the well settled proposition that the establishment of a reservation for the use and occupancy of certain Indians reserved, by

implication if not in express terms, the use of adjacent waters sufficient in quantity in an arid climate to supply the needs of the Indians. Correlative to this principle is the proposition of more general application that by the withdrawal of lands from the public domain for any federal reservation, the unappropriated waters appurtenant to the lands so reserved are likewise reserved.

The meld of these two principles was first articulated by the Supreme Court in *Winters* v. *United States,* 207 U.S. 564 (1908). In that case the United States sued to restrain Winters and others from interfering with the flow of the Milk River or its tributaries to the Fort Belknap Indian Reservation. The Court held (at page 577) that the "power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied and could not be * * *. That the Government did reserve them we have decided and for a use which would be necessarily continued through the years," citing *United States* v. *Rio Grande Dam and Irrigation Co.,* 174 U.S. 690, and *United States* v. *Winans,* 198 U.S. 371.

In the *Rio Grande* decision, the Supreme Court had stated, "in the absence of specific authority from Congress, a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property." 174 U.S., at p. 703. And in the *Winans* decision, the Supreme Court had found implied in a treaty with the Yakima Indians a reservation of fishing rights in the Columbia River as to the entire land relinquished to the United States under the treaty.

The *Winters* decision has been applied with respect to various Indian Reservations, and as recently as the case of *United States* v. *Ahtanum Irrigation District,* 236 F. 2d 321 (9th Cir. 1956), *cert. denied* 352 U.S. 988. See also *Conrad Investment Co.* v. *United States,* 161 Fed. 829 (9th Cir. 1908); *United States* v. *Walker River Irrigation District,* 104 F. 2d 334 (9th Cir. 1939); *United States* v. *McIntire,* 101 F. 2d 650 (9th Cir. 1939). The manner of creation of the Reservation has caused no variation in the application of the rule of reserved water rights. In regard to the Walker River Indian Reservation,

established by executive order, the Court of Appeals stated, 104 F. 2d at 336:

> "In the Winters case, as in this, the basic question for determination was one of intent—whether the waters of the stream were intended to be reserved for the use of the Indians, or whether the lands only were reserved. We see no reason to believe that the intention to reserve need be evidenced by treaty or agreement. A statute or an executive order setting apart the reservation may be equally indicative of intent."

As to the Indian Reservations within the Lower Colorado River Basin, intent to reserve waters of appurtenant streams was in practically all instances expressly manifested. Consider first the Reservations on the main stream of the Colorado River and on its tributaries above Lake Mead. The Zuni Pueblo, the site of an agricultural economy antedating the coming of the Spanish explorers, was accorded recognition by the United States and to meet the further needs of the Zuni Indians, additional lands were set aside by the Executive Order of March 16, 1877. When it was discovered that the boundary description of that executive order did not with sufficient definiteness include Nutria Springs and Pescado Springs, the description was amended by Executive Order of May 1, 1883 to supply the necessary definiteness. (U.S. Exs. 109, 110.) These springs were the source of supply then as they are now for considerable irrigation by the Zuni Indians. (U.S. Exs. 119, 120, 155, 157; Tr. 12,786–8.)

Preliminary to the estblishment of the Navajo Indian Reservation by the Treaty of June 1, 1868, agents of the United States gave attention to inclusion of lands suitable for irrigation farming within the selected area of the Reservation. (U.S. Ex. 258 (p. 389); U.S. Ex. 259.) So, too, prior to establishment by executive order of the Hopi Indian Reservation (U.S. Ex. 258 (p. 588); U.S. Exs. 402 through 405).

The Hualapai Indians have historically utilized the limited irrigation areas on the reservation, school reserve and allotments established for their use and occupancy (U.S. Exs. 811 through 815; Tr. 13,763). They, like the Zuni, Navajo and Hopi Indians, have traditionally engaged in stock-raising, and

additional use of water for stock-raising was necessarily contemplated in the establishment of the various reservations for these Indians. (Tr. 12,635; 12,733; 12,643; 12,632; 13,763.)

By the express terms of the Executive Orders of creation, waters of Cataract Creek and the existing settlements and improvements of the Havasupai Indians were included within the reservation established for their use and occupancy (U.S. Exs. 701, 702, 703). The Kaibab Indians have long utilized the waters of Moccasin Spring which is one of the present sources of supply for irrigation of the Kaibab Reservation (U.S. Exs. 604, 605, 606, 615; Tr. 13,761). The Moapa band of the Paiute Indians were persuaded to come to the Moapa Reservation located on the Muddy River on the promise that the Government would aid them to become established in agriculture there (U.S. Ex. 911).

On the main stream of the Colorado River, Fort Mohave Reservation was originally established in 1870 as a military reserve; its basis of priority of that date lies in the "general" reservation doctrine which had its most recent expression in *Federal Power Commission* v. *Oregon,* 349 U.S. 435 (1955).[2] Implied intent is pertinent to the transfer of the Reservation in 1890 to Indian use, as well as with respect to the lands later added to the Fort Mohave Indian Reservation. Reports of agents of the United States relied upon the fertility of the land, the ease by which it could be irrigated from the Colorado River, and the proximity of the railhead of Needles, California for marketing of crops in recommendations for this addition to Fort Mohave Indian Reservation (U.S. Ex. 1309 (p. 116)).

The Yuma Indian Reservation was created by the Executive Order of January 9, 1884, for the Yuma and such other Indians as the Secretary of the Interior might see fit to settle thereon. By agreement with the United States, the Yuma Indians surrendered their interest in the Reservation in consideration of the allotment to each of five, later increased to ten, acres of

[2] We do not now address the question whether the navigable waters of the Colorado River were capable of appropriation under State law. For present purposes it is sufficient to note that if they were, the creation of the Fort Mohave Reservation effectively insulated against subsequent appropriation the waters appurtenant to the reserved lands.

irrigable land. Neither (1) this internal arrangement between the Yuma Indians and the United States nor (2) the opening to entry and settlement of a part of that Reservation nor (3) provision in the California Seven-Party Agreement incorporated into the various contracts between the United States and California water users for a second priority for the lands of the Yuma Project in California, detracts from the vitality of the 1884 priority with respect to those lands of the Yuma Project within the Yuma Indian Reservation. Allotted Indian lands on the Yuma Reservation and on other Indian Reservations of the Lower Colorado River Basin continue to share in the reserved rights arising from the creation of those reservations. *United States* v. *Powers,* 305 U.S. 527 (1939); *Skeem* v. *United States,* 273 Fed. 93 (9th Cir. 1921); *United States* v. *Hibner,* 27 F. 2d 909 (D. Idaho, 1928).

Because of the enduring reserved rights attached to the Indian lands of the Yuma Reservation, lands under the jurisdiction of the Secretary of the Interior, it would be just as inappropriate for the Secretary to reduce to contract form the right to use Colorado River water on the Yuma Reservation as on any other Indian Reservation. This is so not only because it would involve the Secretary "contracting with himself," but more fundamentally because water rights reserved for Indian use, being real property rights of the United States, can be affected or modified only by specific grant of the United States. *United States* v. *California,* 332 U.S. 19, 40 (1946); *United States* v. *Parkins,* 18 F. 2d 642 (D. Wyo. 1926). Section 5 of the Project Act provides in general language that no person shall be entitled to have the use for any purpose of stored water except by contract with the Secretary of Interior. Such provision cannot reasonably be construed as specific grant of or limitation on rights of the United States in behalf of the Indians and Indian tribes. Pertinent here also is the general rule of long standing that if the United States is to be deprived of a right or a remedy by the general terms of a statute "the language must be clear and specific to that effect," *United States* v. *Stevenson,* 215 U.S. 190, 197 (1907). See also *United States* v. *Rice,* 327 U.S. 742, 755 (1946) (Dissenting opinion of Justice Douglas).

Probably the most clearly expressed intent to reserve water for use on Reservation lands is to be found in the events leading to the establishment of the Colorado River Indian Reservation. The Superintendent of Indian Affairs for Arizona had been authorized to select a reservation for Indians of the Colorado River (U.S. Ex. 511). He caused an engineering survey to be made of 75,000 acres of valley lands on the eastern bank of the Colorado River between "Half-Way Bend and Corner Rock." (U.S. Ex. 513 (p. 157).) The conclusion of such survey was that such lands were most fertile and highly suitable for irrigation from the Colorado River (U.S. Ex. 514). This report was transmitted to and considered by Congress (U.S. Ex. 502). By the Act of March 3, 1865, there was set apart in the Territory of Arizona 75,000 acres from Half-Way Bend to Corner Rock on the Colorado River for an Indian reservation "for the Indians of said river and its tributaries" (U.S. Ex. 501; 13 Stat. 541, 559). The continuation of the Congressional intent to reserve a quantity of water sufficient to irrigate a large area was demonstrated by appropriation acts commencing in 1867 by which were financed construction of works of various sorts for the diversion of Colorado River water on to Reservation lands, culminating in the completion in 1941 of Headgate Rock Dam by which 105,000 acres of the Reservation can be irrigated by gravity. (U.S. Ex. 507 for identification.) This demonstrated and continuous Congressional and Executive intent to reserve and utilize water becomes all the more pointed when compared to the *Winters* case, in which the Supreme Court found an implication of intent solely from the circumstances of the location by treaty of a tribe of Indians upon a prescribed area in arid country.

Nor, with respect to the Indian Reservations of the Lower Colorado River Basin, is there any uncertainty as to the magnitude of the reserved right. The Supreme Court in the *Winters* case did not discuss this matter explicitly but its affirmance of the Court of Appeals decision must be regarded as approval of the conclusion therein stated by the Court of Appeals that there was a reservation for Indian use of the waters of Milk River *at least* to an extent reasonably necessary to irrigate their lands. 143 Fed. 740, 749. In *United*

States v. *Conrad Investment Company,* 161 Fed. 829 (1909), decided by the Ninth Circuit Court of Appeals shortly after the Supreme Court's decision in the *Winters* case, the Court affirmed an order enjoining the defendant from interfering with the use of the waters of a stream for irrigation on the Blackfeet Indian Reservation. The quantity of water thus protected was that which the Court determined would be needed for development in the future of all the lands on the Reservation susceptible of irrigation, notwithstanding a lesser quantity was being irrigated at the time of suit. The Court, referring to the *Winters* case, said, 161 Fed. at pp. 831–2:

> "The law of that case is applicable to the present case and determines the paramount right of the Indians of the Blackfeet Indian Reservation to the use of the waters of Birch Creek, to the extent reasonably necessary for the purposes of irrigation and stock raising and domestic and other useful purposes * * *. What amount of water will be required for these purposes may not be determined with absolute accuracy at this time, but the policy of the Government to reserve whatever water of Birch Creek may be reasonably necessary, not only for present uses, but for future requirements, is clearly within the terms of the treaties construed by the Supreme Court in the *Winters* case."

Accordingly, the Court of Appeals decreed a right to a designated amount of water with leave to the United States to apply for modification of the decree at any time it might determine that its needs would be in excess of that amount. The district court opinion in the *Conrad Investment Company* case shows clearly that the water right reserved was based on total irrigable acreage and increased need was anticipated only because of probable change in use of land resulting from the Indians' progress in agriculture. 156 Fed. 123, 129–130 (D. Mont. 1907). Likewise, in *Skeem* v. *United States,* 273 Fed. 93 (9th Cir. 1921), where water was expressly reserved by treaty for irrigation "on land actually cultivated and in use" the Court of Appeals held that the water right reserved was not limited in quantity to the amount of water necessary to the irrigation of

those Indian lands which were at the time of the treaty actually irrigated. The Court said, 273 Fed. at page 95:

> "The purpose of the government was to induce the Indians to relinquish their nomadic habits and to till the soil, and the treaties should be construed in the light of that purpose and such meaning should be given them as will enable the Indians to cultivate eventually the whole of their lands so reserved to their use."

In the *Ahtanum* case, the most recent application of the *Winters* case, the Court of Appeals said at 236 F. 2d at pp. 326–7:

> "* * * It is obvious that the quantum is not measured by the use being made at the time the treaty reservation was made. The reservation was not merely for present but for future use. Any other construction of the rule in the Winters case would be wholly unreasonable * * *.
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> * * * * *
>
> "It is plain from our decision in the Conrad Inv. Co. case, supra, that the paramount right of the Indians to the waters of Ahtanum Creek was not limited to the use of the Indians at any given date but this right extended to the ultimate needs of the Indians as those needs and requirements should grow to keep pace with the development of Indian agriculture upon the reservation. * * *"

Thus has the doctrine of implied reservation of water been given effect by these decisions holding that when an Indian reservation is set apart, the water right thereby reserved is large enough to irrigate the entire irrigable acreage of the reservation. This rule has been translated into definite quantity by the proof of the United States with respect to the Indian Reservations of the Lower Colorado River Basin. The lands on each of the Reservations which are susceptible of irrigation from existing irrigation systems or extensions thereof or additional systems have been carefully classified for suitability for irrigation according to depth, texture and permeability of soil

and subsoil, slope, erosion, drainage, salinity and alkalinity. The water requirements for each of the many irrigation areas on the several Reservations, including those quantities necessary for domestic use, including stock-watering, incidental to operation of the irrigation areas have been computed. Such computed water requirements plus an indeterminate but comparatively negligible amount for stock-raising on the non-irrigation areas of the several Reservations and for other useful purposes, including commercial recreation, represent the extent of the reserved rights.

Furthermore, the reserved quantity determined in this manner is a reasonable and realistic measure of the needs of the Indians. Many of the Reservations of the Lower Colorado River Basin are already insufficient in natural resources for the support of the Indians living or entitled to live thereon. For example, the Navajo Reservation is adequate to support only 35,000 people (Tr. 12,656–7). The Navajo Indians currently number over 82,000 and their trend of population growth is one of a high rate of increase (Tr. 12,635–6; U.S. Ex. 500, Calif. Ex. 2600–18). Similar conditions prevail with respect to the Hopi Reservation and the Hopi Indians (Tr. 12,642, U.S. Ex. 500; Calif. Ex. 2600–14). Such conditions prompted Congress by the Act of April 19, 1950 to provide appropriations so as to achieve maximum utilization of the Navajo and Hopi Reservations and for the relocation and resettlement of Navajo and Hopi Indians on the Colorado River Indian Reservation. Nor are these conditions peculiar to the Navajo and Hopi Reservations. The White Mountain Apaches, presently numbering about 4,000, are situated on the Fort Apache Reservation which contains scattered irrigable areas aggregating less than 8,000 acres. The Papago Indian Reservation inhabited by some 6,700 members of the Papago Tribe, is large in land area but very limited in water supply. The Apache and Papago Indians are Indians of the "Colorado River tributaries" as are the Hualapai, Hopi, Navajo, Zuni, Supai, Yuma, Chemeheuvi and Fort Mohave Indians (U.S. Exs. 595, 595A, 595B). The general trend of population of these Indians is an increasing one. Such rate of increase accentuates the present inadequacies of the various Reservations of the Lower Basin and makes im-

perative the early completion of the Congressional plan to develop the Colorado River Indian Reservation for all Indians of the Colorado River and its tributaries.

