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

REPLY BRIEF OF THE UNITED STATES OF AMERICA

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The proposed findings of fact, conclusions, and briefs of the other parties present a variety of contentions with which the United States is not in agreement. Because of time limitations it is not practical for us to attempt to respond to such of those contentions as do not appear to be relevant to the considerations on the basis of which we believe this controversy is to be resolved. Omission herein to discuss any contention by any of the parties as to either fact or law is not to be deemed acquiescence therein or a waiver of the right to dispute the same

either before the Special Master or the Court should it subsequently appear or be determined that matters which we believe not to be relevant are in fact so. Neither is our omission here to discuss contentions which are inconsistent with the findings of fact and conclusions of law proposed by the United States, or with our brief in support thereof, to be deemed acceptance by us of such inconsistent contentions.

There seems to be relatively little in the proposed findings and conclusions or in the briefs of the other parties which challenges, either directly or indirectly, the claims of the United States of right to use Colorado River system water as set forth in our proposed findings and conclusions and in our brief in support. Examination of those points which do seem to challenge these claims is the burden of Part I of this brief.

We perceive more in the way of inconsistency with and challenge to the conclusions, and the arguments in support thereof, which the United States has proposed respecting the allocation of the Lower Basin waters of the Colorado River system for use in the respective States. Part II of this brief is concerned with refutation of at least some of the contentions of the other parties in this respect which we believe to be erroneous.

Part III of the brief is responsive to portions of the New Mexico findings, conclusions and brief primarily referring to the controversy respecting apportionment of the Gila River which are not treated, either directly or indirectly, in the preceding portions of the brief.

PART I

A. Even though federal uses are chargeable to the allocations to the States, rights of the United States to use Colorado River system water are independent as a matter of law from the entitlements of the respective States.

The California Defendants have categorized the claims of the United States as (1) paramount claims not within the Compact allocations and thus against the entire Colorado River system—requirements for river regulation, navigation, flood control and satisfaction of the Mexican Treaty, (2) subservient claims not within Compact allocations—water for

generation of power, and (3) claims for beneficial consumptive use (California Brief, Volume I, Section XIII). California proposes the last category—all federal consumptive uses—be treated as within the allocations to the States and says that this treatment is compelled by Section 13(b) of the Boulder Canyon Project Act, providing that the rights of the United States shall be subject to and controlled by the Colorado River Compact. This seems to be the gist also of New Mexico's Point VI and Conclusion of Law 7.

The United States has proposed that its rights with respect to the reclamation projects as well as those relating to uses of water in the National Parks, the National Forests, and in areas under the jurisdiction of the Bureau of Land Management be regarded for the purposes of this case as included within the respective entitlements of the States of the Lower Basin within which such uses occur. (United States Proposed Conclusions 11.1(b), 11.3 and 11.4.) The United States has further proposed that, although its rights to use water on the various Indian Reservations are not limited by the State boundaries, such rights be treated in this case as chargeable to the respective entitlements of the States of the Lower Basin within which such uses occur (United States Proposed Conclusions 11.1(c), 11.5, 11.6, 11.7). But such proposals are in no way construable as concession of the consequences attributed by California to the Colorado River Compact which made allocation only as between the Upper and Lower Basins. Certainly it is an obvious *non sequitur* to suggest as does California that the Project Act subjecting rights of the United States to the *inter*-Basin allocation of the Compact compels the merger of federal uses into *State* allocations within the Lower Basin.

Equally lacking in logic is the California contention that Indian uses are indistinguishable from other federal uses in this respect. California undertakes to explain away the specific recognition of Indian uses contained in Article VII of the Colorado River Compact. She suggests that the framers of the Compact had Indian uses in mind when making the apportionment in Article III(a) to supply "any rights which may now exist" and that Article VII was merely declaratory of the proposition that the Compact did not and could not disturb

the fiduciary relationship between the United States and its Indian wards.[1]

We agree with California that no compact among the states can affect the relationship between the United States and the Indians, just as the states cannot by an act of agreement among themselves diminish any federal right or duty. We agree also that at the time of the negotiation of the Colorado River Compact there existed considerable irrigation on Indian Reservations of the Lower Basin and that there were in being also plans for the further development of the irrigable acreage of those Reservations. Accordingly, it was to give assurance of noninterference by the States with that development that Article VII was included within the Compact. The report of Mr. Herbert Hoover to the Congress makes this abundantly clear. In that report, Mr. Hoover, as Federal Representative on the Colorado River Commission, enumerated the various interests of the United States in the Colorado River Basin and discussed the manner in which such interests were protected by provisions of the Compact. He referred to the special interest of the United States in the development of lands within the Indian Reservations and to the fact that some progress in the irrigation of these lands had already been made. He stated that the interest of the United States in this regard was recognized and protected by Article VII of the Compact (House Doc. 605, 67th Cong., 4th Sess.; Arizona Ex. 53).

This explanation to Congress by the Federal Representative of the Compact Commission is consonant with the literal terms of the Article VII. Whether it be phrased in terms of obligations of the United States to the Indian tribes or in terms of rights of the United States reserved for use of the Indians, the same result obtains—exclusion of present and prospective uses on Indian Reservations from effect by the Compact. Congressional consent to a Compact containing such a disclaimer is consistent with the Congressional recognition of the existence of reserved rights to use of water on Indian Reservations.

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[1] Nevada, although construing Article VII of the Compact as an affirmative recognition of Indian rights to use waters of the Colorado River, denies any entitlement to the United States separate from the allocations to the States. Nevada Brief, pp. 15–16, 164.

B. The reserved rights of the United States with respect to the Indian Reservations are not limited to historic use or to personal operations by Indians.

California seeks to abase the reserved right by limiting it quantitatively to the maximum historic irrigation by Indians. This of course defeats its basic purpose; the reserved right, if it is to accommodate the expanding needs of the Indians, must be prospective and not retrospective in application. The only instance in which the reserved right was terminably fixed—the *Walker River* case—was predicated upon a finding of irrigation relatively constant in quantity for seventy years and a decreasing Indian population. 104 F. 2d 334, 340 (9th Cir. 1939). In marked contrast is the situation of the Indians of the Lower Colorado River Basin: a rapidly increasing population and urgent need for additional irrigation. Furthermore, the *Walker River* decision deviates from other decisions—both before and after—of the Court of Appeals for the Ninth Circuit in which the reserved rights were held to extend to the ultimate needs of the Indians. The matter could hardly be stated more emphatically than in *United States* v. *Ahtanum Irrigation District,* 236 F. 2d 321, 327 (9th Cir. 1956), *cert. den.* 352 U.S. 988, in which the Court of Appeals said "Some effort is made here to assert that the reservation of waters for the benefit of the Indians must be limited to the amount or quantity actually used beneficially by the Indians within some period of time or within what the Court might find to be a reasonable time. * * * *Nothing in the Winters case or in any other decided case lends any support to such an argument.*" [Emphasis supplied.]

A corollary to California's theory that the reserved right should be limited to historic irrigation on Indian Reservations [2]

[2] California also proposes certain findings tabulating the extent of Indian irrigation on various Reservations in the most recent year of record, 1955, and comparative figures for the year of maximum irrigation. (California Proposed Finding 14G:106.) This bit of window-dressing merits little consideration; 1955 was a dry year, a fact attested to by the massive evidence in this case, and the very exhibits from which the California figures are taken attribute the decrease in irrigation in large part to the prevailing drouth conditions. See *e.g.*, explanation contained in United States Ex. 1954, p. 1, Crop Report of 1955 for Indian Unit of the San Carlos Project—

is that the only irrigation of significance in this connection is that personally accomplished by Indians. Why Indians should thus be penalized for utilization of leasing or other tenure arrangements common to non-Indian irrigators is most difficult to comprehend. California's legal argument in support of this proposition seems based on what the *Winters* and successor cases did *not* hold and the legal inhibitions to leasing of Reservation lands existing at the time of creation of the various Reservations of the Lower Colorado Basin.

Of course, the case of *Skeem* v. *United States,* 273 Fed. 93, 96 (9th Cir. 1921), did expressly hold that water rights appurtenant to Indian-reserved land are not lost by leasing the land. See also *United States* v. *Powers,* 16 F. Supp. 155 (D. Mont. 1936). And analysis of the statutory authorizations of leasing of Reservation lands and the reasons leading thereto reveals that, far from undertaking to cause any limitation of the reserved right, Congress sought by such legislation to promote greater utilization of Reservation lands.

Beginning with the Act of February 28, 1891 (26 Stat. 795), Congress authorized leases of allotted lands for farming or grazing purposes. This and later enactments were superseded by the Act of May 31, 1900 (31 Stat. 229) now codified in 25 United States Code § 395, which provides:

> Whenever it shall be made to appear to the Secretary of the Interior that, by reason of age, disability, or inability, any allottee of Indian lands can not personally, and with benefit to himself, occupy or improve his allotment or any part thereof, the same may be leased upon such terms, regulations, and conditions as shall be prescribed by the Secretary for a term not exceeding five years, for farming purposes only.

Other statutes have been enacted specifically to permit leases of allotted lands for "irrigation farming", Act of May 18, 1916 (39 Stat. 128; 25 U.S.C. 393) and for "farming and grazing purposes", Act of March 3, 1921 (41 Stat. 1232; 25 U.S.C. 393).