In summary, rights to use water with priorities according to the dates of creation of and addition to the Indian Reservations situated on the main stream of the Colorado River and on its tributaries above Lake Mead come about by application of the intent, either express or implied, to reserve such rights at that time; the priorities extend to the future needs of the Indians involved; and the limit of such future needs is ascertainable and indeed has been defined by the computation of water requirements for the irrigable areas of those Reservations. Such rights arise under the laws of the United States and they exist as against all other uses, without regard to state boundaries, of waters from the common source, both upstream and downstream. They are not capable of limitation by apportionments which may be made of certain quantities of, or shares in, the water from that source for use in the respective States wherein the particular reservations are situated.

CONCLUSIONS 4.4.1, 4.4.2, 4.4.101, 4.4.102, 4.4.103, 4.4.104, 4.4.105, 4.4.106, 4.5.101

The boundaries of the Colorado River and Fort Mohave Indian Reservations in California

There have arisen in the trial of this case controversies between the United States and the California defendants over the correct boundaries of the Colorado River Indian Reservation and the Fort Mohave Indian Reservation in California. These controversies require resolution in order that there may be determined the quantity of irrigable acres of both Reservations to which reserved rights for the use of water attach. The United States has proposed alternative Findings of Fact and Conclusions of Law against the event that its primary contentions as to the boundary locations are not sustained and has previously submitted a memorandum regarding the Fort Mohave Indian Reservation boundary.

The controversy regarding the boundary of the Colorado River Indian Reservation involves mainly an interpretation of the Executive Order of May 15, 1876, declaring the westerly

boundary of the Reservation to run from the top of Riverside Mountain in California "in a direct line toward the place of beginning to the west bank of the Colorado River; thence down said west bank to a point opposite the place of beginning [in Arizona]" (U.S. Ex. 505). It is our position that by its plain reference to the west bank and its delineation of the boundary down the west bank, as well as by its intent, the Executive Order fixed a permanent Reservation boundary not affected by subsequent changes in the course of the River. We submit further that the location of the west bank, as it existed at the time of the Executive Order of May 15, 1876, is best evidenced by the General Land Office Surveys of 1874 and 1879, those surveys being contemporaneous with the Order and precisely locative of the west bank of the River as it then existed. Alternatively, and in the event it is determined that the boundary shifts with the course of the River, we claim the accretions to the Reservation lands bounded on the west by the 1876 bank (United States' Proposed Finding 4.4.102 and Conclusion 4.4.102), as well as those areas which are presently on the west side of the River as a result of its avulsive changes (United States' Proposed Findings 4.4.103–107, Conclusions 4.4.103 and 105) and accretions to the Reservation lands on the Arizona side of the River which are west of the location of the 1874 meander line (United States' Proposed Finding 4.4.108 and Conclusion 4.4.105).

Lands in California were first added to the Colorado River Indian Reservation by the Executive Order of November 16, 1874 (U.S. Ex. 504). That part of the westerly boundary prescribed by that Order extending in a straight line from the top of Riverside Mountain in California southeasterly to the point of beginning in Arizona excluded from the Reservation certain land on the east or Arizona side of and adjacent to the Colorado River. The Indian agent reported to the Commissioner of Indian Affairs that this exclusion left valuable land east of the River and adjacent to the Reservation which was attracting settlement by non-Indians (U.S. Ex. 505A). Consequently, the Commissioner recommended to the President that, in order to include this valuable land within the Reservation, the west bank of the Colorado River be made the Res-

ervation boundary (U.S. Ex. 505B). The Secretary of the Interior concurred in this recommendation, and transmitted it to the President; the Executive Order of May 15, 1876 followed (U.S. Exs. 505C, 505D). Clearly, the designation of the west bank as the Reservation boundary was intentional and deliberate and designed to annex permanently this valuable land regardless of future changes in the course of the River.

The Supreme Court has held that reference to a bank fixes the location of the boundary thereon. This point received elaborate consideration by the Court with regard to that part of the boundary between Georgia and Alabama defined as beginning on the western bank of the Chattahoochee River where it crosses a stated line, running thence up the river "along the western bank thereof." In the case of *Howard* v. *Ingersoll,* 54 U.S. 380 (1851), the Supreme Court concluded at page 422 that the call "along the western bank" excluded the bed of the river and indicated an intent to reserve the river within the boundary. In *Alabama* v. *Georgia,* 64 U.S. 505, 515 (1859), the Court stated with reference to the same boundary:

> "The western line of the cession on the Chattahoochee river must be traced on the water line of the acclivity of the western bank, and along that bank where that is defined; and in such places on the river where the western bank is not defined, it must be continued up the river on the line of its bed, * * * ."

Helpful to the instant question are the Supreme Court decisions with respect to the boundary between Oklahoma and Texas. *United States* v. *Texas,* 162 U.S. 1 (1896); *Oklahoma* v. *Texas,* 256 U.S. 70 (1921), 260 U.S. 606 (1923). The treaty between the United States and Spain had fixed the boundary with reference to three Rivers—the Sabine, the Red and the Arkansas. It located the boundary along the "western bank" of the Sabine and the "southern" bank of the Arkansas. Notwithstanding that, with reference to the Red River, the boundary was not expressly located along the bank, the Court held that the boundary as fixed by the treaty was along the south bank of the River. And as to the precise location of that boundary,

the Court after a review of the cases in which a river bank had been made a boundary concluded, 260 U.S. at pages 631–2:

> "Upon the authority of these cases, and upon principle as well, we hold that the bank intended by the treaty provision is the water-washed and relatively permanent elevation or acclivity at the outer line of the river bed which separates the bed from the adjacent upland, whether valley or hill, and serves to confine the waters within the bed and to preserve the course of the river, and that the boundary intended is on and along the bank at the average or mean level attained by the waters in the periods when they reach and wash the bank without overflowing it."

As a matter of law, therefore, the calls in the Executive Order of May 15, 1876, "to the west bank of the Colorado River" and "down said west bank" fixed the Reservation boundary on the relatively permanent acclivity separating the bed of the River from the adjacent upland.

The best evidence of the location of this acclivity or bank are the General Land Office Surveys of 1874 and 1879. The instructions under which these surveys were conducted provided:

> "Both banks of *navigable* rivers are to be meandered by taking the courses and distances of their sinuosities, and the same are to be entered in the fieldbook."

Compliance with these instructions is demonstrated by the plats of the surveys on which the meanders of the west bank are plotted by courses and distances (U.S. Exs. 576C, 576D, 576F, 576G, 578C, 578E, 578G) and by the field notes of those surveys in which the meanders are more fully described and the height of the bank at various points noted. A dependent resurvey accomplished by the United States Bureau of Land Management in 1958 confirmed the accuracy of the meander line. Further demonstrative of the location of the bank in 1876 is the continued and present existence of a high and prominent bank along a considerable portion of the line surveyed as the west bank of the Colorado River in 1874 and 1879. And even as to that portion where the west bank as

then surveyed has been obliterated by intervening changes in the course of the river, the notes of the surveys leave no doubt of the existence of a low bank at that time along the meander line (U.S. Ex. 576B, pp. 19, 21, 22; U.S. Ex. 576E, pp. 49–51).

Employment of meander surveys as probative of the location of a bank is no novelty in the law. *In Re County Ditch No. 67, Murray County,* 151 Minn. 292, 186 N.W. 711 (1922); *Lammers* v. *Nissen,* 4 Neb. 245 (1876). The meander line along the west bank of the Colorado River as surveyed in 1874 and 1879 has been tested and confirmed and its use will permit the effectuation of the plain terms and intent of the Executive Order of May 15, 1876.

If the meander line should be regarded not sufficiently exact to fix the 1876 bank of the River in that reach where the bank has since been obliterated, and the present west bank consequently taken as the Reservation boundary, account must be taken of those areas on the west side of the River by reason of avulsive changes of the River and those lands to the east of the bank where the 1876 bank remains in place, as well as accretions on the east side of the River. The law is well settled that change of a boundary stream by avulsion—a sudden and rapid abandonment of its old course—leaves the boundary unchanged. If the change is by accretion, the river remains the boundary. *Nebraska* v. *Iowa,* 143 U.S. 359 (1892); *Missouri* v. *Nebraska,* 196 U.S. 23 (1904).

There are two known and proven avulsions in this reach of the River—the so-called Olive Lake and Ninth Avenue Cut-Offs. The Olive Lake Cut-Off was constructed by the Palo Verde Mutual Water Company across the neck of a large loop in the existing river channel in 1920. Since the River channel was within the boundaries of the Colorado River Indian Reservation, application for permission to construct the cut-off across Indian lands was made to the Department of Interior (U.S. Ex. 589A), and such permission was granted (U.S. Ex. 589D). The water turned into this man-made channel soon enlarged the channel so that substantially the entire flow of the River followed this course rather than its former course (Tr. 20,126–128). As a consequence some 2,058 irrigable acres

of the Reservation located east of the 1920 west bank now lie west of the River.

A smaller area of the Reservation became situated on the western side of the River as a result of the Ninth Avenue Cut-Off. This man-made channel was constructed in 1943 and turning the River into this channel caused a permanent change in the course of the River. East of the 1943 west bank but now west of the River are 222 irrigable acres of the Colorado River Indian Reservation. If the meander line is not adopted as the Reservation boundary, account must be taken also of 461 irrigable acres which are east of the present channel of the River but west of the meander line of the west bank of the River surveyed in 1874. These lands constitute accretions to the Reservation lands and consequently are part of the Reservation.

CONCLUSIONS 4.21, 4.22.1, 4.23.2, 4.23.3, 4.23.4, and 13.4

The United States has rights to use the waters of the main Gila River, and its tributaries above the respective Reservations, on the Gila Bend Indian Reservation, the Gila River Indian Reservation (and the non-Indian portion of the San Carlos Federal Irrigation Project nad the Florence-Casa Grande lands served through the facilities of that Project), and the San Carlos Indian Reservation, such rights having the priorities enumerated in the United States' Proposed Conclusions above designated. The equitable shares of New Mexico and Arizona in the waters of the Gila River system are subject to such rights and the equitable share of Arizona includes such rights.

A. THE UNITED STATES HAS RESERVED, WITH PRIORITIES ACCORDING TO THE DATES OF ESTABLISHMENT AND ADDITION TO THE RESPECTIVE RESERVATIONS, THE WATERS OF THE GILA RIVER SYSTEM FOR USE ON THE SAN CARLOS, THE GILA RIVER, AND THE GILA BEND INDIAN RESERVATIONS

In addition to the rights of the United States with respect to the Indian Reservations utilizing the waters of the main stream of the Colorado River and of the tributaries above Lake Mead, *supra*, pp. 22–31, the reserved rights to use water and

the priorities arising from the creation of the Indian Reservations on the main stream of the Gila River clearly have interstate application. Included within this category are the Gila River Indian Reservation and the San Carlos Indian Reservation. Rights to use water on these Reservations were decreed to the United States by the Gila Decree (Plf. Ex. 103). Alternatively and additionally, the United States claims rights to use water on these Reservations, as well as on the Gila Bend Reservation, also on the main stream of the Gila River, by reason of, and with priorities according to the dates of, establishment of the Reservations.

Independently of the general condition of aridity and the impossibility of successful agriculture without irrigation, the existence of which conditions alone sufficed for the Court's implication in the *Winters* case of an intent to reserve the necessary waters, intent to reserve water can readily be found in the circumstances attendant upon the creation of each of these Reservations. Lands of the Gila Bend Reservation had historically been irrigated by the Papago Indians (United States' Proposed Finding 4.21.4). Irrigation of the valley lands of the Gila River within the San Carlos Indian Reservation occurred before and immediately after the establishment of the Reservation for the use of the Apache Indians (United States' Proposed Finding 4.22.2). The Pima and Maricopa Indians were irrigating lands of the Gila valley set aside as the Gila River Indian Reservation pursuant to the Act of February 28, 1859. Because of the need of the Indians for more water, the Reservation was later enlarged by various executive orders to include reaches of the Gila River both upstream and downstream from the original area of the Reservation (United States' Proposed Findings 4.23.2, 4.23.3, 4.23.4).

Under the authorities discussed, *supra*, pp. 22–31, there were reserved quantities of water sufficient for the irrigable acreage of the Indian Reservations on the Gila River. The lands susceptible of irrigation from the main stream of the Gila River and the priorities of water rights attached thereto according to the dates of creation of and addition to the Gila Bend, San Carlos and Gila River Indian Reservations are set forth in

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United States' Proposed Findings 4.21.3, 4.22.5, 4.23.16 and 4.23.25 and Conclusions 4.21, 4.22.1, 4.23.2 and 4.23.4.

As noted *supra,* p. 31, rights of this nature transcend State boundary lines. They extend upstream against the claims of all other users of water from sources which contribute to the source from which water for use on the Indian Reservation of concern is diverted. They extend downstream against the claims of all other users of water from sources affected by the diversions for use on the Reservation. Not only are all other uses from the main stream of the Gila River in Arizona and from the upstream tributaries in that State subject to the rights of the United States with respect to these Reservations—so also are all uses of Gila system water in New Mexico, both present and future. The State line has nothing to do with these rights of the United States.

Thus, in the effectuation of an apportionment between New Mexico and Arizona of the waters of the Gila River, it is necessary that all uses in New Mexico of water which may be apportioned for use in that State be subject to the rights of the United States to use the quantities of Gila River water necessary for irrigation of the irrigable lands of the Indian Reservations on the main stream of that river, with the priorities noted in our Proposed Findings and Conclusions.

Also for consideration in connection with apportionment of the Gila River between Arizona and New Mexico are the rights of the United States with respect to the San Carlos Federal Irrigation Project (including the non-Indian portion thereof and the old Florence-Casa Grande Project lands not included within the San Carlos Project but receiving water through the Project facilities), and the effect of the Gila Decree (Plf. Ex. 103).

B. THE GILA DECREE ADJUDICATES THE RIGHTS OF THE PARTIES TO THE ACTION IN WHICH IT WAS ENTERED TO USE THE WATERS OF THE MAIN STREAM OF THE GILA RIVER ABOVE ITS CONFLUENCE WITH THE SALT RIVER. IT IS BINDING UPON THE STATES OF NEW MEXICO AND ARIZONA AND THE DETERMINATION THEREIN OF THE RELATIVE PRIORITY OF RIGHTS AND USES IN THE TWO STATES ON THE REACH OF THE RIVER ENCOMPASSED THEREBY SHOULD BE ADOPTED.

The United States is a party to the Gila Decree. We have asserted, and continue to assert, that with respect to the reach of the Gila River encompassed by the decree, it constitutes a valid adjudication of the relative rights of the water users within that reach. As against the parties to that decree, we have recognized that the reserved rights of the United States to use the waters of the main stream of the Gila River with respect to the Gila River and San Carlos Indian Reservations are limited by the decree. See United States' Proposed Conclusions 4.22.1, 4.23.2, and 4.23.3, and Finding 4.23.41. We understand that Arizona's position is in accord.

With respect to New Mexico, there is no question but that the individual water users in that State, and their successors in interest, who were parties to the Gila Decree are bound by the decree. Aside from the general rules of law supporting this conclusion, this point has been decided specifically by the Court of Appeals for the Ninth Circuit in *Brooks* v. *United States,* 119 F. 2d 636 (1941). That was a suit against the water users in New Mexico who had voluntarily become parties to the Gila Decree to have them held in contempt for violating the decree. The defense was that the Court did not have jurisdiction over the defendants when it entered the decree. The Court of Appeals affirmed the decision of the lower court holding the defendants in contempt. Since the parties to the decree are bound, the question becomes the extent to which the State of New Mexico is bound when it represents these parties as *parens patriae.*

It seems almost so obvious as to require no argument that the State of New Mexico cannot assert as *parens patriae* in this case a claim to more water from the Gila River than could be asserted by those whom the State is representing who are

bound by the Gila decree. Any other conclusion would lead to the anomalous result that the extent of the individual rights would be dependent on the fortuitous circumstance of who asserts the right. That the decree is binding on New Mexico under the circumstances of this case was recognized by the Court of Appeals in the *Brooks* case, *supra,* at page 643, when it said:

> "The State of New Mexico is not a party to the decree. It need not be made so. It is not bound by it except as it might be considered in an action between Arizona and New Mexico in the Supreme Court in making an equitable division of the waters of the stream."

If argument is required, however, the rule that those in privity with a party to a decree are bound by the decree dictates that the State of New Mexico is bound by the Gila Decree because it is representing *parens patriae* parties to that Decree. The State is certainly in privity with its citizens in regard to the claims it is asserting on their behalf.

The citizens of a State are bound by decrees of the Supreme Court in suits in which they are represented by the State *parens patriae. Wyoming* v. *Colorado,* 286 U.S. 494 (1932). Likewise, they are bound by apportionment of the waters of an interstate stream by interstate compact when their interests are represented by the State. *Hinderlider* v. *LaPlata,* 304 U.S. 92 (1938).

Since the citizens of New Mexico will be bound by reason of their representation by the State, it follows that the State is bound by a decree binding on the citizens when it undertakes to represent them in regard to the very rights which were determined by such decree.

We recognize that the reach of the river encompassed by the Gila Decree does not include some of the tributaries in New Mexico. Therefore, the existence of the decree does not preclude proof by New Mexico of uses and rights on those tributaries which are not determined by the decree. However, this does not mean the decree should be rejected as far as it goes. Because both Arizona and New Mexico are bound by it by reason of their representation here of citizens who are

bound by it, the determination by the decree should be accepted and the priority of rights on the tributaries which were omitted from the area to which the decree extends should be determined and fitted into the schedule of priorities included in the decree.

Such determination with respect to the Gila Decree will permit its acceptance as defining the rights of the United States to use the waters of the main Gila River on the San Carlos and Gila River Indian Reservations. And the United States' rights with respect to the Gila Bend Reservation can be fitted into the schedule of priorities established by that decree in like manner as above suggested with respect to the rights in New Mexico on the tributaries in that State not included within the area of prior adjudication. Any other rule as to the effect of the Gila Decree will, we believe, require a determination that as against the parties to that decree, including those in New Mexico, the United States has the rights and priorities adjudicated to it under the decree, while as against other users in New Mexico the United States' rights by reason of establishment of the Indian Reservations under discussion are something different. We submit that such a result would be at best difficult to put into practice.

C. IN ADDITION TO REQUIRING THAT USES IN NEW MEXICO NOT INTERFERE WITH USES BY THE UNITED STATES OF GILA RIVER WATER ON THE SAN CARLOS, GILA RIVER, AND GILA BEND INDIAN RESERVATIONS IN ACCORDANCE WITH THE RESERVED RIGHTS OF THE UNITED STATES, AS DETERMINED BY THE GILA DECREE, APPORTIONMENT BETWEEN NEW MEXICO AND ARIZONA OF THE WATERS OF THE GILA RIVER MUST TAKE INTO ACCOUNT THE RIGHTS OF THE UNITED STATES WITH RESPECT TO THE SAN CARLOS FEDERAL IRRIGATION PROJECT, INCLUDING THE NON-INDIAN PORTION THEREOF AND THE FLORENCE-CASA GRANDE LANDS SERVED THROUGH THE PROJECT'S FACILITIES. THE SATISFACTION OF SUCH RIGHTS WITH THE PRIORITIES DETERMINED BY THE GILA DECREE SHOULD NOT BE HINDERED BY SUCH APPORTIONMENT.

The rights of the United States to use the waters of the Gila River on the San Carlos Federal Irrigation Project and

on the Florence-Casa Grande lands served through the facilities of that project are set forth in detail in our Proposed Findings 4.23.20–4.23.41, and Conclusion 4.23.3. Acceptance of the Gila Decree as above urged as the cornerstone for equitable apportionment between New Mexico and Arizona will assure protection of the priorities to which the United States is entitled with respect to that Project.

Such would accord in all respects with the fundamental principles underlying the doctrine of "equitable apportionment" between appropriation States. It is that doctrine which must control apportionment of the waters of the Gila River since, unlike the controversy as to the main stream of the Colorado River, there are no statutes and contracts to settle the matter.

The doctrine of "equitable apportionment" is founded upon, and arises because of, the inadequacy of the water supply available in an interstate stream to supply all the claims of right to its use. Such situation exists in regard to the uses and claims of right to the use of water from the Gila River. For example, the proof reflected in the United States' Proposed Findings 4.23.35, 4.23.36 and 4.23.37 establishes that the surface flow in the Gila River and its tributaries available to supply the needs of the San Carlos Federal Irrigation Project is inadequate. Our Proposed Finding 4.23.36 shows that the average annual undepleted virgin flow of the river for the period 1914–1945 at a point a short distance upstream from Ashurst-Hayden dam was substantially less than the diversion requirements of the Project. Cf. United States' Proposed Finding 4.23.40. The inadequacy is not remedied by existing storage facilities, as is indicated by the proof supporting the United States' Proposed Finding of Fact 4.23.26. Nor may further resort be made to underground sources to meet the needs of the San Carlos Project in Arizona since this source, too, has been utilized and is inadequate. See United States' Proposed Findings 4.23.37, 4.23.38 and 4.21.5.

Since the water supply presently available to supply existing uses on federal projects in Arizona is inadequate, the claims of New Mexico to water from the Gila River to undertake new developments should be denied. In the most recent equitable apportionment case decided by the Supreme Court, *Nebraska*

v. *Wyoming,* 325 U.S. 589 (1945), one of the parties claimed water for projects to be developed in the future. The Special Master to whom the case was referred for hearing stated in his report to the Court some of the principles guiding his decision. As to the proposed developments, he said:

> "A rule that would seem elementary in equitable distribution (even aside from the legal rights based on priority statutes) is that present rightful uses should be preferred to prospective uses under possible development." Sp. Master's Ex. 7.

The Supreme Court agreed with the Special Master in that case and concluded that the available water supply was not sufficient to warrant approval of the proposed developments since to do so would take part of the water supply necessary to sustain existing projects. *Nebraska* v. *Wyoming,* 325 U.S. 589, 622 (1945).

But aside from New Mexico's claim of right to the use of water for future development, a due regard for the principles of priority of appropriation and other factors properly considered in effecting equitable apportionment of an interstate stream would seem to require that the United States' prior rights with respect to the San Carlos Project and its other rights as determined by the Gila Decree be fully recognized and protected.

Priority of appropriation has long been an important factor in decisions of the Supreme Court equitably apportioning the use of waters of interstate streams. In *Nebraska* v. *Wyoming,* 325 U.S. 589 (1945), the Supreme Court decided that other factors must also be considered. At p. 618, the Court said:

> "But if an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible. For example, the economy of a region may have been established on the basis of junior appropriations. So far as possible those established uses should be protected though strict application of the priority rule might jeopardize them. Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority

> of appropriations is the guiding principle. But physical and climatic condition, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made."

Priority of appropriation is therefore a factor, although not the only one, to be considered in equitably apportioning the waters of the Gila River. The priorities of the rights of the United States to use Gila River water on the San Carlos Federal Irrigation Project in Arizona, as well as all other rights to the use of Gila River water within the area of adjudication, were determined and are evidenced by the Gila Decree.

Furthermore, the fact that there is a large scale, established Project in Arizona utilizing the waters of the Gila River which is the source of livelihood of many persons and which represents a great investment of time, effort and money, should be considered, and the Project protected and preserved in effecting an apportionment of the waters of the Gila River.

The San Carlos Project has been in operation since 1928 (United States' Proposed Finding 4.23.22) and a predecessor federal project was in operation in the area prior to that time (Proposed Finding 4.23.23). It consists of 100,546 acres of irrigable land (Findings 4.23.20; 4.23.33), and the Florence-Casa Grande lands which are served through the Project facilities are in addition thereto. (Finding 4.23.23.) Coolidge Dam has been constructed to store water for the Project (Finding 4.23.26). Picacho Reservoir, a small off-channel storage reservoir (Finding 4.23.30), Granite Reef Dam, a diversion dam in the main stream of the Gila River (Finding 4.23.27), and extensive diversion and distribution facilities (Findings 4.23.31 and 4.23.32), have also been constructed as part of the Project. The fact that such a project exists, its magnitude, its needs,

and the number of persons dependent on it are factors which cannot be disregarded in determining the apportionment which must be made.

The priorities of the United States as determined by the Gila Decree, and of other parties to that Decree, should be accepted in order that the patently equitable result may be achieved.

CONCLUSIONS 4.14, 4.15, 4.17.1, 4.18, 4.19, 4.20, 4.22.2, 4.23.1

The United States has rights to the use of the waters of the tributaries of the Gila River within Arizona on the Indian Reservation referred to in the above designated Conclusions and such rights have priorities as specified in those Conclusions. Other uses in Arizona of the water of those tributaries and of the main Gila River downstream from such tributaries are subject to those priorities.

The rights of the United States to use the water of the tributaries of the Gila River within Arizona on the Salt River, Fort McDowell, Fort Apache, Papago, Ak Chin and San Xavier Indian Reservations, and on the San Carlos River and Oliver Talgo Farm Areas of the San Carlos Reservation and on the Maricopa District of the Gila River Reservation are generally similar in nature to the United States' rights discussed *supra*, pp. 22–31 and pp. 36–38. Other uses in Arizona of the waters of those tributaries and of the main Gila River downstream from such tributaries are subject to those rights, with the priorities specified in the above designated Conclusions.

CONCLUSION 4.17.2 AND FINDING 4.0.3

The reserved rights of the United States to use the waters of the Colorado River system on the Indian Reservations in the Lower Basin include the waters needed for stock watering and other useful purposes within the needs of the Indians. Use of water for commercial recreation on an Indian Reservation adapted thereto is use for such a useful purpose.

The courts have recognized that reserved rights arising from the establishment of Indian reservations are not restricted to

irrigation use. The *Winans* case, *supra,* dealt with fishing rights. The *Conrad Investment Company* decision, *supra,* p. 28, defined the quantum of the reserved right as being that amount necessary "for the purposes of irrigation and stock raising and domestic and other useful purposes." 161 Fed. at 831. Nor has the recognition that the water needs of the Indians extend to uses other than irrigation been restricted to the judiciary. Congress, in opening to mineral entry lands of Indian Reservations within Arizona, California, Nevada, New Mexico, and other states expressly excepted "lands containing springs, water holes, or other bodies of water needed or used by the Indians for watering livestock, irrigation or water power purposes." Act of December 16, 1926 (44 Stat. 922).

Reference has previously been made to uses for domestic and stock-watering purposes on Indian Reservations of the Lower Colorado River Basin. Although computation has been made only of the amounts necessary for such purposes incidental to operation of the irrigation areas, the United States expects that the decree herein will recognize its right to use such waters as are reasonably necessary for domestic use and watering of livestock on the entire Reservations. Even more minor in amount are the uses for power generation and commercial recreation which the United States also asks be recognized as within the reserved right.

It would be highly illogical as well as discriminatory to limit the Indians' use of water to agricultural and related activities. The growing population and needs of the Indians of the Lower Colorado River Basin dictate maximum utilization of the resources of the Reservations therein situated. Enterprises such as that undertaken by the White Mountain-Apache Tribe to develop the reservation potential of the Fort Apache Indian Reservation provide employment and revenue to members of the Tribe. The modest amount of water thereby required is manifestly for a "useful purpose" and should be declared to be within the reserved right.

CONCLUSION 4.7

The rights of the United States to the use of Colorado River Water on the Cocopah Indian Reservation

The Cocopah Indian Reservation is located geographically within the boundaries of the Valley Division of the Yuma Reclamation Project. The land of the Reservation is not part of the Reclamation Project but water for irrigation on the Reservation is obtained through the facilities of the Valley Division. Such water is purchased by the Bureau of Indian Affairs but there is no contract for such purchase and delivery.

Under the Act of February 21, 1911 (36 Stat. 925), commonly known as the Warren Act, *infra*, p. 54, the Secretary of the Interior would be authorized to enter a contract for the delivery of water to an extent not exceeding excess capacity in the facilities of the Yuma Project with individuals, corporations, associations, and irrigation districts engaged in furnishing or in distributing water for irrigation. That Act does not specifically provide for such contracts with respect to such deliveries to Indian Reservation lands or other lands under the jurisdiction of the Secretary of the Interior for the obvious reason that a contract between the Secretary and himself would be meaningless. However, it can not be assumed that the Warren Act, in authorizing certain contracts to be made with respect to the use of reclamation project facilities in excess of the needs of the project, is in any way a limitation of the Secretary's authority to utilize excess capacity in the facilities of the project for the irrigation of Indian Reservation lands adjacent to the project. Even though there is no contract the Secretary of the Interior, acting through the Bureau of Indian Affairs, may purchase water from the Valley Division of the Yuma Project and have that water delivered through the facilities of that Project for irrigation of lands on the Cocopah Indian Reservation.

But even were it to be held that the delivery of water through the facilities of a Federal Reclamation Project to lands of an adjacent Indian Reservation is not authorized under Federal law, we submit that the use of Colorado River

water on this Reservation is a use on lands of the United States within paragraph (1) of Article 7 of the 1944 Arizona water delivery contract. Accordingly, the State of Arizona is precluded from questioning such use. *Supra,* p. 17. And the other parties are not concerned therewith.

CONCLUSION 4.9

The rights of the United States to the use of Colorado River water on the Coachella Indian Reservations

As indicated in Proposed Findings of Fact 7.5.1 through 7.5.17 and Proposed Conclusions of Law 7.22, 7.23 and 7.24, the United States is asserting a claim with respect to the water required to irrigate lands in the Coachella Valley. This claim is based on, and is asserted in recognition of, the water-delivery contract entered into, on October 15, 1934, between the United States and the Coachella Valley County Water District providing for delivery of water from storage in Lake Mead through the All-American and Coachella Canals to land in the Coachella Valley. By Conclusion of Law 4.9, the United States is asserting a claim for water from the Colorado River through the All-American and Coachella Canals and the distribution facilities of the Coachella Valley County Water District for irrigation of the lands of three Indian Reservations located in the Coachella Valley. The purpose of this portion of the brief is to explain the interrelationship of these claims.