Similarly, with respect to tribal property, various authoriza-

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"C.Y. 1955 water apportionment of 1.5 a.f. was not sufficient to farm all irrigable lands. Approximately 50% of entire acreage was idle thru lack of water."

tions for leasing have been enacted. The general leasing act now in effect (69 Stat. 539; 25 U.S.C. 415) provides that—

> Any restricted Indian lands, whether tribally or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary. * * *

It appears therefore that in order to promote effective utilization of allotted lands and to remedy the insufficiency of Congressional appropriations for development of irrigable Reservation lands, Congress has encouraged leasing. To have the results of that Congressional policy redound to the detriment of the Indians by a dimunition of the water rights reserved for their use would be a curious result indeed.

C. Under California law, riparian rights attach to riparian reservations of the United States.

The California Defendants have stated in their proposed findings and conclusions that with respect to the Colorado River Indian Reservation the United States has not complied with the law of California relating to the acquisition of water rights by appropriation and use of water and that no right under the law of the State of California to use water upon the Colorado River Indian Reservation has been or can presently be acquired except by appropriation and use. (18D:101, 201; Findings II, p. XVIII 25.) Apparently, California attributes the same consequences to the lack of compliance by the United States with the law of California relating to the acquisition of water rights by appropriation and use of water with respect to the Fort Mohave Indian Reservation and the Chemehuevi Indian Reservation. (18E:101; 18E:201; 18F:101; 18F:201.) Assuming without conceding the efficacy of rights acquired in conformity with state law to use

of waters of the Colorado River, there is more to be considered under California law than appropriative rights. Although but fleeting reference has been made thereto (California Brief, p. 50; California Findings I, pp. III–67, VI–9), the fact is that the law of California accords to riparian lands the reasonable use of appurtenant waters, such right being not lost by non-use and being superior to the right of subsequent appropriators. *Lux* v. *Haggin,* 69 Calif. 255, 4 Pac. 919 (1884), 10 Pac. 674 (1886); *Hargrave* v. *Cook,* 108 Calif. 72, 41 Pac. 18 (1895). The status of the United States as a riparian proprietor under California law has been specifically recognized. *Palmer* v. *Railroad Commission,* 167 Calif. 163, 168; 138 Pac. 997 (1914); *Lux* v. *Haggin, supra.*

Proof of the United States has established that the portions of the Fort Mohave and Colorado River Indian Reservations situated in the State of California and the entire Chemehuevi Indian Reservation are riparian to the Colorado River. Water requirements for irrigation from the Colorado River of the irrigable lands of those Reservations in California have been computed and made the basis of the extent of the respective reserved rights (United States' Proposed Findings Nos. 4.4.21, 4.5.10 and 4.6.6). Such requirements are equally appropriate as the measure of the riparian rights.

Under California law, the riparian right relates back to the acquisition of title to the riparian land. As to government lands patented to private owners, the riparian right vests when the land passes to private ownership. *McKinley Bros.* v. *McCauley,* 215 Calif. 229, 9 P. 2d 298 (1932). As to lands held in Government ownership and reserved for a specific purpose, the analogous rule would result in recognition of the riparian right as of a date at least no later than the date of the setting apart of the particular Reservation.

Accordingly, the priorities of right of the United States with respect to the mentioned Indian Reservations accruing as of the dates of the Reservations' creation have foundation in the law of riparian rights of California as well as by virtue of the act of reservation. See United States' Proposed Conclusions of Law 4.4.4, 4.5.1 and 4.6.

D. Rights of the United States to use Colorado River system water on federal reservations are not limited to rights under state law.

Our response to California's omission to accord proper credit to riparian rights should not be construed as acquiescence in the view that rights of the United States with respect to use of water on Indian Reservations can be limited to rights acquired under State law. As stated by Judge Frank, in *United States* v. *Forness,* 125 F. 2d 928, 932 (2d Cir. 1942), "But state law cannot be invoked to limit the rights in land granted by the United States to the Indians, because, as the court below recognized, state law does not apply to the Indians except so far as the United States has given its consent," citing *Worcester* v. *Georgia,* 6 Pet. 515, and other cases. And it has been specifically held that neither federal nor state laws respecting appropriation of water have application to the construction of an irrigation system and diversion of water on to an Indian Reservation by the United States. *United States* v. *Morrison,* 203 Fed. 364, 366 (C.C. Colo. 1901).

Federal Power Commission v. Oregon, 349 U.S. 435 (1955), is the most complete answer to the contention that state law or regulations can have an inhibiting effect on the use by the United States of waters appurtenant to its reservations. See also *Nevada* v. *United States,* 165 F. Supp. 600 (D. Nev. 1958). Without repeating what we have previously said (Brief in Support of Findings of Fact and Conclusions of Law Proposed by the United States, pp. 56–61), we submit that *Federal Power Commission* v. *Oregon* also refutes California's contention that exercise of the reserved rights is dependent on the existence of something more than the withdrawal of the lands, such as, in the case of the Indian Reservations, a bilateral arrangement between the United States and the Indians.

In summary, the United States has certain rights to use of water in the Lower Colorado River Basin arising from its ownership of land and the reservation of certain of those lands for specified purposes. In consenting to an allocation between the Upper and Lower Basins, Congress did not subordinate those rights to state law nor limit them to the entitlements of the respective states in which the federal uses occur. These

are sovereign rights of the United States and must be recognized and treated as such.

PART II

We have heretofore proposed that the entitlements of the States of California, Arizona, and Nevada, to the use within those States of the waters of the Colorado River system, exclusive of the tributaries below Lake Mead, are to be determined primarily by reference to the water-delivery contracts which the Secretary of the Interior has made under authority of Section 5 of the Boulder Canyon Project Act, subject, in the case of California, to the limitation of use in that State required by Section 4(a) of the Project Act, and subject in all cases to specified rights and obligations of the United States. This proposal is predicated on the propositions (1) that Congress has constitutional power to regulate and control the diversion and use of the waters of the Colorado River and the use and benefits of the structures which have been constructed for the storage and regulation of such waters, and (2) that Sections 4(a) and 5 of the Project Act, in pursuance of and in conformity to which the contracts have been made, constitute a valid exercise of that power.

Congress' intention to limit the California use to 4,400,000 acre-feet per annum of the first 7,500,000 acre-feet per annum of water in the main stream available for use in the Lower Basin and to permit the use in that State of not to exceed one-half of such water in excess of 7,500,000 acre-feet per annum is apparent from the legislative history of the Project Act.[3]

[3] A Congressional purpose to exclude the Gila River system from this calculation is demonstrated in our initial brief. While an expression of intention one way or the other with respect to the Lower Basin tributaries which flow into the main stream above the California points of diversion is not so apparent, we believe it is not unreasonable to conclude that the legislative history of Section 4(a) of the Project Act does not establish a Congressional purpose to exclude the inflow of those tributaries into the main stream for purposes of calculating the gross supply in the main stream, in which California uses may share to the extent of 4,400,000 acre-feet of the first 7,500,000 acre-feet per annum of net supply and to the extent of not to exceed one-half of such net supply in excess of 7,500,000 acre-feet annually. The provisions of Article 7(d) of the Arizona 1944 contract and of Article 5(a) of the Nevada contract, as amended, by which the agreement of the United States to deliver stored water is reduced to the extent tributary uses above Lake Mead diminish the flow into Lake Mead are confirma-

The meaning of the words "apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River Compact" and the words "any excess or surplus waters unapportioned by said Compact," as used in the first paragraph of Section 4(a) of the Project Act, is to be determined by reference to those portions of the legislative history which indicate what the Senators understood the words to mean. Such meaning is not to be obtained by interpretation of paragraphs (a) and (b) of Article III of the Compact, and of other provisions of that Article respecting "surplus" or "unapportioned" waters, in the light of other matters which shed no light on the sense in which the language in question was employed by Congress.

For purposes of decision in this case of the quantities of water allocable for use in the respective States, the Colorado River Compact, except as it may encompass an agreement between the Lower Basin States respecting sharing of the Lower Basin's contribution, if necessary, to satisfaction of the Mexi-

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tory, as administrative interpretations, that Congress in enacting the first paragraph of Section 4(a) did not intend to exclude those tributaries. Since there seems to be no basis in the legislative history for distinguishing between the tributaries above Lake Mead and those below, other than the Gila, it may be that the Arizona depletions of the Bill Williams River should be included in the gross supply, and that the Arizona contract should be construed as requiring that such depletions be treated as a pro tanto reduction of the stored water delivery obligation in the same manner as depletions of the tributaries above Lake Mead. If Congress did not intend that the waters of such tributaries be excluded in calculation of the gross Lower Basin supply of main stream water, then Arizona's obligation to accept, on account of her depletions thereof, a pro tanto reduction of the water deliverable under Article 7(a) of her contract is implicit in her recognition by Article 7(h) of the California contracts insofar as deliveries and uses thereunder do "not exceed the limitation of such uses in that State required by the provisions of the Boulder Canyon Project Act and agreed to by the State of California * * *." Whether depletions of the tributaries in Utah by use in that State and of the Little Colorado by use in New Mexico should be added to the supply of main stream water in determining the quantity of such water in which California uses may share is a difficult problem to which we find no ready answer. In light of the Senators' apparent conception of 3,100,000 acre-feet of main stream water for use in Arizona and Nevada as a corollary to 4,400,000 acre-feet for use in California, the answer would seem to be no. On the other hand, should it be determined that the answer is yes, the same provision of Article 7(h) of the Arizona contract would be a basis for reducing the Arizona entitlement to the delivery of stored water under Article 7(a) of that contract to the extent of the Utah and New Mexico depletions.

can Treaty burden (see United States' Proposed Conclusion 11.11; our initial brief, pp. 67 to 70; and *infra,* pp. 47–52), is useful only insofar as it may aid in determining the minimum quantity of wet water which may from year to year be available in the Lower Basin in the main stream.[4] This is true because the Compact is not concerned with interstate apportionment within the Lower Basin. Even more, it is true because Congress enacted the first paragraph of Section 4(a) of the Project Act having in mind only main stream waters in the Lower Basin, without determining or attempting to determine what paragraphs (a) and (b) and the other provisions of Article III may mean basin versus basin.[5]

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[4] In light of the Compact's concern only with apportionment between Basins, we believe the provisions of Article VIII are without significance here:

"Article VIII

"Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

"All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the waters apportioned to that Basin in which they are situated."

In this light, the first sentence of Article VIII is no more than a declaration of purpose by the party States as between Basins, and the second sentence of that Article makes clear that whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main stream for the benefit of the Lower Basin, all claims of perfected rights in the Lower Basin as of the time the Compact became effective would be satisfied from stored water and no longer assertable in natural flow contrary to the provisions of Article III.

The third sentence of Article VIII is consistent with this interpretation of the first two sentences. It and the second sentence would be meaningless and redundant, and the first sentence would be inconsistent with the provisions of Article III, if the Article were construed otherwise.

[5] Arizona, and perhaps also Nevada (see p. 135 of her Brief Relating to Findings of Fact and Conclusions of Law, Nevada Volume II) contends that both III(a) and III(b) water are main stream water, and that the III(a) apportionment is identified with the III(d) delivery. On the other hand, California says that both III(a) and III(b) water are any system water in the Lower Basin, wherever it may be found, and that any water in the Basin in excess of 7,500,000 acre-feet per year available for beneficial consumptive use (perhaps 8,500,000 acre-feet is the controlling figure when

Since Section 4(a) of the Project Act and the contracts which have been made control in determining the quantities of main stream water which may, subject to the specified rights and obligations of the United States, be used for consumptive use in California, Arizona, and Nevada, there is no occasion to consider either the applicability or the application of any principle of priority as between the claims of the respective States so long as the net main stream water supply available for consumptive use in the Lower Basin is at least 7,500,000 acre-feet per annum.[6] The fallacy of the California contention that priority of appropriation or priority of contract is relevant with respect to the allocation of waters which are "excess or surplus waters" within the meaning of Section 4(a) of the Project Act is apparent on its face. Whatever may be the quantity of such waters, the use thereof for use in California is limited to "not more than one-half." Under that limitation, California's entitlement cannot be more than one-half—the other half is for use elsewhere. In the face of the limitation, California cannot get more than one-half, whether the whole be 1 or 1,924,000 acre-feet, by saying her citizens or agencies made prior appropriations or executed earlier contracts with the Secretary of the Interior. As we said in our opening statement, when you divide an apple in half you get two halves—you don't get a pound on one side first with the equality of the second half contingent on whether there is that much left.

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it comes to sharing with the Upper Basin the Mexican Treaty burden), including water in the III(d) delivery, is surplus which must be applied to the Mexican Treaty obligation before the Upper Basin need contribute to that burden from her III(a) apportionment. The California contention suggests the possibility noted at page 74 of our initial brief that, if the Compact were to be so construed, the surplus, if any, which would be so created as between Basins would be charged off first as water used on the Indian Reservations in the Lower Basin. The utter futility of attempting to resolve such conflicting contentions and possibilities respecting the Compact's meaning in the absence of the Upper Basin States hardly needs to be further emphasized.

[6] The United States' Proposed Conclusions 11.6, 11.7, and 11.8 do require a determination of the priorities of the United States' rights to use water on the Indian Reservations on the main stream and on the tributaries above Lake Mead. However, we believe that our Conclusions 11.7 and 11.8 follow from a recognition of the reserved rights for those reservations with the priorities we have asserted. The necessity to determine the priorities of

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Except as noted in footnote 6, *supra,* the only possible relevance of priority of right, either by appropriation or by contract, to the issues here respecting the allocation between the States of mainstream water is with reference to the question: How shall shortages be borne if the net supply of main stream water available for consumptive use in the Lower Basin is less than 7,500,000 acre-feet per year?

By our Proposed Findings 11.1 and 11.2 and our Proposed Conclusion 11.14 we have demonstrated, as expressed in our Proposed Conclusion 11.15, that such deficiency in the net supply of main stream water is sufficiently unlikely within the predictable future that there is no present necessity for decision how such shortage should be borne by the States.[7] Alternatively, we have proposed by our Conclusion 11.15 that if

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right with respect to those reservations does not of itself mean that there must be a determination in this case of the relative priorities of other rights to use water from the same sources. A determination that uses within the respective States wherein the reservations are situated initiated later in time than the dates of creation of the reservations are junior to the rights for the reservations will be enough to permit reaching our Proposed Conclusions 11.7 and 11.8. If we are correct in our assertion that the burden of contributions by the States to satisfaction of the Lower Basin's share of the Mexican Treaty requirement is to be borne by users within the respective States other than the United States for use on the Indian Reservations (United States' Proposed Conclusion 11.12 and Brief in Support, p. 61), there would be even less call for a detailed determination of the priorities of other rights because of the determinations respecting the Indian Reservations.

[7] It is to be noted that the Stetson estimate of available main stream supply, which by the adjustments proposed in our Finding 11.2 becomes an estimate of surplus, is the predicate for the California "safe annual yield" quantity of 5,850,000 acre-feet. We believe that the reduction of this estimate by 325,000 acre-feet to arrive at an estimated "safe annual yield" is hardly necessary. We think Mr. Stetson's corrected estimate of 6,175,000 acre-feet (Tr. 21,836) is of itself quite conservative. We think that even more conservatism in estimation of the water supply is hardly justified where, as here, the net result would be no more than to permit consideration of how a shortage of the main stream supply under 7,500,000 acre-feet shall be borne, when there is no present assurance that such shortage will ever occur.

We anticipate, of course, that our proposed adjustments of the Stetson estimate will be vigorously challenged. In anticipation thereof, we discuss this matter further at pp. 44–47, *infra.*

such shortage should occur, it will be by reason of call upon the Lower Basin States to contribute from their contract entitlements to the delivery of main stream water for satisfaction of the Mexican Treaty obligation. We have proposed that the sharing of a shortage attributable to such a call shall be governed, not by considerations of priority of appropriation or priority of contract, but by the considerations discussed in our Proposed Conclusions 11.11 and 11.12 and at pp. 67–70 and 61–62, of our initial brief. And see *infra,* pp. 47–52. In sum, if our proposed findings and conclusions be accepted there is no need to determine, or to even consider, the relative priorities of right with respect to the uses within the States of main stream water except as noted in footnote 6, *supra.*

So much for summarization and review of the United States' contentions respecting allocation of the main stream waters between the States. We shall now discuss at least some of what we consider to be challenges thereto by the other parties.

A. The Colorado River Compact does not bear on the apportionment of waters of the tributaries between the States in which the tributaries are situated.

New Mexico argues that the Colorado River Compact principle of reservation of water for future use in the respective basins is by the Compact made applicable with respect to apportionment of the Lower Basin waters, including the tributaries, between the States of the Basin. Her claim of right to the use of water from the tributaries in New Mexico for future development is bottomed in large measure on this argument.

We believe that the Compact is silent as to, and has no bearing upon, the apportionment of Colorado River system water intrabasin. The negotiators, after determining that agreement as to that kind of apportionment was out of the question, compromised with an agreement apportioning water between the basins. That document cannot now be construed as establishing principles for interstate apportionment, a matter as to

which the negotiators gave up and undertook to make no provisions.

Even if there were validity to the New Mexico argument otherwise, the principle she would draw from the compact could not be applied to the prejudice of the United States' rights and requirements for the use of water on the Indian Reservations on the Gila River and on the San Carlos Project and related lands. The United States is not a party to the Compact, Nevada's argument to the contrary notwithstanding.[8]

Although Congress has by Section 8 of the Project Act directed that the United States and those claiming under the United States "shall observe and be subject to and controlled by" the Compact in "the construction, management, and operation" of the works authorized by the Act, and has by Section 13(b) directed that the rights of the United States and those claiming under it in or to the waters of the Colorado River and its tributaries shall be "subject to and controlled by the Compact", we submit that no such unexpressed principle of the Compact as that contended for by New Mexico could be applied to the detriment of the United States by reason of directions such as these. Furthermore, the Compact, whatever its implications as well as its express provisions may be, expressly disclaims any effect upon the obligations of the United States to Indian tribes. *Supra*, pp. 2–4.

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[8] In her brief, p. 7, Part II, Nevada asserts that upon consent by Congress to the Compact and proclamation by the President that the Project Act was effective, the Compact "thereupon became a law of the Union." Elsewhere she argues that the United States is bound by the Compact, either (we are not just sure of the intent of her argument) as a party thereto or as though a party thereto.

An interstate compact, although it can not become effective without the consent of Congress (Constitution of the United States Article I, Section 10), does not become a law of the United States by reason of the necessary consent being granted. *Hinderlider* v. *La Plata Co.*, 304 U.S. 92, 109 (1938). Neither does the United States, either by such consent or by participation in the compact negotiations, become a party thereto or bound as a party. The extent to which the United States may be affected or controlled by such a compact depends upon what Congress expressly provides in that respect, as it did by Sections 8(a) and 13(b) of the Boulder Canyon Project Act. But it is the act of Congress so providing which is the law of the United States, and not the interstate compact to which it refers.