The contract of October 15, 1934 between the United States and the Coachella Valley County Water District provided for delivery of water by the United States to lands located within the Coachella Service Area as defined in the contract, and then or thereafter within the Water District. The lands in the Service Area were subdivided and designated in the contract as: Improvement District No. 1, Salton Area, Dos Palmas Area, and Fish Springs Area. Presently only the lands within Improvement District No. 1 are included within the Water District.

There are three Indian Reservations in the Coachella Valley—the Cabazon, the Augustine and the Torres-Martinez. Both the Cabazon and Augustine Reservations are within the

Coachella Service Area and Improvement District No. 1. Within the Coachella Service Area and also within Improvement District No. 1 are 7,976 acres of the Torres-Martinez Reservation; 1,360 acres of the Torres-Martinez Reservation are in the Fish Springs Area of the Coachella Service Area. (Finding 4.9.2.)

Distribution facilities have been constructed to serve 74,500 acres in the Coachella Service Area and Improvement District No. 1. Specific provision was made in the construction of this distribution system for sufficient capacity to irrigate 10,500 acres of Indian lands in the Coachella Valley. (Finding 4.9.3.)

The Act of August 25, 1950 (64 Stat. 470) directed the Secretary of the Interior to designate the lands of the Cabazon, Augustine and Torres-Martinez Reservations which might be irrigated from the facilities of the Coachella Valley County Water District. Thereafter the Secretary of the Interior and the District entered an agreement by which the United States agreed, subject to appropriate authorization by Congress, to construct the distribution facilities needed to serve the lands in the three Reservations from the facilities of the District and the District agreed to deliver water to the Indian lands under the works to be constructed to the same extent as other lands in the District. The necessary authorization for the construction of the irrigation facilities on the three Reservations in Improvement District No. 1 was given by Congress by Act of August 28, 1958 (72 Stat. 968).

Once the distribution facilities authorized by the Act of August 28, 1958 (72 Stat. 968) have been constructed, the irrigable lands of the three Reservations in Improvement District No. 1 will, by reason of the agreement entered into between the District and the United States and by reason of the fact they are within Improvement District No. 1 and the Coachella Service Area, be entitled to delivery of Colorado River water through the All-American and Coachella Canals and the distribution facilities of the Coachella Valley County Water District under the October 15, 1934 water delivery contract of the United States with that District, as a part of, and on a parity with the other lands of the Coachella Valley County

Water District in Improvement District No. 1 and the Coachella Service Area.

There are, as has been previously stated, 1,360 acres of irrigable land of the Torres-Martinez Indian Reservation which are within the Coachella Service Area but outside Improvement District No. 1. Since these lands are located within the Coachella Service Area as defined in the contract of October 15, 1934, they will be entitled to delivery of Colorado River water through the All-American and Coachella Canals and the facilities of the Coachella Valley County Water District, upon inclusion within the Water District, as a part of, and on a parity with, the other lands, both Indian and non-Indian, forming a part of the Coachella Valley County Water District.

CONCLUSIONS 4.16.1 AND 4.16.2

The rights of the United States to the use of Colorado River system water on the Camp Verde Indian Reservation

As to the Camp Verde Indian Reservation, the United States relies on rights to use water of the Verde River acquired in accordance with state law. This Reservation is composed of two tracts, located in the Verde River Valley, known as the Middle Verde and the Lower Verde Areas.

The Middle Verde Area was acquired by the purchase of two tracts of land with shares and privileges in the O.K. Irrigation Ditch, including a permanent right to the flow of water sufficient to irrigate 208 acres (U.S. Exs. 2303A, 2303B). The O.K. Ditch was located on June 20, 1876, completed May 3, 1877, and a ditch right for agricultural purposes filed on January 7, 1877; the ditch was maintained by the shareholders of the O.K. Ditch Company (U.S. Exs. 2304, 2305). Under Arizona law, an appropriator may perfect his appropriation by acquiring the permanent right to the service of another's ditch, *Slosser* v. *Salt River Valley Canal Co.*, 7 Ariz. 376, 65 Pac. 332 (1901). This water right with its priority of June 20, 1876 was acquired by the United States.

The Lower Verde Area of the Camp Verde Indian Reservation was acquired by purchase of land and appurtenances on November 1, 1909 (U.S. Ex. 2301). Waters of the Verde

River were thereafter applied to beneficial use on this area by Indians of the Reservation. Prior to the enactment of the Arizona Water Code in 1919, appropriation of water was accomplished under the law of Arizona merely by the application of water to beneficial use for irrigation. *Slosser* v. *Salt River Valley Canal Co., supra. Tattersfield* v. *Putnam,* 45 Ariz. 156, 41 P.(2d) 228 (1935).

CONCLUSIONS 2.1, 5.1, 6.1–6.4

The United States has certain rights and obligations with respect to the use of Colorado River water for flood control, improvement of navigation, river regulation, satisfaction of the Mexican Water Treaty, and the maintenance of wildlife refuges. The contract entitlements to the delivery of stored water of the States of California, Arizona, and Nevada are subject to such rights and obligations.

We believe that the reasoning which supports the Conclusions referred to in the caption is self-evident, and that the validity of those Conclusions is apparent from the Findings of Fact which precede them. The relationship of the rights and obligations of the United States referred to therein to the entitlements of the several States is further explained in our Proposed Conclusions 11.1, 11.9, 11.10, 11.11, 11.12 and 11.13.

CONCLUSIONS 7.3, 7.4, 7.5, 7.6, 7.8, 7.9, 7.11, 7.12, 7.13, 7.14, 7.15, 7.16, 7.17, 7.18, 7.24, 7.26, 7.27, AND 11.3

The United States has certain rights to divert the waters of the Colorado River for use on and under the several Federal Reclamation Projects and related uses referred to in the above designated Conclusions. While the diversion and use of water under these rights is included within the entitlements of the respective States wherein the uses are made, those entitlements are subject to the provisions of the contracts which the United States has made respecting the delivery of water for such projects and related uses and to the laws of the United States relating thereto and to administration and operation of such projects.

Generally speaking, we believe that the Conclusions we have proposed respecting the rights of the United States to

divert and deliver waters of the Colorado River for use on the several Federal Reclamation Projects utilizing the waters of the main stream and related uses are self-explanatory. We do not know of any real challenge to any of them and we accordingly feel that argument of none of them is necessary at this time. However, some further explanation of our Proposed Conclusions 7.19 and 7.20 and 7.21 may be useful. The paragraphs which immediately follow are therefore addressed to those Conclusions.

CONCLUSION 7.19

*The term "beneficial consumptive use" as used in the Gila Project Reauthorization Act is to be construed as meaning "the quantity of water * * * absorbed by the crop and transpired or used directly in the building of plant tissue, together with that evaporated from the crop-producing land."*

The Act of July 30, 1947 (61 Stat. 628) specified the number of irrigable acres to be included in the Yuma Mesa and Wellton-Mohawk Divisions of the Gila Project and with respect to each Division the acreage specification is followed by the following language: "or such number of acres as can be adequately irrigated by the beneficial consumptive use of no more than three hundred thousand acre-feet of water per annum diverted from the Colorado River * * *." This language can mean nothing other than that within each Division of the Project there may be beneficially consumptively used three hundred thousand acre-feet of Colorado River water per annum and that there may be diverted from the Colorado River whatever quantities of water are necessary to provide for this quantity of beneficial consumptive use.

As set forth in our Proposed Finding 7.3.29, the term "beneficial consumptive use" as used in the Act of July 30, 1947, has by administrative interpretation been determined to mean "the quantity of water * * * absorbed by the crop and transpired or used directly in the building of plant tissue, together with that evaporated from the crop producing land." It was estimated that such consumptive use in the Wellton-Mohawk Division on 75,000 irrigable acres would be 300,000 acre-feet

per annum. On the basis of such interpretation and such estimate, the Wellton-Mohawk Division of the Project was designed and has been constructed to serve 75,000 irrigable acres.

The validity of this interpretation is confirmed by the testimony of William Steenbergen, Project Manager of the Bureau of Reclamation, respecting the estimated future water requirements of the Wellton-Mohawk and Yuma Mesa Divisions of the Project. (United States' Proposed Findings 7.3.28 and 7.3.30.) By that testimony it is demonstrated that the consumptive use, defined as that term was defined in the Definite Plan Report for the Wellton-Mohawk Division, of irrigation water on 75,000 irrigable acres within the Wellton-Mohawk Division will be approximately 268,640 acre-feet per year and that approximately 599,300 acre-feet must be diverted at Imperial Dam to provide for such consumptive use on the lands of the Division. We submit that the term "beneficial consumptive use" as used in the Gila Project Reauthorization Act is to be construed in accordance with the meaning attributed to it in the planning of the Wellton-Mohawk Division and on the basis of which the Project has been constructed and a repayment contract entered into between the United States and the Wellton-Mohawk Irrigation and Drainage District.

Under such interpretation, the estimated consumptive use of 158,630 acre-feet per year of irrigation water on 40,000 acres of irrigable lands within the Yuma Mesa Division of the Gila Project, with an estimated annual diversion requirement at Imperial Dam of 427,310 acre-feet, is clearly within the limitations of the Reauthorization Act.

CONCLUSIONS 7.20 AND 7.21

The Special Use and Warren Act Contracts which have been entered into by the United States in the Yuma area are valid contracts for the delivery of stored water.

The United States has entered into numerous special water delivery contracts in the Yuma, Arizona, area (United States' Proposed Finding 7.4.1). These contracts provide for delivery of water from the facilities of the Yuma, Yuma Auxiliary and Gila Reclamation Projects to water users outside those Proj-

ects. Fourteen of the contracts for delivery of water from the Gila Project and two of the contracts for delivery of water from the Yuma Auxiliary Project are by express language made pursuant to the Warren Act of February 21, 1911 (36 Stat. 925) and the Boulder Canyon Project Act of December 21, 1928 (45 Stat. 1057). All of these contracts specifically state that they are for permanent service. Nine contracts for the delivery of water from the Gila Project and two for the delivery of water from the Valley Division of the Yuma Project are made pursuant to the Miscellaneous Special Use Act of February 25, 1920 (41 Stat. 451) and all but three of them recite that they are made pursuant to the Boulder Canyon Project Act and that they are for permanent service.

The Warren Act provides that:

> "* * * whenever in carrying out the provisions of the reclamation law, storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project, the Secretary of the Interior, preserving a first right to lands and entrymen under the project, is hereby authorized, upon such terms as he may determine to be just and equitable, to contract for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity with irrigation systems operating under the act of August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and individuals, corporations, associations, and irrigation districts organized for or engaged in furnishing or in distributing water for irrigation."

The essence of this Act is, therefore, that, when excess storage or carrying capacity has been constructed in the facilities of a federal reclamation project, the Secretary of the Interior may contract for the delivery of water through the project facilities to an extent not exceeding such excess capacity, providing that a first right is preserved to lands and entrymen under the project. All the water-delivery contracts in the Yuma, Arizona, area entered into pursuant to the Warren Act specifically preserve a first right to the lands and entrymen under the

project in question. They are, therefore, valid contracts under the Warren Act.

Section 5 of the Boulder Canyon Project Act provides, in substance, that the Secretary of the Interior may contract for the storage and delivery of stored water and that such contracts shall be for permanent service. All the water-delivery contracts in the Yuma, Arizona, area made pursuant to the Warren Act specifically state that they are for permanent service. These contracts are, therefore, valid contracts under the Boulder Canyon Project Act also.

The Miscellaneous Special Use Act of February 25, 1920 (41 Stat. 451) provides that:

> "* * * the Secretary of the Interior in connection with the operations under the reclamation law is hereby authorized to enter into contract to supply water from any project irrigation system for other purposes than irrigation, upon such conditions of delivery, use, and payment as he may deem proper: *Provided,* That the approval of such contract by the water users' association or associations shall have first been obtained: *Provided,* That no such contract shall be entered into except upon showing that there is no other practicable source of water supply for the purpose: *Provided further,* That no water shall be furnished for the uses aforesaid if the delivery of such water shall be detrimental to the water service for such irrigation project, nor to the rights of any prior appropriator: *Provided further,* That the moneys derived from such contracts shall be covered into the reclamation fund and be placed to the credit of the project from which such water is supplied."

This Act in substance, therefore, authorizes the Secretary of the Interior to contract to deliver water from a reclamation project irrigation system for purposes other than irrigation providing that certain conditions designed to protect the water users in the reclamation project are met. The nine contracts for delivery of water from the Gila Project and the two contracts for delivery of water from the Valley Division of the Yuma Project made pursuant to this Act meet these pre-

scribed conditions and are, therefore, valid contracts under this Act.

Of the eleven contracts made pursuant to the Miscellaneous Special Use Act, eight are also made pursuant to the Boulder Canyon Project Act. Each of these contracts is for permanent service. These contracts are, therefore, valid contracts under the Boulder Canyon Project Act.

Three of the contracts made under the Miscellaneous Special Use Act do not refer to the Boulder Canyon Project Act. We submit that they are nevertheless valid contracts, that the delivery of stored water according to their terms is authorized, and that under the provisions of the Miscellaneous Special Use Act, the delivery of water thereunder may not interfere with the water service for the reclamation projects through which such water is delivered.

CONCLUSIONS 8.1, 9.1, 10.1, AND 11.4

The United States has rights to the use of water from sources within the drainage area of the Lower Colorado River on the various national forests, parks, monuments, memorial, and recreation area, and on lands under the jurisdiction of the United States Bureau of Land Management lying wholly or in part within that drainage area. Such rights arise by reason of, and with the dates of priority of, establishment of these various reserves and include the right to increased use in the future in order to accomplish the purposes of such reserves.

The water uses of the United States on its forests, parks, monuments, memorial, recreation area and lands under the jurisdiction of the United States Bureau of Land Management in the Lower Colorado River Basin have been set forth in the respective Findings in Sections VIII, IX and X of the Findings of Fact and Conclusions of Law proposed by the United States. The United States claims priorities arising by virtue of establishment of these reserves and relies also on rights acquired in pursuance of the law of the state in which the particular uses are situated.

Although we believe there is no issue in this case respecting these rights of the United States, the following brief explana-

tion of the law supporting the existence of such rights is submitted.

The rights of the United States to use water on the various national forests, parks, monuments, memorial and recreation area, and lands under the jurisdiction of the United States Bureau of Land Management lying wholly or in part within the Lower Colorado River Basin are, for the most part, based on the reservation concept. This involves the proposition that by the withdrawal of lands from the public domain the unappropriated waters appurtenant to the lands so withdrawn are set aside and reserved for the purposes of the reservation, and thereby removed from the operation of the various Federal acts permitting appropriation and beneficial use by the public of waters on the public domain.