B. The meaning of neither paragraph (a) nor paragraph (b) of Article III of the Colorado River Compact respecting the source and method of measurement of use of the water therein referred to can be determined in the absence of the Upper Basin States.

The other parties make various contentions respecting the meaning of the Colorado River Compact as to the Article III (a) and III(b) waters. E.g., see footnote 5, *supra*. Arizona, after arguing that both paragraphs (a) and (b) of Article III refer to main stream water, says that Congress so construed those paragraphs in enacting Section 4(a) of the Project Act.

As we have previously noted, the meaning of the Compact itself respecting the source and method of measurement of the III(a) and III(b) water, and the meaning and relationship of the provisions of Article III(d) and III(c) to III(a) and III(b) can hardly be resolved in the absence of the States of the Upper Basin. And as those States have an interest in and will be directly affected by a determination of what the Compact means in this respect, they also have an interest in and will be directly affected by a determination that Congress, in consenting to the Compact, construed its language in a certain way. For as the Compact was without effect until consented to by Congress, we suppose that when consent was granted the Compact became effective only as Congress construed it in determining that consent should be extended.

The argument advanced by the United States at pages 73 through 89 of our initial brief avoids any problem by reason of the fact that the Upper Basin States are not parties to this case. We urge that the first paragraph of Section 4(a) is to be construed in the light of what Congress understood the language employed therein to mean. It is our contention that in the selection of that language Congress contemplated only waters in the main stream available for use in the Lower Basin (including inflow from the tributaries other than the Gila, *supra*, footnote 3), and that the determination that consumptive uses for use in California should be limited to 4,400,000 acre-feet of the first 7,500,000 acre-feet and not to exceed one-half of the surplus was made without regard to whether such excess might include III(b) water. In other words, Section

4(a) is a strictly intra-basin matter and can be interpreted without attempting to answer questions with which the Upper Basin States are concerned.[9]

*C. The second paragraph of Section 4(a) of the Project Act does not establish "a formula for the division of water among the Lower Basin states * * * which the Secretary of the Interior was required to follow * * * unless a different division should be agreed upon by compact between the states * * *."*

The language quoted in the caption appears at page 47 of Arizona's Opening Brief, and substantially reflects Point V of the argument in that brief.

We submit that, had Congress intended the formula established by the second paragraph of Section 4(a) to be binding on the Secretary of the Interior absent a different agreement between the States of California, Arizona, and Nevada, language more suitable for the purpose than that of advance consent to a compact between the States was abailable and would have been employed. As noted at page 87 of our initial brief, if there were serious doubt otherwise, we believe the exchange between Senators Johnson and Pittman just before the vote on the Hayden amendment which provided for the proposed Tri-State Compact eliminates that doubt.

However, we do not labor the point because, as noted under the next following subheading, the results to be reached are substantially the same under the interpretation of Section 5 and the first paragraph of Section 4(a) of the Project Act for which we contend and under the interpretation for which Arizona contends respecting the effect of the second paragraph of Section 4(a).

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[9] We should note an apparent inconsistency between the argument advanced in our brief and some of the language of our Proposed Conclusion 11.17. The inconsistency would be eliminated and the net effect of the Conclusion left unchanged by striking the second and third paragraphs of the conclusion and substituting in place thereof the following:

"Construed in the light of the legislative history, Section 4(a) of the Project Act precludes 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."

The only material difference in the results to be reached under the two theories would be with respect to the sharing by the Lower Basin States of the Lower Basin contribution to satisfaction of the Mexican Treaty burden in the event of an insufficiency of the waters which are surplus under the Compact for that purpose. Under Arizona's theory, the language of the proposed Compact respecting that matter would of necessity be read into each of the water-delivery contracts which have been made and Arizona and California would each contribute from their aggregate contract entitlements one-half of the quantity which the Lower Basin might be called on to put in. Cf. our Proposed Conclusion 11.11 and pp. 67–70 of our initial brief. And see, *infra*, pp. 47–52.

D. The water-delivery contracts which have been made by the Secretary of the Interior conform to the formula proposed by the second paragraph of Section 4(a) of the Project Act as well as the first paragraph of that Section.

Arizona says that the proposed Tri-State Compact does not require that her 2,800,000 acre-feet per annum or that Nevada's 300,000 acre-feet be diminished by their respective uses of tributary waters above Lake Mead, and that it does not provide for use in Nevada of any surplus waters unapportioned by the Compact. She argues that the provisions of the Arizona and Nevada contracts calling for reduction of the deliveries of main stream water on acount of tributary depletions are therefore unauthorized and ineffective, and that this is true also of the provisions of her contract requiring that she suffer use in Nevada, Utah, and New Mexico of part of the one-half of the surplus waters referred to in Article 7(b) of her contract. She also argues that if the California contracts are construed as permitting the delivery of any III(b) water for use in California, they also are unauthorized and ineffective in that respect.

We submit that the words "apportioned to the lower basin by paragraph (a) of Article III of the Colorado River Compact" in subdivision (1) of the second paragraph of Section 4(a) of the Project Act have precisely the same meaning as the substantially identical words in the next preceding sen-

tence, which is in the first paragraph of the Section.[10] We submit that this is true also of the words "one-half of the excess or surplus waters unapportioned by the Colorado River Compact" in subdivision (2) of the second paragraph of Section 4(a) and the substantially identical words in the next preceding sentence in the first paragraph. (And see the argument of the California Defendants at pp. 97–98 of Volume One of their initial brief.)

Therefore, if we are correct in our assertion that in the enactment of the first paragraph of Section 4(a) Congress was thinking only in terms of main stream water (see our initial brief, pp. 73 *et seq.; supra,* footnote 3), the same follows as to subdivisions (1) and (2) of the second paragraph. If we are correct in our assertion (*supra,* footnote 3) that the main stream water available for use in the Lower Basin contemplated in connection with the development of the language of the first paragraph included, or at least did not exclude, inflow from the Lower Basin tributaries other than the Gila, the same follows as to subdivisions (1) and (2) of the second paragraph.[11] And if we are correct in our assertion that Congress, thinking only in terms of main stream water, did not intend to preclude the consumptive use for use in California of any part of one-half the main stream water available for use in the Lower Basin in excess of 7,500,000 acre-feet per annum, without regard to whether such waters might be classified under the Compact as III(b) waters or otherwise (see our initial brief, pp 82 *et seq.*), the same follows under the Arizona argument that the second paragraph of Section 4(a) is binding upon the Secretary.

The omission of the proposed Tri-State Compact to provide for any use in Nevada of surplus water or to recognize the

[10] While we do not mean to argue the obvious, we do call attention to Senator Hayden's comment respecting Senator Phipp's perfecting amendment, adding the words "paragraph (a) of Article III" to the phrase mentioned in the first paragraph of the Section: "I will state that I have no objection to the amendment offered by the Senator from Colorado to his own amendment, because it makes it even more in conformity with the amendment that I now offer." (Arizona "Legislative History of Sections 4(a), 5 (1st paragraph), and 8, Boulder Canyon Project Act," p. 64.)

[11] We think it may follow *a fortiori* under the second paragraph of Section 4(a). For while the proposed Tri-State Compact by express language would give Arizona the exclusive use of the Gila, it is silent as to the other tributaries. The others, then, are left as components of the common supply.

rights of Utah and New Mexico to either apportioned or surplus water does not mean that the Arizona contract is not in conformity with the second paragraph of Section 4(a) of the Project Act. The Arizona contract, "unconditionally ratified, approved, and confirmed" by Act of the Arizona legislature (United States' Proposed Finding 1.37) recognizes the right of the United States and Nevada to contract for a part of the excess or surplus waters available in the Lower Basin (Plf. Ex. 32, Art. 7(f)), such to come out of the one-half of the surplus waters which the proposed Tri-State Compact would have permitted to be used in Arizona (Plf. Ex. 32, Art. 7(b)). Article 7(g) of the Arizona contract recognizes the rights of New Mexico and Utah to equitable shares of the waters apportioned by the Compact to the Lower Basin and also of the unapportioned waters.

Even if Arizona were correct in all aspects of her argument respecting the effect of the second paragraph of Section 4(a), *supra,* p. 18, she cannot, as she urges at pp. 55–57 of her opening brief, rid herself and Nevada of the provisions of their respective contracts whereby the quantities of stored water deliverable are subject to reduction to the extent of main stream depletions by uses on the tributaries above Lake Mead (and perhaps also, by implication in law, to the extent of such depletions by uses on the Bill Williams, *supra,* footnote *3*). Neither can she rid herself of the provisions of the contract respecting uses by Nevada, Utah, and New Mexico of part of one-half of the surplus waters and the rights of New Mexico and Utah to equitable shares of the waters apportioned to the Lower Basin by the Compact and the unapportioned waters.

In the first place, Section 5 of the Project Act *authorizes* the Secretary to make contracts for the storage and delivery of water, which contracts are to "conform to paragraph (a) of Section 4." The Section further provides that "No person shall have *or be entitled to have* the use for any purpose of the water stored as aforesaid except by contract made as herein stated." We see nothing in the language of this Section which *requires* the Secretary at any point in time, even when some "person" is ready to put the water to use in either Arizona or Nevada, to provide by contract with the respective States for

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the use in the States of *all* the main stream water which under Section 4(a) is authorized to be used therein.