This proposition was the basis for the decision in *Winters* v. *United States,* supra, p. 23. That it extends to any federal reservation has been firmly settled by the recent case of *Federal Power Commission* v. *Oregon,* 349 U.S. 435 (1955). Involved there was the question whether the Federal Power Commission had the power, in spite of Oregon's refusal to assent, to issue a license to a private hydro-electric project on a non-navigable stream. One end of the dam involved in the project abutted on Indian lands previously reserved by the Government. The other abutted on land previously reserved by the United States for power purposes. The state of Oregon objected that the project would interfere with that state's fish and game regulations and that the Desert Land Act of 1877, and its precursor legislation in the Acts of July 26, 1866, and July 9, 1870, constituted an express congressional delegation or conveyance to the state to regulate the use of the waters. The Supreme Court upheld the Federal Power Commission's authority. The Court concluded, *inter alia,* that there was no constitutional question as to the Commission's authority to grant such a license for a project on reserved lands of the United States. This authority, the Court noted, springs from the Property Clause of the United States Constitution which provides: "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Art.

IV, § 3. The Court noted the project was to occupy lands which came within the term "reservations," as distinguished from "public lands." The Court said "reservations" are not subject to private appropriation and disposal under public land laws.

The Court further held that the Desert Land Act of 1877, and related statutes of 1866 and 1870, were "not applicable to the reserved lands and waters here involved." *Id.*, at 448. The Court went on to say:

> "* * * The Desert Land Act covers 'sources of water on public lands. * * *' The lands before us in this case are not 'public lands' but 'reservations.' Even without that express restriction of this Desert Land Act to sources of water supply on public lands, these Acts would not apply to reserved lands. *'It is a familiar principle of public land law that statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated to some other purpose.'* * * *" (Emphasis supplied.)

In light of the Supreme Court's unequivocal differentiation in *Federal Power Commission* v. *Oregon* between public and reserved lands, as well as of the authorities cited in this brief in connection with the Indian reservations, it is patent that the Desert Land Act of 1877 and related acts have no application to the Federal areas here considered and that the priorities of the United States to use the waters within such areas date from times no later than the respective dates of withdrawal of the lands whereon the several uses are situated.

While the inapplicability of the Desert Land Act and related statutes to the waters on reserved lands unappropriated at the time of withdrawal comes about merely by the act of withdrawal from the public domain without regard to the purpose of the reservation, the reasonableness of the rule of *Federal Power Commission* v. *Oregon* as applied to the areas under discussion is all the more apparent when consideration is given to the purposes of the several reservations.

The national forests are used for the protection of watersheds to maintain the natural flow of the streams below, for the production and harvesting of timber, for the production and harvesting of forage for domestic livestock permitted on the reservations, for the protection and propagation of fish and wildlife, and for recreation uses by the general public. (United States' Proposed Finding 8.1.) Particularly significant is the fact that the Act of June 4, 1897, prescribing the purposes for which public lands could be reserved as national forests provided, *inter alia,* that "no national forest shall be established, except to improve and protect the forests within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; * * *" (30 Stat. 34; 16 U.S.C. 475). It is clear from this language that use of the waters appurtenant to the forest areas is necessary to accomplishment of the purposes of their establishment.

With regard to the parks and similar areas, the purposes to be served could not be capable of fruition without the use of at least a part of the unappropriated waters on the reservations. Congress has recognized this need in a statute providing for the National Park Service. The statute declared the fundamental purpose of the national parks, monuments and reservations was "to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." (48 Stat. 389; 16 U.S.C. § 1.) It is patent that accomplishment of these objectives would not be possible without water.

Waters used on areas that later became part of the lands under the jurisdiction of the Bureau of Land Management were, practically speaking, expressly reserved by an Executive Order dated April 17, 1926. The Order states:

> "It is hereby ordered that every smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one-quarter

> of a mile of every spring or water hole located on unsurveyed public land be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and reserved for public use in accordance with the provisions of section 10 of the Act of December 29, 1916 (39 Stat. 865; 43 U.S.C. 300), and in aid of pending legislation."

Since only areas were withdrawn that had significance with regard to water, a purpose that the waters themselves be likewise withdrawn can hardly be controverted. Moreover, an Act of Congress authorizing such reservation spoke in terms of reserving these areas for "watering purposes" and "watering places" (39 Stat. 865). In addition, it is manifest that the purposes of the Taylor Grazing Act of 1934 and National Soil Conservation Act of 1935, expressed in United States' Proposed Finding 10.1, could not be accomplished without these waters.

A small part of the United States' claim to the right to the use of water in these areas is based on priorities acquired by use, and construction or use. (See Finding 10.8; also Finding 8.13, 8.23, 8.30 and 8.41.) By the Acts of 1866, 1870 (43 U.S.C. § 661) and the Desert Land Act of 1877 (43 U.S.C. § 321), Congress accorded recognition to and sanctioned possessory rights to use waters on the public lands asserted under local customs and laws. And by force of these Acts, the United States thereafter conferred a right to the use of water on the public lands when such water was appropriated and applied to beneficial use in accordance with the local customs and laws. By putting the waters on the public lands referred to in this paragraph to beneficial use, the United States has protected as against appropriation by others its rights to use such waters. For it is a familiar principle that the Government may take the benefits of an Act, though not named, although it may not be bound to its detriment by an Act unless it is named. See *Dollar Savings Bank* v. *United States,* 86 U.S. (19 Wall.) 227, at 239 (1873).

Moreover, the Desert Land Act and related statutes merely permit the appropriation by the public of unappropriated nonnavigable waters on the public lands. Those statutes do not

preclude the United States from putting such waters to use before they are appropriated by members of the public and thereby removing them from the category of unappropriated water which may be appropriated by the public.

CONCLUSION 3.1

Subject to the contracts it has made respecting the generation and sale of electrical energy, the United States has the right to use any and all waters of the main stream of the Colorado River reaching its reservoirs and power plants for the generation of electrical energy to the extent that such use does not jeopardize the use of those waters for river regulation, improvement of navigation, flood control, irrigation and domestic uses. The discretion to determine whether stored waters may be released exclusively for power generation without jeopardizing existing or foreseeable requirements for preferred uses resides in the Secretary of the Interior.

We believe that the reasoning which supports our proposed Conclusion 3.1 is self-evident. The relationship of the rights of the United States referred to therein to the entitlements of the several States is further explained in our Proposed Conclusions 11.1, 11.2, and 11.8.

CONCLUSION 11.12

While the contract entitlements of the several States to the delivery of stored waters are subject to reduction on account of contributions to be made by them, if necessary, for satisfaction of the Mexican Treaty requirements (Conclusion 11.11), uses of Colorado River water on the Indian Reservations within the respective States are not subject to reduction on account thereof and the burden of such reduction in the deliveries for use within the States is to be borne by the water users other than the United States for use on such Indian Reservations.

The immunity of uses on the Indian Reservations from contribution to Mexican water deliveries follows from the terms of the Colorado River Compact. Article III(c) of that Compact makes provision for the satisfaction of the Mexican

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Treaty from the waters covered thereby and Article VII excludes from operation of the Compact, obligations of the United States to Indian tribes. The interaction of these Compact provisions results in exemption of Indian uses from the Mexican Treaty burden, even when diminution of other uses is necessary to satisfy that burden.

Furthermore, the United States cannot be deemed to have limited its rights held in behalf of the Indians except by clear and express grant. *United States* v. *California,* 332 U.S. 19, 40 (1946); *United States* v. *Parkins,* 18 F. 2d 642 (D. Wyo. 1926). Nowhere in the pertinent instruments is to be found an express subjection of Indian uses to the Mexican obligation and accordingly there is no basis for charge on these uses of a share of the Mexican Treaty. And see *supra,* p. 26.

CONCLUSION 11.3

For the purpose of determining the aggregate quantities of water deliverable in satisfaction of the several State contract entitlements, the fair and equitable rule for measuring the consumptive use of the quantities of water diverted from the main stream is the quantity diverted for use within a State less the quantity of determinable return flow from that State to the main stream of the Colorado River in the United States or elsewhere in such manner that such return flow is available for other downstream uses in the United States or for satisfaction of the Mexican Treaty obligation.

The rule stated in the caption for determining the consumptive use of water diverted from the main stream, which is embodied in United States' Proposed Conclusion 11.3, is a rule of convenience proposed for application to the specific situation with respect to which it is stated. We realize it is different from the rule proposed in our Conclusion 7.19 for determining "beneficial consumptive use" within the meaning of the Gila Project Reauthorization Act of July 30, 1947 (61 Stat. 628). We realize it is also different from the rule provided under Article 7(d) of the Arizona water-delivery contract for determining the quantity of use to be charged to the

Arizona contract entitlement on account of uses in Arizona on the tributaries above Lake Mead.[2] And we realize it is different from the rule proposed in our Conclusion 11.11 for measuring the quantity of use of the waters of all the tributaries in Arizona for the purpose of determining that State's share of main stream water to be contributed for satisfaction of the Mexican Treaty burden should such contribution be necessary.

But, we submit, there is no inconsistency between the several proposed methods for determining consumptive use. The rule urged for interpretation of the Gila Project Reauthorization Act is justified and fully supported by the considerations discussed *supra,* pages 52 to 53, inclusive. The rule of Article 7(d) of the Arizona water-delivery contract for the measurement of tributary uses which diminish the flow into Lake Mead, extended by our Proposed Conclusions 11.4 and 11.11 to the measurement of consumptive use of the tributaries in Nevada and other tributaries in Arizona, is fully justified by the circumstances for application to which it is proposed. *Infra,* pages 66 to 67 and 69 to 70. And, in like manner, the rule proposed for measuring consumptive use of main stream waters for the purpose of determining the quantities of water deliverable in satisfaction of aggregate State entitlements is fully justified and supported by the circumstances prevailing with respect to the uses of such water.

There is no need to attempt to reconcile these several methods of measurement of consumptive use with the term "beneficial consumptive use" as that term is used in the Colorado River Compact. Obviously, it would be futile so to attempt in the absence of the Upper Basin States. But beyond that, except as it establishes the quantity of water available for use in the Lower Basin, the Colorado River Compact is not concerned with allocation between the Lower Basin States of the waters available for use within that Basin. There is a need for reconciliation, if at all, only with the documents which control that allocation, viz.: Section 4(a) of the Project Act, the

[2] In our Conclusion 11.4 we propose that the latter rule is also to be applied in determining the quantity of use to be charged to the Nevada contract entitlement on account of the use of water diverted from the tributaries within that State.

California Limitation Act, and the several water-delivery contracts made under authority of Section 5 of the Project Act.

Clearly, the consumptive use by crops of irrigation water cannot be the measure of use for the purpose under discussion. And while depletion of the waters available in the main stream at a common downstream point, comparable to the rule of the Arizona contract for the measurement of tributary uses which diminish the flow into Lake Mead, would probably yield approximately the same result, we believe that diversions less determinable return flow is the rule of measurement most appropriately to be applied in this connection.

It is the rule prescribed by Section 4(a) of the Project Act for determining the quantity of consumptive use of Colorado River water for use in California. To attempt to measure the aggregate consumptive uses of main stream water in other States by different standards would be at best impractical. If diversions less returns to the river is a fair measure of consumptive use of Colorado River water in California, which we think it is, it is a fair measure of the aggregate consumptive use of main stream water in Arizona and Nevada.

We believe that the quantity of use should be the diversions less the "determinable" return flows. It is obvious that in areas of use such as the Palo Verde Valley in California, the Yuma Valley in Arizona and California, the Mohave Valley in Nevada, California and Arizona, and the Parker Valley in Arizona, there are substantial returns to the river which are not now, and cannot in the future be, measured in surface drains. The approximate quantities of such returns are capable of determination by application of principles of engineering, but the best method for making such determinations may change as increased knowledge is obtained from additional experience. The record shows that on the basis of present operating experience with respect to the Gila Project there are numerous uncertainties respecting the quantity of return flow from the Yuma Mesa and Wellton-Mohawk Divisions of that Project. However, we submit that the method to be adopted by the Court for determining return flows from that Project should be a method which will permit the application of reasonable engineering judgment by the operator of the river in the light

of developing circumstances and increased experience and knowledge.

By law the Secretary of the Interior is vested with authority to operate the works which have been constructed for regulation of the Colorado River. It is he who is empowered to contract for the storage and delivery of main stream water and it is he who must make the determinations necessary for the delivery of such water in conformity with the contracts which have been made. The engineering determinations which must from time to time be made in order to deliver water in conformity with the contracts are to be made by him in exercise of the broad discretion which Congress has vested in him. We submit that the method, or methods, for determining the quantities of return flow which may from time to time give the most dependable results is a matter for determination by him and that the Court need not attempt to prescribe such.

We believe it is obvious that when any diversion takes water out of the main stream of the Colorado River for use in a State so that that water is not available for other use in the United States or for satisfaction of the Mexican Treaty the quantity so taken should be charged against the State entitlement. On the other hand, credit should be allowed for any returns which augment the supply of main stream water available downstream for use in the United States or which can be utilized in satisfaction of the Treaty requirements. Thus, the rule for measuring consumptive use for the purpose of determining the aggregate quantities of water deliverable in satisfaction of the several contract entitlements which we have proposed is sufficiently broad to permit the allowance of credit for water delivered to Mexico by special arrangements with that country which may be made with that country from time to time, even though it may not be delivered in the bed of the stream in the limitrophe section in strict compliance with the Treaty. An instance of such a special arrangement is the delivery at San Luis at present by pumping from the Yuma Project drain directly into the Mexican canals (Tr. 21,192–2A; U.S. Ex. 53). Other such arrangements as this may be made in the future and proper credit as for return flow to the river should

be allowed if and when the water involved goes to reduce the Mexican deliveries.

CONCLUSIONS 11.4 AND 11.5

For the purpose of determining the aggregate quantities of water deliverable in satisfaction of the Arizona and Nevada contract entitlements, the quantity by which consumptive uses from tributary sources in each State diminish the flow into Lake Mead is to be determined by the Secretary of the Interior in the exercise of his discretionary functions with respect to operation of the Boulder Canyon Project and the delivery of stored water under contracts made in pursuance of the Project Act.

Article 7(d) of the Arizona 1944 water-delivery contract provides that the obligation of the United States to deliver water thereunder "shall be diminished to the extent that consumptive uses now or hereafter existing in Arizona above Lake Mead diminish the flow into Lake Mead."

We believe this provision is predicated on the proper rule for measuring for purposes of this case the consumptive use of waters of the tributaries of the Colorado River above Lake Mead. The evidence shows (e.g., Tr. 13,182) that much of the water so used would never reach the main stream if it weren't used. We believe it is only reasonable, as well as fair and equitable, that in allocating the waters of a common source—in this case, the main stream of the Colorado River—for use in different States, a State ought not to be charged with the use of water which would not be available for use in other States if it were not used in the State of origin.