In the second place, and more importantly, we believe, is the fact that the State of Arizona has by act of its legislature "unconditionally, ratified, approved, and confirmed" the water-delivery contract of February 9, 1944. The contract is as much the voluntary act of the State as is the Act of her legislature ratifying, approving and confirming it. We think Arizona cannot now be heard to claim rights or an entitlement by reason of those portions of the contract which she likes and to reject other portions which she considers onerous. Regardless of what different contract Arizona might have been able to claim she was entitled to,[12] the contract which her legislature has unconditionally ratified, approved, and confirmed effectively prescribes and delineates the quantity of main stream water which may be put to use in that State.

E. The provisions of Section 5 of the Project Act authorizing the Secretary of the Interior to make contracts for the storage and delivery of water and providing that no person shall have or be entitled to have the use of stored water except by contract made in conformity with paragraph (a) of Section 4 of the Act are constitutional.

(1) THE ARIZONA AND CALIFORNIA CONTENTIONS RESPECTING UNCONSTITUTIONALITY.

Arizona suggests that unless Section 4(a) of the Project Act is interpreted as establishing a formula for the division of water which "the Secretary *must* follow in contracting with Lower Basin states," then the provisions of Section 5 noted in the caption constitute an unconstitutional delegation of the legislative function. (Page 50 of Arizona's Opening Brief.) California, while not accepting Arizona's argument that the second paragraph of Section 4(a) does or could establish a formula for the Secretary to follow which would satisfy the requirement of adequate standards for implementation of the

[12] We submit that her claims in that respect would have been, as they are now, without merit, since the contract she has provides for all that she can properly claim.

legislative policy, seems to agree generally with that suggestion.[13] (Initial Brief of the California Defendants, pp. 128 *et seq.*)

We disagree.

We find nothing in the Project Act which requires the Secretary to contract with any of the Lower Basin States, or in case he does, to contract with respect to any particular quantity of water. On the contrary, he is authorized to contract and the contracts made are required to conform to Section 4(a). This means that as to contracts for use in California, the quantities of stored water deliverable thereunder, including all other consumptive use of Colorado River water for use in California, may not exceed in the aggregate the quantities specified by the limitation of use for use in California. But unless the second paragraph of Section 4(a) be given the effect for which Arizona contends, there is no similar Congressionally imposed limitation upon the quantities which may be used in either Nevada or Arizona.

It does not follow, however, that the authority of the Secretary to make contracts for the storage and delivery of Colorado River water is subject to his "uncontrolled whim and fancy." Congress has said that in his management and operation of the works authorized by the Project Act and in the storage, diversion, delivery, and use of water for power, irrigation, and other purposes, he shall observe and be controlled by the Colorado River Compact (Project Act, Section 8(a)). This means, if nothing more, that he may not contract for the delivery of Lower Basin water outside the Lower Basin. By Section 8(b) of the Project Act, Congress has said that he shall observe and be controlled by any agreement which California, Arizona, and Nevada, or any two thereof, may make for the equitable division of the waters available for use in those States, provided that any such agreement becoming effective after January 1, 1929, shall not supersede contracts made by the Secretary under Section 5 during the time the States have been unable to agree. And Congress has said that contracts

[13] California's suggestion of additional constitutional questions noted at page 134 of her initial brief is, we believe, not seriously put forward. But see pp. 2 to 7 of our initial brief.

for the delivery of water for use in California may not provide for more than the specified limited quantities. To us, these limitations alone clearly refute the suggestion that the authority granted to the Secretary is uncontrolled by reasonable standards or that it constitutes a "dangerous delegation of imperial power to an administrative officer."

But Congress did not stop there. By Section 14 of the Project Act it provided "This Act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided." Without attempting to review all of the provisions of the reclamation law by which the Secretary is to be guided in the execution of further contracts within the Arizona and Nevada contract entitlements, as required by the provision "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," or other provisions of federal law applicable with respect to the making of such contracts or with respect to the delivery of Colorado River water to lands of the United States (see, particularly, Plf. Ex. 32, Art. 7(l)), we submit there is no dearth of standards established by Congress for exercise of the discretion it has seen fit to vest in the Secretary. And if any doubt should arise as to any particular situation, it can always be eliminated by act of Congress. See, e.g., the Gila Project Reauthorization Act of 1947 (p. 52 of our initial brief), and the Act of September 2, 1958, relating to Boulder City. See our Proposed Finding 7.7.7.

It is to be remembered that while we believe the Arizona and Nevada water-delivery contracts were made by the Secretary in valid exercise of the authority conferred on him by Section 5 of the Project Act (See also Section 8(b)) and that they effectively establish the aggregate quantities of water for consumptive use in those States with respect to which he will make contracts absent agreement between the States, nevertheless the actual utilization of the water covered by those contracts is still dependent upon satisfaction of the requirement "That no person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract

made as herein stated" or upon such water being used on lands of the United States (as expressly provided for under Art. 7(l) of the Arizona contract) or otherwise as specifically authorized and provided for by Congress.

But without regard to what there may be in the way of Congressionally imposed standards other than the second paragraph of Section 4(a), we believe that Arizona's suggested question as to constitutionality is moot.

While we do think the Project Act does not *require* the Secretary of the Interior to conform to the formula which the proposed Tri-State Compact, if agreed to by the States, would have provided for the allocation of uses between Nevada and Arizona, we do not disagree that by giving its advance consent to that Compact Congress "expressed what it considered a fair and equitable apportionment of water among the Lower Basin states." (Arizona's Opening Brief, p. 47.) Thus, while the formula therein proposed was not prescribed by Congress it was nevertheless approved. Such express approval by Congress was sufficient to establish it as an adequate standard for the Secretary's guidance in the absence of some other agreement between the States, even though he was not directed to apply it.

Since the Arizona and Nevada contracts, when interpreted in accordance with Congress' intention as evidenced by the legislative history of Section 4(a), and particularly the first paragraph (*supra,* pp. 19–22), do conform to the second paragraph as well as the first paragraph of that Section, there is presented no question whether contracts made by the Secretary other than in conformity with such Congressionally approved formula would be validly authorized.

(2) THE NEVADA CONTENTIONS RESPECTING UNCONSTITUTIONALITY.

Although not addressing the matter directly, Nevada suggests that Congress is without power "to allocate the waters of the Colorado River between the States of the Lower Basin." Brief Relating to Findings of Fact and Conclusions of Law Nevada, Volume II, pp. 66, 32, 124. Her theory seems to be that such an allocation could be effected only by agreement of

the States or by decree of the Supreme Court of the United States. She says "That any assumption by Congress to fix and determine the States' and the United States' rights to the beneficial consumptive use of the Compact apportioned waters in question would constitute the unconstitutional exercise of judicial power." (*Id.*, p. 32.)

Apparently to support that conclusion she argues (1) that when Congress consented to the Colorado River Compact between the States the United States' plenary control of the apportioned navigable waters of the Colorado River, "insofar as such control shall interfere with and/or control the beneficial consumptive use thereof," was "surrendered" to the States of the Lower Basin (id., p. 18); (2) that, apparently as a result of this asserted effect of Congress' consent to the Compact, the waters of the Colorado River apportioned for use in the Lower Basin are now non-navigable (id., p. 45); (3) that the non-navigable waters within the boundaries of the Lower Basin States belong to the States and are subject to their plenary control (id., pp. 35 *et seq.*, p. 32, pp. 44 *et seq.*); and (4) that the allocation of such waters of an interstate source between the respective States is solely a judicial function absent agreement by the States.

(a) By exercise of its power to impose reasonable conditions on the use of federal funds, federal property, and federal privileges, Congress can in effect allocate the waters of an interstate stream for use in the States concerned.

Of course, no one would question that the equitable apportionment of an interstate stream is within the judicial power of the United States, or that such power is vested in the Supreme Court. But even if Nevada were right on each of her supporting arguments, *supra*, her conclusion would still not be supported.[14] For the propositions so recently re-enunciated by the

[14] She concedes the limitation of consumptive use for use in California, but says that results from California's own voluntary acceptance of the limitation, and not by reason of Section 4(a) the the Project Act. *Id.*, p. 23. When she says that no other Lower Basin State, "by Legislative Act, agreement or contract, has limited its claim of right" to Lower Basin water (*id.*, p. 24) she apparently overlooks the fact of Arizona's legislative ratification of the Arizona contract, and the fact that even Nevada has entered into

Supreme Court in *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 295 (1958), would still be applicable. "* * * the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges" is "beyond challenge." "* * * the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof. Conversely, a State cannot compel use of federal property on terms other than those prescribed or authorized by Congress." And see our initial brief, pp. 2–7.

Even though we think *Ivanhoe* alone conclusively refutes the Nevada contention respecting the incapacity of Congress to control allocation between the States of the main stream water by requiring that no one shall have or be entitled to have the use of stored water except by contract made as provided in the Project Act, her supporting arguments are so laden with error we feel compelled at least to note our exceptions thereto.

(b) Congress has not "surrendered" to the States of the Colorado River Basin the United States' plenary control of the waters of that river.

To say that Congress surrendered to the States the plenary control of the United States over the Colorado River by a statute which (1) authorized the Secretary of the Interior to "construct, operate and maintain" great works for the purposes of flood control, improvement of navigation, and river regulation, providing for storage and delivery of the stored water for reclamation "of public lands" and other beneficial uses, and for the generation of power, and (2) provided that no one should be entitled to have the use of the stored water except by contract made as provided by the Act is so far into the realm of fancy that we feel answering argument is not required. Consideration of the other detailed provisions of the act by which consent to the Compact was granted further demonstrates the absurdity of this contention. To suggest that by Section 18 of the Project Act Congress intended to and did nullify the

and accepted a contract 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 300,000 acre-feet per year (United States' Proposed Finding 1.40).

many specific and detailed provisions of the act relating to operation and management of the works authorized to be constructed and the administration of the stored water by the Secretary of the Interior is equally untenable. See *Arizona* v. *California*, 283 U.S. 423 (1931); *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 228–229 (1957); *MacEvoy Co.* v. *United States*, 322 U.S. 102, 107 (1944); *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208 (1932); *Baltimore National Bank* v. *Tax Commission*, 297 U.S. 209, 215 (1936). It is untenable not only by reason of the rule that the specific requirements of a statute qualify the general provisions thereof; it is untenable also because it is quite clear, we think, that Section 18 of the Project Act was never intended to apply with respect to the main stream of the Colorado River.