In United States' Conclusion 11.4 we have proposed, with respect to the United States' uses in the national parks, national forests, and areas under the jurisdiction of the Bureau of Land Management of the Department of the Interior, that the rule of Article 7(d) of the Arizona contract should apply also in determining the quantities of main stream water deliverable under the Nevada contract. And in our Conclusion 11.5 we propose that the quantity of use on the Indian Reservations above Lake Mead in both Arizona and Nevada should be determined in the same manner.

We believe that the quantity by which the tributary uses above Lake Mead may diminish the flow into Lake Mead is not feasible of judicial determination in this case, if it presents a justiciable matter in any case. We submit that this also is of necessity a matter for determination by the Secretary of the Interior in his operation and administration of the Boulder Canyon Project and in the making of deliveries of stored water in pursuance of the several contracts relating thereto. Involved are questions of technical knowledge and judgment, and the Secretary's discretion to utilize varying and improved methods for making such determinations should not be hampered by the imposition of judicial rules relative thereto. *Supra,* pages 64 to 65.

CONCLUSION 11.11

In case of shortage of water requiring that the States of the Lower Basin contribute from the waters apportioned by the Colorado River Compact for use in that Basin for satisfaction of the Mexican Treaty, each of the States of Nevada, Arizona, and California is obligated to contribute from its contract entitlement to the delivery of stored water a quantity of water which is proportionate to the use within that State of the total Colorado River system water available for use within the three States to the extent such system water could be available for delivery to Mexico if not used within the States.

Article III(c) of the Colorado River Compact provides that the waters necessary for satisfaction of the Mexican Treaty shall be supplied first from those which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b) of the same Article, "and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper and Lower Basin."

While it is undoubtedly true that the circumstances under which the Upper Basin must contribute from its apportionment water for satisfaction of the Mexican burden cannot be determined in the absence of the Upper Basin States, never-

theless, we believe that the contributions by the Lower Basin States to the Lower Basin's share of the Mexican Treaty burden, whatever it may be, are generally determinable by reference to the quoted language.

Article III(c) of the Compact constitutes an agreement by the Lower Basin States to bear one-half of the deficiency of the surplus to meet the Mexican requirement from the waters apportioned by the Compact for use in the Lower Basin. Absent further stipulation, the only reasonable construction of that agreement by and between the Lower Basin States is that each will contribute to the Basin's share of the treaty requirement a quantity of water which is proportionate to the uses within that State of the total supply of system water available for use in the Lower Basin to the extent such supply would be available for delivery to Mexico if not used within the States.

However, on the basis of practical considerations, our Proposed Conclusion 11.11 provides that no burden to supply water to Mexico from their tributary uses should be imposed on Utah and New Mexico, and that the entire burden is to be borne by Nevada, Arizona, and California from their contract entitlements to the delivery of stored water. This proposal is not only reasonable from an operating standpoint—it appears to be completely justified when consideration is given to the relative equities of the water users on the tributaries in the different States.

For example, if New Mexico were required to reduce her uses of the Gila if and when there is a necessity for contribution by the Lower Basin States to the Mexican Treaty requirement, the only beneficiaries of such reduction would be the downstream users on the Gila in Arizona. Only a small part of the additional water at the New Mexico State line, if any, could be passed on across Arizona for delivery to Mexico, and to require, or permit, that such be done would be wasteful in the extreme. It is plain that even if New Mexico were to be compelled to reduce her uses on account of the Treaty burden, the Arizona share of the burden will be paid out of the main stream at the expense of reducing uses other than those which would benefit from the New Mexico

reduction. There is no reason in law or logic why water users in New Mexico should be required to reduce their uses for the sole benefit of uses in Arizona which are independent of the Arizona uses which will in fact bear the Arizona share of the treaty burden. Similar considerations are equally applicable in arriving at this same result with respect to contributions by New Mexico via the Little Colorado River tributaries in that State and by Utah via the Virgin River and other tributaries in that State.

In construing the agreement between the Lower Basin States as contained in Article III(c) of the Compact to arrive at the proportionate shares of California, Nevada, and Arizona in the Lower Basin's share of the Mexican Treaty burden, it is necessary to take into account the aggregate use within each contributing State of Colorado River system water to the extent such would be available for delivery to Mexico if not used within the States. Thus, the uses in Arizona from the tributaries below Lake Mead should be included on the same basis as tributary uses above Lake Mead in Arizona and Nevada. For such water, if not used in Arizona, would in part at least be available for delivery to Mexico.

However, as we have proposed with respect to allocation of the main stream waters between the States (*supra*, p. 66), we believe that the agreement between the States respecting the treaty burden contemplates sharing in that burden only to the extent uses within the respective States affect the supply of water available for delivery to Mexico. Thus, water which, although used within a State, would not be available to Mexico if not used should be excluded from the computation.

Our Conclusion 11.11 provides that tributary uses should be included "only in the quantities by which they diminish the flow into the main stream of the Colorado River." Perhaps for this purpose, the point of measuring depletions should be the International Boundary. However, we believe that no injustice will be done if the same calculations as must be made by the Secretary of the Interior with respect to the tributary uses above Lake Mead for the purpose of making contract deliveries are utilized for the purpose of calculating, if neces-

sary, the contributions of Nevada and Arizona to the Mexican Treaty burden. And, we submit, it would be equally appropriate if consumptive uses on the Bill Williams and Gila were calculated by determining the extent to which such uses diminish the flow of those streams at their respective points of confluence with the main stream.

Since determination of each State's contribution to the Lower Basin's share of the Mexican Treaty burden is involved in determination of the aggregate quantities of water deliverable in satisfaction of the several water-delivery contracts, it is appropriate that the necessary determinations of the extent to which tributary uses in Arizona below Lake Mead diminish the flows of the tributaries into the main stream be made by the Secretary of the Interior in the same manner as such determinations must be made by him with respect to the tributaries above Lake Mead. *Supra,* pp. 66 to 67.

CONCLUSION 11.14

Losses in storage of water stored for use in the Lower Basin are a part of the Lower Basin's "beneficial consumptive use" under the Colorado River Compact and such losses are to be borne by the States of Nevada, Arizona and California in the proportions which their respective entitlements to the delivery of stored water bear to the total of such entitlements.

We believe it cannot reasonably be contended that net reservoir losses of water stored for use in the Lower Basin are not a part of the Basin's beneficial consumptive use under the Colorado River Compact. We think it follows just as logically that such losses are to be apportioned ratably to the States of California, Arizona and Nevada as being in partial satisfaction of their respective contract entitlements.

If there were a reservoir for each of the three States, there could be no question. We believe there is no ground for question simply because the waters stored for use in the different States are not divided between separate reservoirs so denominated.

Article 7(a) of the Arizona contract provides for the delivery of "so much water as may be necessary for the beneficial con-

sumptive use for irrigation and domestic uses in Arizona of a maximum of 2,800,000 acre-feet." Can it be said that a part of the main stream reservoir losses proportionate to Arizona's entitlement under this contract is not "beneficial consumptive use for irrigation and domestic uses in Arizona"? We submit that such a position would not be tenable.

Beyond this, Article 7(d) of the same contract provides for reduction of the United States' obligation to deliver water thereunder "on account of evaporation, reservoir and river losses, as may be required to render this contract in conformity with [the Colorado River Compact and the Boulder Canyon Project Act]." While it is observable that this language is perhaps somewhat less clear than might be desired, nevertheless, we submit that it is an express recognition that the Arizona contract entitlement includes that State's proportionate share of the evaporation and other net reservoir losses which are within the Lower Basin's right under the Compact to the beneficial consumptive use of main stream water.

There is no provision similar to Article 7(d) of the Arizona contract in the California and Nevada contracts. However, the language of those contracts, and, as to California, of Section 4(a) of the Project Act and of the California Limitation Act, as well as the application of simple logic, lead to the same conclusion as to each of those States.

By Section 4(a) of the Project Act and by the California Limitation Act it is "the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California" which is limited. Clearly, losses in storage of water stored for use in California constitute consumptive use "for use" in California. The parenthetical definition of consumptive use as "diversions less returns to the river" is not inconsistent with this analysis. Loss to evaporation of water stored for use in California is a diversion for use in that State just as much as any other diversion for use in that State. The language of the California water-delivery contracts (United States' Proposed Findings 1.26, 1.28, 1.29) is to be construed in the light of this limitation upon California uses and, so construed, is consistent therewith.

The Nevada contract (United States' Proposed Finding 1.40) provides for the delivery of "so much water, including all other waters diverted for use within the State of Nevada from the Colorado River system, as may be necessary to supply the State a total quantity not to exceed Three Hundred Thousand (300,000) acre-feet each calendar year." Whether a part of the reservoir losses proportionate to the quantity of water stored for use in Nevada be treated as water supplied to Nevada or water diverted for use within Nevada, reasoning on a parity with that above outlined concerning Arizona and California compels the conclusion that such part of the reservoir losses is in partial satisfaction of the Nevada contract entitlement.

In view of our Proposed Finding 11.2 and our Proposed Conclusion 11.15, we believe it is unnecessary to consider whether natural river losses on the main stream are "beneficial consumptive use" within the Lower Basin's apportionment under the Compact. By treating the reservoir losses as being in partial satisfaction of the several State entitlements and by making the other adjustments proposed in our Finding 11.2 of the estimates of net supply of main stream water available for use in the Lower Basin, it is demonstrated that there will be no shortage of main stream water within the predictable future to satisfy the basic contract entitlements of the several States, but that if such shortage should occur by reason of contributions to the Mexican Treaty burden, it should be borne by the States as outlined in our Proposed Conclusion 11.11. If all or a part of the natural river losses were to be allocated as consumptive use for use within the respective States utilizing the waters of the main stream, our Proposed Conclusion 11.15 would be even further strengthened. However, in the light of our Proposed Conclusions 11.17, 11.18, and 11.19, we think that, except as it would bear upon that point, decision of the question would be unfruitful. Whether allocated or not, the diminution of the water available for use in the States by reason of such losses will be the same and we are unable to perceive a difference in their proportionate shares of such losses whether allocated or not.

CONCLUSION 11.17

The first paragraph of Section 4(a) of the Project Act and the California Limitation Act preclude the consumptive use of Colorado River water for use in California in excess of 4,400,000 acre-feet per year except to the extent of one-half the waters in the main stream available for use in the Lower Basin in excess of 7,500,000 acre-feet per year.

The first paragraph of Section 4(a) of the Project Act requires that California agree that the aggregate annual consumptive use of Colorado River water for use in California shall not exceed 4,400,000 acre-feet of the waters apportioned to the Lower Basin States by paragraph (a) of Article III of the Colorado River Compact, "plus not more than one-half of any excess or surplus waters unapportioned by said Compact." By its Limitation Act the State of California so agreed. Our Proposed Conclusion 11.17 would define the "excess or surplus waters unapportioned by" the Compact of which one-half may be consumptively used for use in California.

If in construing the Section 4(a) reference to unapportioned waters in connection with the California limitation consideration were to be given only to the express language of the first paragraph of Section 4(a) of the Project Act and Article III of the Compact, a result different from that proposed by our Conclusion 11.17 might well be reached. For the language of Article III(c) indicates that the system waters which are "surplus" are those waters over and above the aggregate of the quantities "specified" in paragraphs (a) and (b), and the language of Article III(d) indicates that the waters which are not apportioned are those "unapportioned by paragraphs (a), (b), and (c)."

Construction of Section 4(a) in the light of that express language only would indicate a conclusion that the III(b) waters, whatever they may be, are not "surplus waters unapportioned by the compact" and that California is precluded from making any use thereof. On the other hand, such construction could be the predicate for a determination that if, in the aggregate, the III(d) obligation of the Upper Basin not to deplete the flow of the river at Lee Ferry below 75,000,000

acre-feet for any period of ten consecutive years plus the waters of the tributaries below Lee Ferry result in there being available for use in the Lower Basin system waters in excess of 8,500,000 acre-feet per year, then there are "surplus waters unapportioned by" the Compact within the Lower Basin to the extent of such excess even though the undepleted flow of the river at Lee Ferry were exactly 15,000,000 acre-feet per year.

It would then be necessary further to determine

(1) The method by which the tributary waters shall be measured. (Consistently with our argument concerning our Proposed Conclusions 11.3, 11.4, 11.5, and 11.11, *supra*, pages 62 to 70, we would urge in such event that only to the extent uses of the tributaries diminish the flow into Lake Mead, or into the main stream below Lake Mead, as the case may be, should such uses be taken into account in determining whether the waters in the Lower Basin available for consumptive use exceed 8,500,000 acre-feet.)

(2) Whether uses of tributary and main stream waters on the Indian Reservations are in fact chargeable to the "apportionment" of system water to the Lower Basin, or whether such uses are not so chargeable with the result waters physically within the Lower Basin in excess of 8,500,000 acre-feet are absorbed by them and are not surplus as between the two basins. (If our Proposed Conclusions respecting the effect of Section 4(a) of the Project Act, the California Limitation Act, and the several water-delivery contracts are accepted it will, we believe, be unnecessary further to consider this problem for the purpose of decision of this case.)

(3) The manner in which such "surplus" might be availed of under Article III(c) of the Compact for satisfaction of the Mexican Treaty requirements and the possible effect of its existence upon the obligation of the Upper Basin under Article III(c) to deliver water in addition to that required under III(d).

Plainly, none of these determinations could be made, at least conclusively, in the absence of the States of the Upper Division.

Further reflection would undoubtedly suggest additional questions necessary of determination which would follow from such a construction of Section 4(a) of the Project Act. Likewise, a complete reappraisal of the relationships of the various claims of the United States to the contract entitlements of the several States as reflected in Section XI of our Proposed Findings and Conclusions would be necessary. It should be noted that our Proposed Conclusions respecting those relationships are conditioned on, among other things, the hypothesis that the construction of the first paragraph of Section 4(a) of the Project Act which we propose is correct and will be adopted by the Court.

However, we do not pause here to reflect upon the additional questions which might have to be answered, to argue those questions we have stated, or to suggest the changes we would consider necessary in Section XI of our Proposed Findings and Conclusions, and especially Conclusions 11.3, 11.4, 11.5, 11.7, and 11.8. For we believe that a construction of the first paragraph of Section 4(a) of the Project Act to define the words "apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River Compact" or the words "surplus waters unapportioned by said compact" as used therein as including any part of the waters of the Gila River system would be erroneous.[3]

Such a construction would be inconsistent with the legislative history of Section 4(a). It would be inconsistent with the terms of the proposed Tri-State Compact to which Congress gave its advance consent by the second paragraph of Section

[3] As hereinafter explained in subdivision B of this Section of the brief, we believe that a construction of the Act precluding the consumptive use for use in California of any part of one-half the water in the main stream available for use in the Lower Basin in excess of 7,500,000 acre-feet per annum, including within the 7,500,000 acre-feet consumptive uses on the tributaries above Lake Mead to the extent they diminish the flow into Lake Mead, would be equally erroneous, subject, of course, to the requirements for satisfaction of the Mexican Treaty and other rights and obligations of the United States which are not limited or restricted by the respective State entitlements.

4(a). It would be inconsistent with the administrative interpretation of Section 4(a) by the Secretary of the Interior as evidenced by the February 7, 1933 "General Regulations for the Storage of Water in Boulder Canyon Reservoir and the Delivery Thereof in Arizona" (Plf. Ex. 28), the 1944 Arizona water-delivery contract, and the Nevada water-delivery contract, as amended. And it would be inconsistent with what the Compact in fact does, as distinguished, perhaps, from what it says.

Before proceeding with a demonstration of those inconsistencies, it should be noted and emphasized that the problem is one of arriving at Congressional intent in the enactment of Section 4(a) of the Project Act. If Congress used the words "apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River Compact" or the words "surplus waters unapportioned by said Compact" in a sense entirely different from what the Compact negotiators contemplated—a point which need not, we submit, be resolved in this case—nevertheless, it is the meaning which Congress attributed to those words which must control in interpretation of the statute and not some other meaning which might be derived by examination of the Compact language independently of the other provisions of the Project Act and its legislative history.

A. THE LEGISLATIVE HISTORY OF SECTION 4(*a*) OF THE PROJECT ACT DISCLOSES A CLEAR INTENTION TO LIMIT TO 4,400,000 ACRE-FEET PER ANNUM THE CONSUMPTIVE USE IN CALIFORNIA OF THE AVERAGE ANNUAL DELIVERY OF 7,500,000 ACRE-FEET OF WATER TO BE PASSED DOWN BY THE UPPER BASIN TO THE LOWER BASIN AT LEE FERRY.

The conclusions stated in the caption at the beginning of this section of the argument, *supra,* page 73, and in subheadings A, immediately above, and B and C, *infra,* pages 82 and 85, reflect what we believe is the overall effect of the legislative history of Section 4(a) in its entirety, and particularly those portions of that history contained in the California compilation entitled "Availability of Article III (b) Waters for Use in California: Legislative History of Sec-

tion 4(a) of Boulder Canyon Project Act," and in the Arizona compilation entitled "Legislative History of Sections 4(a), 5 (1st Paragraph), and 8, Boulder Canyon Project Act." However, there are a number of references therein which serve specifically to show that Congress was thinking only in terms of main stream water and that the 4,400,000 acre-foot figure finally agreed upon was related to an average of 7,500,000 acre-feet which it was assumed the Upper Basin would deliver yearly at Lee Ferry.

Thus, the committee amendment to Section 5 of S. 728, as reported on March 20, 1928, by the Senate Committee on Irrigation and Reclamation in S. Report No. 592, 70th Congress, 1st Session, was "designed to give further assurances to the various states, *particularly those in the Upper Basin,* against any undue advantages or rights to California." (Calif. compilation, p. 6.) This amendment would have provided that contracts under Section 5 should not "provide for an aggregate annual consumptive use in California of more than 4,600,000 acre-feet of the water allocated to the Lower Basin by the Colorado River Compact * * * and one-half of the unallocated, excess and/or surplus water: * * *." (Calif. Ex. 2001.)

This amendment was offered in Committee by Senator Kendrick of Wyoming "for the purpose of protecting the water rights of the four upper States" against the possibility that otherwise "California would only be restricted by *the 7,500,000 acre-feet that went down*" and, if Arizona stayed out of the Compact, "she would have her legal right to appropriate as much water as she could put to beneficial use." Such might have been the result "unless there was an agreement as to exactly how much water should go to the lower States out of *the 7,500,000 acre-feet that went down to them.*" See the explanation by Senator Pittman during the debate on the Bratton amendment to the Phipps amendment, which was approved and became the first paragraph of Section 4(a). (Arizona compilation, p. 59; Calif. compilation, pp. 107 and 108.)

In addition to Senator Pittman's repeated references to the 7,500,000 acre-feet that "went down" to the Lower Basin

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States, there is to be noted the obvious fact that in their concern to protect the apportionment of 7,500,000 acre-feet to the Upper Basin States neither Senator Kendrick, the Senate Committee on Irrigation and Reclamation, nor the Senators who approved the Phipps amendment to the pending bill, modified by Senator Bratton's amendment, could possibly have seen any threat to the Upper Basin's water through use in the Lower Basin of the Lower Basin tributaries. In other words, they were just not thinking about Lower Basin tributaries—it was the use and appropriation of main stream water with which they were concerned.

The Committee amendment to Section 5 of S. 728 apparently had its genesis in the recommendations of the Governors of the four Upper Basin States at a conference in Denver, Colorado, in the summer and autumn of 1927. That recommendation was of "the following as a fair apportionment of water between the States of the lower division, subject and subordinate to the provisions of the Colorado River Compact: 1. *Of the average annual delivery of water to be provided by* the States of the upper division at *Lees Ferry* under the terms of the Colorado River compact: (a) To the State of Nevada, 300,000 acre-feet, (b) To the State of Arizona, 3,000,000 acre-feet, (c) To the State of California, 4,200,000 acre-feet." (Arizona compilation, pp. 33 and 34, and p. 105.) While this recommendation was followed by recommendations of apportionment to the States in which the Lower Basin tributaries flowed of the waters of those tributaries (Arizona compilation, pp. 35 and 105), the factor of most significance here is that this starting point for the ultimate figure of 4,400,000 acre-feet of III(a) water for use in California was expressly related to the average annual delivery of 7,500,000 acre-feet at Lee Ferry under the terms of the Colorado River Compact.

The recommendation of the Governor's conference was frequently referred to during the debates on the various amendments of which the first paragraph of Section 4(a) was the fruition. Among others were references by Senator Pittman of Nevada (Arizona compilation, pp. 13 and 14, p. 60), Senator Hayden of Arizona (Arizona compilation, pp. 33 and 34), Senator King of Utah and Senator Bratton of New Mexico

(Arizona compilation, p. 47). It was placed before the Senate in full by Senator Hayden early in the debate on his proposed amendment to Section 4(a) of the pending bill, for which the Phipps amendment was later substituted (Arizona compilation, pp. 13 and 14).

While the 4,600,000 acre-foot limitation provided for in the committee amendment to Section 5 was the quantity demanded by California representatives at the Denver conference rather than the quantity recommended by the Upper Basin Governors as a compromise (see discussions by Senator Hayden, Arizona compilation, p. 38, and Senator Pittman, California compilation, p. 109), it is obvious that the water which was considered available for possible use by California and which was in the Committee's contemplation in proposing the limitation as to both "allocated" and "unallocated, excess and/or surplus water" was water in the main stream, just as it was in the contemplation of the Upper Basin Governors.

There are numerous other references indicating that it was only the main stream waters which were in the contemplation of the Senators as the language of the first paragraph of Section 4(a) was developed. Thus an amendment to Section 5 proposed by Senator Waterman of Colorado during the 1st Session of the 70th Congress, but not debated or voted upon (Calif. compilation, p. 14), would have required California to agree to furnish, from her 4,600,000 acre-feet and one-half of the unallocated water, any water required by Arizona "out of the main stream" in excess of 2,900,000 acre-feet per annum plus one-half the unallocated water, "so that in no event shall there ever be demanded or required, *out of the main stream of the Colorado River,* by the States of Arizona, California, and Nevada * * * any water in excess of the amount apportioned to them by Article III of the Colorado River compact, to be delivered to them * * * at Lee Ferry * * * or elsewhere."

In discussing the difference between Arizona's contention for a 4,200,000 acre-foot limitation on California and California's contention for 4,600,000 acre-feet, Senator Pittman on December 7, 1928, said: "Arizona, as I understand, will ratify the agreement whenever there shall be a provision in the bill or a separate agreement between Nevada and Arizona and

California *dividing the water let down to the three lower States. Of the 7,500,000 acre-feet of water let down that river* they have gotten together within 400,000 acre-feet. They have got to get together, and if they do not get together Congress should bring them together." (Arizona compilation, p. 44.)

On December 8, 1928, Senator Bratton was explaining a proposed amendment to Section 4(a) which would have limited California to 4,400,000 acre-feet of III(a) water, 500,000 acre-feet of III(b) water, and one-half of the excess or surplus waters unapportioned by the Compact. The following colloquy between him and Senator King occurred:

> "Mr. KING. I will ask the Senator if it is not a fact that at the time when the governors' conference considered the matter and recommended a settlement upon a basis of 4,200,000 acre-feet to California there had not been fully discussed and fully appreciated the fact that there was probably a million acre-feet subject to capture which, under the compact, was allocated to Arizona and California, so that if 4,200,000 acre-feet were awarded out of the 7,500,000 there would be an additional 500,000 acre-feet out of this 1,000,000 acre-feet which, under the compact, was to be allocated to the two States, so California in the aggregate would get 4,700,000 acre-feet?
>
> "Mr. BRATTON. That is true if the estimated surplus actually exists. At the same time, Arizona would get her 3,000,000 acre-feet agreed to by the governors as her just share of the allocated water, plus 500,000 acre-feet, being one-half of the unallocated surplus, so that while California would get 4,700,000 acre-feet Arizona would get 3,500,000 acre-feet. The surplus to which the Senator from Utah refers would be equally divided between Arizona and California. Neither State would get an advantage by reason of the division of the surplus." (Arizona compilation, p. 47.)

Can it be supposed that Senator Bratton would have expressed any doubt concerning existence of the extra water if

he were contemplating inclusion of the Gila River system in the total supply of which he was seeking to accomplish a division?

Of similar import is a statement made by Senator Phipps on May 2, 1928, in response to a comment by Senator Johnson of California:

> "Mr. PHIPPS.
>
> * * * * *
>
> "The Senator from California referred to the limit of 4,600,000 acre-feet of water written in this bill as the maximum amount which California might use per annum out of the stream. I think in that statement he was disregarding the fact that California would be entitled to at least her one-half of the surplus or additional waters *which are known to pass through the stream* annually, to the extent, it is estimated, of at lease 1,000,000 acre-feet." (Calif. compilation, p. 12.)

Highly persuasive, we believe, are the following statements by Senator Pittman after the Bratton amendment (fixing the limitation at 4,400,000 acre-feet of apportioned water, plus one-half of the excess or surplus water unapportioned by the Compact) to the Phipps amendment to Section 4(a) had been approved but before final adoption of the Phipps amendment. which became the second paragraph of Section 4(a) was being debated. Senator Pittman said:

> "The Senate has already determined upon the division of water between those States. How? It has been determined how much water California may use, and the rest of it is subject to use by Nevada and Arizona. Nevada has already admitted that it can use only an insignificant quantity, 300,000 acre-feet. That leaves the rest of it to Arizona. As the bill now stands it is just as much divided as if they had mentioned Arizona and Nevada and the amounts they are to get; * * *." (Arizona compilation, p. 80.)
>
> "As I understand this amendment, *Arizona today has practically allocated to it 2,,800,000 acre-feet*

of water in the main Colorado River. It is there for their use * * *." (Arizona compilation, p. 82.)

"We have already decided as to the division of the water, and we say that if the States wish they can enter into a subsidiary agreement confirming that. * * *" (Arizona compilation, p. 85.)

The foregoing is not an exhaustive review of the possibly relevant materials in the legislative history. We do believe, however, that it demonstrates the validity of the Conclusion we have proposed and we think a further review in this brief of the more marginal materials would not be useful. Reference should be made, however, before proceeding to our next point, to the "yellow slip," received in evidence as California's Exhibit No. 2020 as having been considered by Congress in connection with the Second Deficiency Appropriation Act of 1930 (Tr. 12,352). It will be noted that on page 2 of the exhibit the total water referred to in the division between California, Arizona and Nevada there described is "water of the main stream after eliminating Gila and all other tributaries."

B. THE LEGISLATIVE HISTORY OF SECTION 4(A) OF THE PROJECT ACT DISCLOSES THAT BY REFERENCE TO "SURPLUS WATERS UNAPPORTIONED BY SAID COMPACT" IT WAS INTENDED THAT THE USE IN CALIFORNIA OF UP TO ONE-HALF OF ANY WATERS IN THE MAIN STREAM AVAILABLE FOR USE IN THE LOWER BASIN IN EXCESS OF 7,500,000 ACRE-FEET PER YEAR SHOULD BE PERMITTED, WITHOUT REGARD TO WHETHER SUCH WATERS MIGHT BE CLASSIFIED UNDER THE COMPACT AS III(B) WATERS OR OTHERWISE.

It can be fairly stated that the significance attributed by the Senators of the 70th Congress to Article III(b) of the Colorado River Compact does not leap with vivid clarity from the pages of the Congressional debate.

Undoubtedly, there is material in the legislative history to support a contention that California's use of *all* water available in the Lower Basin by reason of the Compact apportionment, allocation, or specification for use in that Basin may not exceed 4,400,000 acre-feet.

However, we believe the weight of the implications, if our conclusion that the Senators were dealing only with main stream water as they developed the language of the first paragraph of section 4(a) be accepted, is to the effect that any main stream waters in excess of the 7,500,000 acre-feet average annual delivery at Lee Ferry which was the predicate for the 4,400,000 acre-foot figure was considered surplus of which California should be permitted to use not more than one-half. In other words, we think the Senate, having provided in effect for division between the Lower Basin States of the first 7,500,000 acre-feet of water available in the main stream for use in that Basin, contemplated that California might use up to one-half of any additional water there available without regard to the question whether or not water used under Article III(b) of the Compact is "apportioned" water.

Such is the implication of the comments by Senators King, Bratton, and Phipps noted at pp. 80 and 81, *supra,* in which an estimated 1,000,000 acre-feet per year additional to 7,500,000 acre-feet was variously referred to as water "subject to capture which, under the compact, was allocated to Arizona and to California," "the estimated surplus," and "the surplus or additional waters which are known to pass through the stream annually."

Such also is the implication of several of the amendments proposed after discovery by some of the Senators that "there were 1,000,000 acre-feet of water more to divide than we had discussed at Denver." (See the comments of Senator Pittman at page 14 of the Arizona compilation and of Senator Hayden at page 37 thereof.) Those amendments included one by Senator Pittman suggested on May 28, 1928, and placed in the Record (Arizona compilation, pp. 15–16), Senator Hayden's amendment offered on December 6, 1928 (Arizona compilation, p. 17), and Senator Bratton's amendment offered on December 8, 1928 (Calif. compilation, pp. 79–80). The Pittman and Hayden amendments would have limited the California use to 4,200,000 acre-feet of III(a) water, 500,000 acre-feet of III(b) water, and one-half of the excess or surplus unapportioned water. Senator Bratton's amendment was

similar in these respects except it would have permitted the use of 4,400,000 acre-feet of III(a) water.

With reference to his amendment Senator Bratton said "* * * I presented an amendment * * * with the provision that in her act of ratification the State of California should limit herself to 4,400,000 acre-feet annually of the allocated water and one-half of the surplus waters of the lower basin. In that connection the senior Senator from Colorado [Mr. Phipps] previously had introduced and had printed a similar amendment, fixing the maximum at 4,600,000 acre-feet. Otherwise the two amendments are quite similar." (Calif. compilation, p. 87.) Thus Senator Bratton apparently attached no significance to the reference in his amendment to III(b) water and seemed to think it fell into the provision respecting one-half of the surplus. This is further borne out by the fact the Phipps amendment, which he said was quite similar to his except for "fixing the maximum at 4,600,000 acre-feet" rather than 4,400,000, made no specific reference to III(b) water but spoke only of waters apportioned and waters unapportioned (Calif. compilation, p. 76).