(c) The navigable waters of the Colorado River have not been converted to non-navigable waters by the Colorado River Compact or by Congress' consent thereto.

To say that by the Colorado River Compact the navigable waters of the Colorado River were converted to non-navigable waters, or even that the use of those waters for navigation was effectively subordinated to their use for irrigation and domestic use, is refuted by the Supreme Court's decision in *Arizona* v. *California*, 283 U.S. 423 (1931).

(d) The waters of all sources of supply within their respective boundaries do *not* belong to the States of the Lower Basin.

We do not quarrel with the proposition that in the exercise of their police powers the States of the Lower Basin, subject to the authority of the United States under the Constitution, may legislate with respect to use by the public of the non-navigable waters within their borders or that by reason of the Desert Land Act of 1877 (19 Stat. 377) local laws and customs have been adopted by Congress as the basis for acquisition by the public of rights to use such waters on the public lands of the United States. Referring to the authority of the States to change the common law rule of riparian rights, the Supreme Court said in *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690, 703 (1899):

> Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that 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. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. * * *

However, the Nevada assertion of State ownership of "the waters of all sources of supply within the boundaries of the State, whether above or beneath the surface of the ground," so challenges the rights of the United States that we are unable to let it go unnoticed. And while we think that the questions in this case respecting the waters of the main stream at least are answerable simply by reference to the United States' power to control and regulate the use of those waters without determining the ownership of the unappropriated (or unused) portion thereof,[15] we think some consideration of the Nevada contention under discussion may be useful.

The assertion of ownership by the States is premised upon a misconception of the effect of the States' authority to legislate with respect to appropriation and use by the public of the nonnavigable waters within their boundaries.

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[15] As was found to be true both in the *Ivanhoe* case, *supra*, p. 27, at p. 290, and in *Nebraska* v. *Wyoming*, 325 U.S. 589, 616 (1945) we believe the question of title to or vested rights in unappropriated water is not necessary to decision of this case. If it is necessary to decision of the United States' claims of rights to the use of water on the Indian Reservations and in the National Parks and Forests and areas under the jurisdiction of the Bureau of Land Management, then, we submit, it has been decided favorably to the United States by *Winters* v. *United States*, 207 U.S. 564 (1908); *Federal Power Commission* v. *Oregon*, *supra*, p. 9; *United States* v. *Rio Grande Dam and Irrigation District*, *supra*, p. 28; and other decisions referred to in the argument at pp. 22–31 of our initial brief.

But state ownership of unappropriated waters or of rights to use the same is not proved by a mere showing of authority to legislate with respect thereto. Neither are *ipse dixits* such as contained in that portion of Section 102 of the California Water Code which provides "all water within the State is the property of the people" and in the statutes of other States such as those cited at pp. 37–38 of Volume II of the Nevada brief sufficient to establish title in a State to the unappropriated water.

The fatal fallacy in the contention addressed, and in the so-called Colorado doctrine of State ownership generally, is explained in an early decision of the Supreme Court of California. "* * * from a very early day the courts of this state haveconsidered the United States government as the owner of such running waters on the public lands of the United States, and of their beds. Recognizing the United States as the owner of the lands and waters, and as therefore authorized to permit the occupation or diversion of the waters as distinct from the lands, the state courts have treated the prior appropriator of water on the public lands of the United States as having a better right than a subsequent appropriator, on the theory that the appropriation was allowed or licensed by the United States. It has never been held that the right to appropriate waters on the public lands of the United States was derived directly from the State of California as the owner of innavigable streams and their beds. And since the act of Congress granting or recognizing a property in the waters actually diverted and usefully applied on the public lands of the United States, such rights have always been claimed to be deraigned by private persons under the act of Congress, from the recognition accorded by the act, or from the acquiescence of the general government in previous appropriations made with its presumed sanction and approval." *Lux* v. *Haggin*, 69 Calif. 255, 338–339, 4 Pac. 919 (1884), 10 Pac. 674 (1886).

The same court has declared that an appropriation of water on the public domain "affects and divests the riparian rights otherwise attaching to public lands of the United States, *solely* because the act of the Congress declares that grants of public lands shall be made subject to all water rights that may have

previously accrued to any person other than the grantee." [Emphasis supplied.] *Duckworth* v. *Watsonville Water & Light Co.*, 150 Calif. 520, 531, 89 Pac. 338 (1907).

And in *San Bernadino* v. *Riverside*, 186 Calif. 7, 29–30, 198 Pac. 784 (1921), the California Court said with reference to that portion of Section 102 of the California Water Code above noted: "Taken literally, this would include all water in the state privately owned and that pertaining to the lands of the United States, as well as that owned by the state. It should not require discussion or authority to demonstrate that the state cannot in this manner take private property for public use * * *. The constitution expressly forbids it. (Art. I, Sec. 14.) The water that pertained to or was contained in the lands of the state was already the property of the people when this [statute] was adopted. *The statute was without effect on any other property.*" [Emphasis supplied.]

Reference to the applicable acts of Congress and the decisions of the Supreme Court of the United States shows that nothing has happened to vest in the States that ownership of the unappropriated waters which the California Supreme Court so correctly determined was not there otherwise.

It is, of course, judicially noticeable that by the Treaty of Guadalupe Hidalgo, 9 Stat. 922, and the Gadsden Purchase, 10 Stat. 1031, there was ceded to the United States of America by Mexico title to all the lands now situated in the States of California, Nevada, Utah, and Arizona, and within that part of New Mexico in the drainage of the Colorado River, excepting only those lands which had been granted by the previous sovereign. With this transfer of ownership of the public lands, there passed also the ownership of the rights to use the waters appurtenant thereto.

By the Act of July 26, 1866, § 9 (14 Stat. 251, 253; 30 U.S.C. § 51), and the Act of July 9, 1870, § 17 (16 Stat. 217, 218; 43 U.S.C. § 661), Congress recognized the validity of privately-owned rights to the use of water on the public lands of the United States acquired by appropriation in accordance with local laws and customs. It did not, however, transfer the United States' title to the unappropriated waters to the States

wherein the lands to which those waters pertained were situated.

By the Desert Land Act of 1877 (19 Stat. 377; 43 U.S.C. § 321), Congress reserved for "appropriation and use *of the public*" non-navigable surplus waters upon the public domain in the States and Territories referred to in the Act. In *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 162 (1935), the Supreme Court held that "as the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately." It was further held that by this act the waters upon the public domain were "severed" from the land, and that thereafter a patent of public lands did not carry with the land any right to use the water thereon except "as fixed or acknowledged by the customs, laws, and judicial decisions of the state of their location."

However, the Desert Land Act did not transfer to the States title to the unappropriated waters on the public lands. It merely adopted local laws and customs as the basis for acquisition by the public of rights to the use of such waters. This adoption of local laws for the regulation and control of the acquisition by the public of such rights did not empower the States by their laws to "destroy the right of the United States as the owner of lands bordering on a stream to the continued flow—so far, at least, as might be necessary for the beneficial use of the government property." *United States* v. *Rio Grande Irrigation Co., supra*, p. 28. It was subject to cancellation as to unappropriated waters pertaining to lands of the United States withdrawn or reserved from the public domain, simply by the act of withdrawal or reservation. *Winters* v. *United States, supra*, p. 29; *Federal Power Commission* v. *Oregon, supra*, p. 9. And see *United States* v. *Walker River Irrigation District, supra*, p. 5; *United States* v. *Ahtanum Irrigation District, supra*, p. 5.

It is on this background of Federal law that the validity of the Colorado doctrine of state ownership of unappropriated waters must be considered. We ask: Where in the record in this case or elsewhere is there evidence of a grant to the States

of the Lower Basin by a previous title holder of any of the waters, or of the right to use the same, of the Colorado River?

The answer is plain. There is no such evidence.

Certainly the Colorado River Compact, an interstate agreement which merely apportions between Basins the beneficial consumptive use of water, is not evidence of such a grant. Neither is the act of Congress granting consent to that Compact, which act, as noted above, does not even relinquish control of the waters of the Colorado River to the States as Nevada contends it does.

Additionally, the waters of concern here are navigable waters. The Desert Land Act applies only to non-navigable waters on the public domain. While it is sometimes argued that a grant of title to the States can be found in that statute (erroneously, as has been shown above), we know of no act of Congress from which it can be argued with the least degree of reason that title to the navigable waters of the Colorado River has been transferred to the States.

We think the Nevada citation of *Ickes* v. *Fox*, 300 U.S. 82 (1937), at p. 44 of Volume II of her brief, adds nothing to support her contention of ownership by the State of unappropriated water within the State.