Senator Hayden's ready acceptance of the Phipps amendment as a substitute for his amendment as a vehicle for getting a vote on whether the limitation with respect to the first 7,500,000 acre-feet of main stream water should be 4,200,000, 4,600,000 or some other figure, would seem to indicate that he, too, attached no significance to the separate reference in his amendment to III(b) water. (Arizona compilation, p. 56a.) We think the same inference is to be drawn from the fact that his amendment which became the second paragraph of Section 4(a), giving the consent of Congress in advance to a Tri-State Compact, makes no separate reference to III(b) water. (See Arizona compilation, pp. 65 et seq.)

Finally, we think the implications of Senator Phipps' perfecting amendment to his amendment after approval of the Bratton amendment establishing the 4,400,000 acre-foot figure, and of the colloquy which followed between Senator King and Senator Johnson are to the same effect. (California compilation, p. 144.) That amendment provided the reference

to paragraph III(a) of the Compact after it had been agreed, with no such specification, that the California use should be limited to 4,400,000 acre-feet of apportioned waters and not to exceed one-half of the surplus unapportioned waters. Apparently Senator Phipps thought, in light of the fact that the apportioned water of which California was to be permitted to use 4,400,000 acre-feet per year was the average annual delivery of 7,500,000 acre-feet at Lee Ferry, that there was no difference in referring to water apportioned by the Compact and water apportioned by paragraph (a) of Article III. Apparently Senator Johnson thought the reference to surplus unapportioned waters included all waters, if any, coming down in excess of the 7,500,000 acre-feet without regard to their relationship to Article III(b) of the Compact. And the Senate, by acceptance without debate, of the Phipps' perfecting amendment, apparently agreed with both.

C. THE LEGISLATIVE HISTORY OF SECTION 4(A) OF THE PROJECT ACT DISCLOSES THAT CONGRESS DID NOT CONTEMPLATE THAT USES OF THE WATERS OF THE GILA RIVER SYSTEM SHOULD BE TAKEN INTO ACCOUNT IN DETERMINING THE EXISTENCE OF "SURPLUS WATERS" IN THE MAIN STREAM THE USE OF UP TO ONE-HALF OF WHICH IN CALIFORNIA WAS INTENDED TO BE PERMITTED.

As stated by Senator Hayden with respect to the first part of his amendment (to the Phipps amendment) providing for a Tri-State Compact, the above proposition is a mere corollary to the proposition argued under subdivisions A and B, *supra*, pp. 76–85, of this section of the brief. (See Arizona compilation, p. 65.) If it is true, as we contend it is, that the apportioned and unapportioned waters with which the Senators were concerned in developing the language of the first paragraph of Section 4(a) were main stream waters, it follows automatically that the waters of the Gila River system are not to be taken into account in determining the existence of "surplus waters" in the use of which California may share. This sequence is so clear that we believe it is unnecessary to argue the point beyond making reference to our argument in support of the proposition from which it follows.

It should be noted, however, that the proposition is further clearly sustained by the fact that Congress apparently so construed the first paragraph of Section 4(a) when it gave its consent in advance to the proposed Tri-State Compact which would have, *inter alia,* (1) apportioned to Arizona 2,800,000 acre-feet of the 7,500,000 acre-feet of III(a) water, (2) allowed Arizona the annual use of one-half of the surplus unapportioned waters, and (3) allowed Arizona the exclusive use of the Gila within that State. For, we submit, it is not to be supposed that by the second paragraph of Section 4(a) Congress consented to a compact which would be contradictory of the provisions of the first paragraph of the same section. The second paragraph of the section certainly reflects Congress' understanding of what is provided by the first paragraph.

It should be noted also that Senator Johnson apparently held the same view of what the first paragraph of 4(a) meant, and believed that adoption of the Tri-State Compact amendment would be confirmatory thereof. During the debate on Senator Hayden's amendment providing for the Tri-State Compact, Senator Johnson, arguing strongly against adoption of the amendment said, among other things: "* * * When Arizona says that she has but 2,800,000 acre-feet of water, to that must be added the Gila River with its 3,500,000 acre-feet, * * *." (Calif. compilation, p. 175.)

D. BY GRANTING ITS CONSENT IN ADVANCE TO THE PROPOSED TRI-STATE COMPACT AS PROVIDED FOR IN THE SECOND PARAGRAPH OF SECTION 4(A) CONGRESS HAS SHOWN THAT THE PROVISIONS OF THE AUTHORIZED COMPACT ARE IN ACCORD WITH THE PROVISIONS OF THE FIRST PARAGRAPH. A CONSTRUCTION OF THE FIRST PARAGRAPH CONTRADICTORY OF THE PROVISIONS OF THE SECOND PARAGRAPH WOULD BE INCONSISTENT WITH THIS EXPRESSION OF CONGRESSIONAL INTENT.

We are not persuaded that Arizona is correct in contending, as we understand her present position, that the second paragraph of Section 4(a) is a direction by Congress to the Secretary of the Interior in the matter of making water de-

livery contracts under Section 5 of the Project Act from which he may not deviate pending the arrival at some different agreement by the States of California, Arizona, and Nevada. The following exchange between Senator Johnson and Senator Pittman just before the vote on the Hayden amendment would seem to obviate that possibility:

> "Mr. JOHNSON. * * * What I want to make clear is that this amendment shall not be construed hereafter by any of the parties to it or any of the States as being the expression of the will or the demand or the request of the Congress of the United States.
>
> "Mr. PITTMAN. Exactly, not.
>
> "Mr. JOHNSON. Very well, then.
>
> "Mr. PITTMAN. It is not the request of Congress.
>
> "Mr. JOHNSON. I accept the amendment then."
>
> (Arizona compilation, p. 86.)

However, as indicated *supra,* p. 86, we think there can be no question but that the second paragraph of Section 4(a) evidences Congress' understanding of the first paragraph insofar as the second paragraph contains provisions which relate to questions of interpretation involved in the first paragraph. Surely the Senators were not so unconcerned with the terms of an agreement between the States of California, Arizona, and Nevada, that they gave their consent in advance to an agreement between the States which could not be accomplished without deviation from the provisions for division of main stream water at which they had finally arrived after long debate. That the authorized compact was, at least as to the first three provisions thereof, completely consistent with the Senators' understanding of the provisions of the first paragraph of the section limiting California use was, if there could be any doubt of it otherwise, clearly expressed by Senator Pittman in these words:

> "We have already decided as to the division of the water, and we say that if the States wish they can enter into a subsidiary agreement confirming that." *Supra* p. 82 of this brief.

Thus, there is this further evidence that Congress did not contemplate the Gila River should be taken into account in determining the quantity of either apportioned or unapportioned main stream water which might be used in either California or Arizona.

E. THE SECRETARY OF THE INTERIOR HAS ADMINISTRATIVELY INTERPRETED THE PROVISIONS OF SECTION 4(A) OF THE PROJECT ACT AS NOT PROVIDING FOR INCLUSION OF THE WATERS OF THE GILA RIVER SYSTEM IN DETERMINING THE QUANTITIES OF EITHER "APPORTIONED" OR "UNAPPORTIONED" MAIN STREAM WATER WHICH MAY BE CONSUMPTIVELY USED IN THE STATES OF ARIZONA AND CALIFORNIA.

The "General Regulations for the Storage of Water in Boulder Canyon Reservoir and the Delivery Thereof in Arizona" issued by the Secretary of the Interior on February 7, 1933 (Plf. Ex. 28) provided for the delivery from storage in Lake Mead of "so much available water as may be necessary to enable the beneficial consumptive use in Arizona of not to exceed [2,800,000] acre-feet annually by all diversions effected from the Colorado River and its tributaries below Lee Ferry (but in addition to all uses from waters of the Gila River and its tributaries) * * *." The 1944 Arizona water-delivery contract (Plf. Ex. 32) is similar in that it provides for the delivery from storage in Lake Mead of so much water as may be necessary for beneficial consumptive use in Arizona of a maximum of 2,800,000 acre-feet, taking into account the extent to which consumptive uses of water above Lake Mead diminish the flow into Lake Mead. While the 1944 contract does not specifically refer to the Gila River as did the 1933 regulations, it is in effect the same in that respect because of its omission to provide for any reduction on account of the use of Gila River water. Subdivision (b) of Article VII of the 1944 contract also provides for the delivery from storage in Lake Mead for use in Arizona of one-half of any surplus waters unapportioned by the Colorado River Compact to the extent such water is available for use in Arizona and less such portions thereof as may be used in Nevada, New Mexico, and Utah in accordance with other provisions of the contract.

Admittedly, the 1933 regulations were, and the 1944 contract is, subject to the availability for use in Arizona of the water to be delivered. Admittedly, also, the Secretary in each document (Subdivision (c) of Article X of the contract proposed in the 1933 regulations and Article X of the 1944 contract) disclaimed any intention to resolve the arguments of the several States respecting the meaning of the Project Act and the Colorado River Compact. For these reasons, it cannot be contended that either the 1933 regulations or the 1944 contract constitutes a conclusive administrative interpretation of Section 4(a) of the Project Act with respect to the question now being discussed.

Nevertheless, we submit, what the Secretary of the Interior in fact did in each instance is of much greater significance than what he said he was not doing. And what he in fact did in 1933 was propose to contract for the delivery for use in Arizona of so much main stream water as necessary to provide for the consumptive use in that State of 2,800,000 acre-feet annually, in addition to all uses from the waters of the Gila River and its tributaries. What he did in 1944 was contract to deliver from storage in Lake Mead so much water as necessary to provide for consumptive use in Arizona for 2,800,000 acre-feet, taking into account consumptive uses above Lake Mead but not taking into account uses of the waters of the Gila River system, plus one-half of any surplus unapportioned by the Compact subject to the conditions above noted.

We submit that by issuance of the 1933 regulations and by execution of the 1944 contract, the Secretary of the Interior has evidenced his interpretation of Section 4(a) of the Project Act as not providing for inclusion of the Gila River system waters in determining the quantities of either apportioned or unapportioned main stream waters which may be used in the States of California, Arizona, and Nevada. We submit further that the effect of such interpretation is not negated by the reservations stated in both the 1933 regulations and the 1944 contract.

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F. INTERPRETATION OF THE COLORADO RIVER COMPACT IN THE LIGHT OF WHAT IT DOES CLEARLY DISCLOSES THAT THERE ARE NO SURPLUS WATERS UNAPPORTIONED BY THE COMPACT IN THE ARTICLE III(D) WATER OR IN THE GILA RIVER SYSTEM WHICH CAN BE TAKEN INTO ACCOUNT IN DETERMINING THE QUANTITY OF SUCH WATER WHICH MAY BE CONSUMPTIVELY USED FOR USE IN CALIFORNIA UNDER THE LIMITATION OF USE IN THE STATE.

If attention be given to what the Colorado River Compact in practical effect does, as distinguished from what it says, it is to be observed that the minimum apportionment of Colorado River system water for use in the Lower Basin is an average annual delivery at Lee Ferry of 7,500,000 acre-feet plus all the water of the Lower Basin tributaries, subject only to the provisions of Article III(c). It is to be remembered that the Compact is concerned only with the apportionment of water between the two basins. It is to be noted that however much water there may be in the Lower Basin tributaries, no part of it will ever be apportioned for use in the Upper Basin. Therefore, and regardless of what the Compact says of future apportionments of unapportioned water, all of the Lower Basin tributaries plus the water involved in the III(d) obligation of the Upper Basin has been irrevocably apportioned for use in the Lower Basin.

On the basis of this practical interpretation of the Compact, and without regard to the legislative history of Section 4(a) of the Project Act, it is apparent that there is no surplus water unapportioned by the Compact within the main stream water to be delivered under Article III(d) of the Compact or within the Gila River system which can be taken into account in determining the quantity of such unapportioned water which may be consumptively used for use in Cailfornia under the limitation of use in that State.

G. THE CONSTRUCTION OF THE LIMITATION PROVISIONS OF SECTION 4(A) OF THE PROJECT ACT HEREIN CONTENDED FOR IS SUPPORTED BY REASONS OF LAW AND LOGIC, IT WOULD ACCOMPLISH A PRACTICAL AND EXPEDIENT RESULT, AND IT WOULD BEST SERVE THE INTERESTS OF THE ENTIRE REGION OF CONCERN AND THE ENDS OF JUSTICE AND EQUITY.

In concluding this portion of our argument, we wish to point out that in addition to the legal and logical reasons above assigned there are other reasons why we think the construction of Section 4(a) of the Project Act for which we contend should be adopted.

Such construction avoids the necessity for definitive interpretation of paragraphs (a) and (b) of Article III of the Colorado River Compact, an interpretation which, we believe, as to both sources of the water and the method of measurement, cannot be conclusively made in the absence of the Upper Basin States. It avoids that necessity simply by the conclusion that Congress, in providing for division between the Lower Basin States, dealt only in terms of main stream water and excluded the Gila from any consideration under Section 4(a). Without regard to Articles III(a) and III(b) and other provisions of the Compact, under the construction we advocate the consumptive use of the first 7,500,000 acre-feet in the main stream available in the Lower Basin is divisable, subject to the rights and obligations of the United States which are not included within the State entitlements, in proportions of 4,400,000 acre-feet for use in California and the balance for use in Arizona and Nevada in accordance with the water-delivery contracts with those States. Any excess in the main stream may be used one-half in California up to her total contract entitlement and the other one-half as provided for in the Arizona contract.

Such construction would likewise avoid the necessity for further consideration in this case of questions such as those suggested at page 74, *supra*.

But beyond such practical considerations, we believe the construction of Section 4(a) for which we contend would serve

the best interests of the Lower Colorado River Basin as a whole more effectively than would construction in accordance with the contentions of either Arizona or California.

While we do not contend that such construction would increase the total water available to satisfy the potential needs in each of the Lower Basin States, we do note that (1) it would not prejudice continuance of presently existing uses of Colorado River water in California even though the further expansion of such uses would, perhaps, in the remote future and at the lower end of the California priority agreement, be at the hazard of the main stream water supply, and (2) it would not reduce, as the construction contended for by California might, the Arizona entitlement to the delivery of main stream water to a quantity less than sufficient for the requirements of existing main stream projects within that State, including the Federal Reclamation projects and ultimate development of the main stream Indian Reservations. While the Nevada entitlement would be limited to the relatively small quantity provided for under her contract and such part of the main stream surplus as she might contract for within the limits of the Arizona contract, no presently existing use in Nevada would be prejudiced and substantial future development would be possible.

We submit, therefore, that the ends of justice and equity will be served by the construction of Section 4(a) as we propose and that the Court should adopt that construction in the absence of legal reasons which forbid it. We think no such reasons exist.

Respectfully submitted.

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