In the first place, the question of ownership by any State of unappropriated waters was neither involved nor discussed in that case. The question which was involved was whether the Secretary of the Interior could require the landowners in a federal reclamation project, as a condition precedent to continuing to receive water under the project, to pay a portion of the cost of additional project works from which, it was asserted, they would receive no benefit. What the Court said respecting the United States as a storer and carrier of water, and the entire opinion, for that matter, was predicated on "the thus far undenied allegations of the bill" which demonstrated, among other things, that the complainant project landowners had "fully discharged all their contractual obligations" (including payment in full of their repayment obligation under the original project), and included allegations "that their water rights have become vested; and that ownership is in them and not in the United States." 300 U.S. 96.

In the second place, the United States was not a party to the action. If, under more recent decisions of the Supreme Court, the suit was maintainable at all against the Secretary of the Interior, it was because he was acting in excess of his statutory authority. See *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 702 (1949).

In the third place, the mere fact that the United States in its activities under reclamation law may be classified as a storer and carrier of water does not mean that as such storer and carrier it cannot, or does not, own those rights to the use of water which it has acquired and developed for the project. As the Supreme Court recognized in *Ivanhoe, supra,* p. 27, at p. 291, "If the rights held by the United States are insufficient, then it must acquire those necessary to carry on the project, *United States* v. *Gerlach Live Stock Co., supra,* at 739, paying just compensation therefor, either through condemnation or, if already taken, through action of the owners in the courts." In *Nebraska* v. *Wyoming, supra,* p. 29, at p. 615, the Court stated "The rights of the United States in respect to the storage of water are recognized" and what it said respecting the allocation of the rights of the individual landowners to the States rather than to the United States was premised on the proposition that the "individual landowners have become the appropriators of the water rights." And as to the "right of the United States as storer and carrier" the Court, at p. 615, footnote 11, said: "[That right] is not necessarily exhausted when [the United States] delivers the water to grantees in its irrigation projects. Thus in *Ide* v. *United States,* 263 U.S. 497, the right of the United States was held to extend to water which resulted from seepage from the irrigated lands under its project and which was not susceptible of private appropriation under local law." Applying that language in *Hudspeth County Conservation and Reclamation District No. 1* v. *Robbins,* 213 F. 2d 425, 428 (1954), *cert. den.* 348 U.S. 833, the Fifth Circuit Court of Appeals said: "* * * the right of the United States as storer and carrier was not exhaused when these waters had been once used, but * * * extended to the recapture and re-use of such waters * * *."

Finally, whatever the nature or quality of the rights of the United States to the use of water for use on a federal reclamation project, it is plain that the ownership of no part of such rights is in the State or States wherein the project is situated and that the power of the United States to regulate and control the administration and use of the project water supply cannot be denied. As the Supreme Court said in *Nebraska* v. *Wyoming, supra,* p. 29, at p. 615, "We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system." And see *Ivanhoe Irrigation District* v. *McCracken, supra,* p. 27; *Bean* v. *United States* 163 F. Supp. 838, 845 (Ct. Cls. 1958), *cert. den.* 358 U.S. 906.

F. Title in the respective States is not the basis for allocation of the use of the Lower Basin waters between the States. The basis for such allocation of the main stream waters is interpretation in the light of the first paragraph of Section 4(a) of the Project Act and its legislative history, and other provisions of the Project Act, of the several water-delivery contracts made in pursuance of Section 5 of the Project Act.

It seems to us that the principal theme of the California argument is that a decree quieting title in Arizona to the right to use the quantity of water claimed by that State for a Central Arizona Project cannot be supported by the record. At page 957 of Volume One of her brief she points out—correctly, we think—that such "title" as Arizona may have proved can be no more than the aggregate of the rights of her water users whom she represents as *parens patriae.*

We are inclined to agree with that general theme of the California argument. We are so inclined because we think determination of the shares of the several States in the waters, or in the consumptive use of the waters, of the Colorado River system in the Lower Basin is not the equivalent of "title" in the States. The decree in none of the equitable apportionment cases has been framed in terms of title in the States, and we think a decree so framed here would be even less appropriate.

But we disagree with the argument which California makes in support of that general theme and with the conclusions she

draws from those arguments. We especially disagree with her arguments respecting the effect of the Arizona 1944 contract and, by implication, at least, the effect of other contracts.

In our view of the case, the "rights" (using that word loosely) of California, Arizona, and Nevada, to the delivery of main stream water for use within their respective boundaries are to be determined generally by reference to the contracts which have been made and the statutory limitation of consumptive use for use in California. California, while accepting the effectiveness of the limitation,[16] argues that the limitation is not "a source of Arizona's right" (pp. 90–106, Volume One, Brief of the California Defendants)[17] and that Arizona's water-delivery contract is not "a Source of Title." (*Id.*, pp. 106–146.)

We do not perceive California's purpose in these technical arguments respecting the effect of the limitation and the Arizona contract. Granted that California is right when she says

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[16] We do not argue California's alternative proposition that if Arizona has ratified the Compact, California is released from the limitation. We think it is sufficient to note that by Section 4(a) of the Project Act California was required to agree with the United States for the benefit of all the other Colorado River Basin States. We think that agreement in reliance on which the Boulder Canyon Project was constructed was not subject to nullification by Arizona's ratification of the Compact in 1944. On the other hand, we do not understand why California argues that Arizona has not ratified the Compact. Granted that her 1944 contract was conditioned upon such ratification. But if there is a real question whether that ratification was effective (which we think there is not), the question to be resolved in determining whether that condition of the contract has been satisfied is whether Arizona did what was contemplated by the contracting parties. Article 14 of the contract (Plf. Ex. 32) reads as follows:

"This contract shall be of no effect unless it is unconditionally ratified by an Act of the Legislature of Arizona, within three years from the date hereof, and further, unless within three years from the date hereof the Colorado River Compact is unconditionally ratified by Arizona. When both ratifications are effective, this contract shall be effective."

We think the intent of that provision has been fully satisfied and we note that, so far as we can see, there was and is no reason why the same contract could not have been made without requiring ratification of the Compact as a condition precedent.

[17] Although we do not agree with it, we do not argue now California's characterization of the California limitation as a "statutory compact" between the United States and California. Should it develop that there is any special significance, which we are presently unable to detect, attributable to that characterization, we reserve the right to address the matter later.

"title" to no species of real property can be proved by showing lack of title in an adversary. And assuming she is right when she says that Arizona's 1944 contract alone does not establish title in the latter State, or even in water users whom the State represents. How does this profit California? She admits (at least conditionally) that she is bound by the limitation upon uses in that State. Once a determination is made of the meaning of that limitation, and of the water which cannot be used in California by reason thereof, of what possible concern is it to California where the rest of the water is used? It seems to us that when the questions involved in interpretation of the California limitation are answered, the only quesion remaining is one of division of the balance of the main stream water between Arizona and Nevada. Surely it cannot be that those States cannot have the water which is within their contract shares until they have proved their "title", and that they cannot establish their "title" until the water is put to use.

It is undoubtedly true that Arizona's contract alone does not establish "title." Nevertheless, it constitutes a valid definition of that State's "right", again using that word loosely, and as such it is a source of that "right." We agree that the delivery of water under paragraphs (a) and (b) of Article 7 is subject to the provisions of subdivision (1) of the same Article, as well as to other provisions of the contract, and we contend that both the Arizona contract and the Nevada contract are subject to the requirement of Section 5 of the Project Act that "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated." But we think it was within the competence of the Secretary of the Interior, under the authority which Congress has given to him, to determine by those contracts how the water which California cannot use may be put to use in the other States concerned.[18] Interpre-

[18] California argues in effect that, while a contract under Section 5 of the Project Act is a condition precedent to the initiation of any new use of main stream water, the right to use the water is dependent on use. She analogizes the contract to a permit or license to appropriate (Volume One of her Brief, pp. 118–119). With this analogy we have no particular disagreement, but we do note that the contract requirement is one of Federal

tation of the various contracts which have been made under valid Congressional authorization is the predicate for the decree to be entered in this case as between California, Arizona, and Nevada—not "title" in any of those States to certain quantities of water from the main stream.

While the foregoing does, we believe, generally answer the California brief respecting the effect, or non-effect, of the Arizona contract, and by implication the Nevada contract, also, there are some statements and arguments in Section IX of Volume One of the Brief of the California defendants our disagreement with which we are constrained to state expressly.

(1) BY SECTION 5 OF THE PROJECT ACT A CONTRACT WITH THE UNITED STATES AS PROVIDED FOR THEREIN IS MADE A CONDITION PRECEDENT TO THE USE BY ANY "PERSON" FOR ANY PURPOSE OF THE STORED WATER.

At pages 108 *et seq.* of Volume One of their brief, the California defendants discuss the purpose of the contract requirement. They say, with reference to the last sentence of the first paragraph of Section 5 of the Project Act, "This sentence does not say that contracts entitle persons to have the use of water stored. Rather, it says no person shall be entitled to use stored water without a contract."

We think the asserted distinction involves no difference. The words of the statute need no paraphrase to be understood. "No person shall have or be entitled to have the use * * * of the water stored * * * except by contract * * *." Those words mean just what they say. They mean nothing else.

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law imposed by Congress in pursuance of its power to regulate and control the use of the waters of the Colorado River and the works authorized for construction and operation by the Project Act. We think there is no question but that the waters within the Arizona and Nevada contract entitlements continue subject to Congress' control, even as to use for purposes of consumptive use, pending their appropriation to use for specific purposes by contracts made as required by the last sentence of the first paragraph of Section 5 of the Project Act or by other action of the United States. But this does not mean that Arizona and Nevada are not entitled to a determination that by reason of their contracts and the California limitation certain quantities of water may be used within the respective States under the law and contract situation presently existing.

And whether we say they mean that only persons having contracts are entitled, or that no person without a contract shall be entitled, the meaning is still the same—no contract, no entitlement.

The California defendants refer to testimony of Mr. Delph Carpenter and Representative Swing (of California) before the House Committee on Irrigation and Reclamation during hearings in the 69th and 70th Congresses to establish what they they say was the purpose of the Section 5 requirement. Mr. Carpenter said, in the portions of his testimony quoted at pages 110–111 of the California brief, that the purpose was to burden the use of water with the Compact and to prevent its use except in accordance with the terms of the Compact. We submit that this does not alter the proposition that Congress has contitioned the use by all persons of the stored water upon the execution of contracts as provided for by the Project Act, and that regardless of what procedure might be followed under the laws of the States, until he has a contract *no* person is entitled to use the water.

With respect to Congressman Swing's observations that rights to use water out of the reservoir would be acquired "only by virtue of the water laws in the State where it has to be put to use," we note that that is not what Congress said. And we note the Gila Project Reauthorization Act of 1947, *supra,* p. 24, and the Boulder City Act of August 28, 1958, *supra,* p. 24, as evidence that Congress has not since been inclined to think it meant in 1928 what Congressman Swing said. With respect to what he said concerning Section 8 of the Reclamation Act, we note only what the Supreme Court said in the *Ivanhoe* case, *supra,* p. 27, at 291:

> As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights [by the United States] must not be confused with the operation of federal projects.

(2) CONTRACTS MADE IN PURSUANCE OF RECLAMATION LAW ARE THE SOURCE OF WHATEVER "RIGHTS" PROJECT LANDOWNERS ACQUIRE IN THE PROJECT WATER SUPPLY OF RECLAMATION PROJECTS GENERALLY.

Notwithstanding her argument that contracts as required by Section 5 of the Project Act do not alone establish rights to the use of water, the California defendants seem to concede that a contract is required as a condition precedent to the use of water, either to "confirm existing rights or [as] a necessary procedural step in the acquisition of new water rights." (Volume One, p. 119, of their brief.) See *supra,* footnote 18. But in getting to that conclusion they appear to argue that under reclamation law generally water-delivery contracts are not determinative of the rights of project landowners in the project water supply (*Id.,* pp. 112–117), and immediately after stating it, they say that "Section 8 of the Act of 1902 * * * provides that water rights vest in water users in accordance with priorities under state law." On both of these points we submit that the California defendants are in error.

We recognize, of course, that Section 8 of the Reclamation Act of 1902 contains the proviso "That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right." This means, we believe, that no project landowner can transfer his contract entitlement to the use of project water to other lands, and that beneficial use by him is the basis of his right to continue to receive water and is the measure and limit of that right. It does not mean that State laws relating to the control, appropriation, use and distribution of water are to be substituted for the express provisions of reclamation law which Congress has provided relating thereto or limit the broad discretionary powers which Congress has given to the Secretary of the Interior respecting the administration of reclamation projects generally. See *e.g., Ivanhoe Irrigation District* v. *McCracken, supra,* p. 27; 43 U.S.C. § 373; *New Mexico* v. *Backer,* 199 F. 2d 426, 428 (10th Cir. 1952).

The case of *Ickes* v. *Fox,* cited by the California defendants, at p. 115 of Volume One of their brief, has been discussed briefly, *supra,* pp. 33 to 35, in connection with Nevada's contentions respecting the water delivery contracts. We think it is unnecessary to repeat or enlarge on that discussion now. Reference to cases such as *Ramshorn Ditch Co.* v. *United States,* 269 Fed. 80 (8th Cir. 1920) cited at p. 143 of Volume One of the California brief; *Ide* v. *United States,* 263 U.S. 497 (1924) (See *Nebraska* v. *Wyoming, supra,* p. 29, at 615, footnote 11); *Hudspeth County Conservation & Reclamation District No. 1* v. *Robbins, supra,* p. 34; and *Bean et al.* v. *United States, supra,* p. 35, demonstrates the narrow limits within which the Court's language in *Ickes* v. *Fox* respecting ownership by the United States of reclamation project water rights must be confined, if that language is authoritative even with respect to a factual situaiton such as was presented by the undenied allegations of the plaintiffs on the basis of which that case was decided. See *Larson* v. *Domestic & Foreign Corp., supra,* p. 34; *New Mexico* v. *Backer, supra,* p. 40; *Hudspeth County Conservation & Reclamation District No. 1* v. *Robbins, supra,* p. 35. We think there is nothing in *Nebraska* v. *Wyoming* which suggests otherwise. It is to be remembered that the question with which the Court was there concerned was simply whether the reclamation project rights should be decreed separately to the United States or included within the State allocations. The Court was not concerned, as we are here, with interpretation of an Act of Congress, such as Section 5 of the Project Act, relating to the administration of a project, or a multiple project, water supply. "We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system." 325 U.S. 615.

Were the California argument supported by authority, we think it would still be appropriate to inquire: If in the acquisition of water rights for a reclamation project the United States acquires neither the ownership of such rights nor the control of the use of water within those rights by project landowners,

what is the basis for the liability to make compensation when exercise of the project rights interferes with the vested rights of private persons? See *United States* v. *Gerlach Livestock Co.*, 339 U.S. 725 (1950). Consideration of that question is unnecessary because we think the *Ivanhoe* case, *supra*, p. 27, settles beyond question (1) that when the United States does not already own the rights necessary for a federal reclamation project it can acquire (become the owner of) the necessary rights, and (2) that there is nothing in reclamation law or in the Constitution of the United States which precludes the imposition by Congress of reasonable regulations respecting administration of a federal reclamation project, including the water supply therefor.

The California statement that under Section 8 of the Reclamation Act water rights vest in water users in accordance with priorities under state law is not supported by the language of Section 8 or by the practice followed in the administration of reclamation projects generally. That practice is that the project water supply is shared ratably by the project landowners—it is not true that the first landowner to get a contract or to apply project water to beneficial use acquires a priority ahead of later users within the project of project water. That is what the *Hudspeth* (*supra*, p. 34) and *Bean* (*supra*, p. 35) cases were about. Warren Act contractors for the use of project water asserted that, notwithstanding the terms of their contract preserving a first right to project lands, they were entitled by reason of appropriation under State law and beneficial use to receive project water ahead of project lands not developed until after water was first applied to their lands, and on a basis of priority with respect to other project lands. In the injunction suit (*Hudspeth*), the District court granted summary judgment against their claims,[19] and in the inverse condemnation suit (*Bean*) the Court of Claims also granted summary judgment against their claims.

Examination of the contracts cited at page 117 of Volume One of the California Brief discloses that they not only do not support, but by their express terms refute, that rights vest in

[19] The Court of Appeals determined that the District Court should have dismissed for lack of jurisdiction of the United States.

water users under reclamation projects in accordance with priorities under State law. Thus, U.S. Ex. No. 31 provides: "The measure of the water right for said lands is that quantity of water which shall be beneficially used for the irrigation thereof, *but in no case exceeding the share, proportionate to irrigable acreage,* of the water supply actually available as determined by the proper officer of the United States, or of its successors, in the control of the project, during the irrigation season for the irrigation of lands under said division." (Emphasis supplied.) Plf. Ex. 168 contains similar provisions as does also Calif. Ex. 378. Calif. Exs 379 and 380 use different language, but to the same effect, 380 providing "The quantity of water to be furnished hereunder shall be that quantity which may be applied beneficially in accordance with good usage in the irrigation of the land described in paragraph 2: *Provided, That in case of a shortage at any time the amount to be furnished shall be an equitable proportionate share, as nearly as practical operations will permit, of the water actually available at the time for all of the area being watered from the same source of supply,* such proportionate share to be determined by the project manager." (Emphasis supplied.) The Warren Act and Special Use contracts included in Plf. Ex. 165 all provide that they are subordinate to the use of water on the reclamation projects through the works of which the water contracted for is to be delivered, without reference to the relative priorities of uses under those contracts and on the project lands.

We repeat, contracts made in pursuance of reclamation law generally are the source of, and they define, the "rights" which project landowners have in the project water supply. Those "rights" are determinable by reference to such contracts and to the laws of the United States in pursuance of which they are made. The fact that Congress has provided generally that the United States shall recognize rights under State law when it acquires the rights to the use of water which it needs for a reclamation project does not mean that the law of prior appropriation as embodied in the laws of the several States shall govern the administration and distribution by the United States of project water within the project.

G. There is no need to determine in this case priorities as between California, Arizona, and Nevada in the event the main stream waters available for use in the Lower Basin should be less than 7,500,000 acre-feet per annum.

Even California has proposed that there is no present necessity to determine interstate priorities. (Findings of Fact and Conclusions of Law Proposed by the California Defendants, Volume I, p. Decree-11.) This, however, is premised on her proposal that she be allocated 4,600,000 acre-feet per year from a "safe annual yield" of the main stream in amount 5,850,000 acre-feet, and that she be allocated an additional 778,000 acre-feet per year from the main stream "Provisional Supply." Nevada would be allocated 120,500 acre-feet per year from such "safe annual yield," but none from the provisional supply, while there would be allocated to Arizona from the "safe annual yield" 1,129,500 acre-feet, and from the provisional supply 80,000 acre-feet per year. We suppose that if it is determined that California may share in the main stream water available in the Lower Basin, calculated as we have suggested, only to the extent of 4,400,000 acre-feet in the first 7,500,000 acre-feet and one-half of the quantity in excess of 7,500,000 acre-feet per annum, all that the California defendants have argued otherwise respecting priority of right will be vigorously asserted. We believe there is no necessity in this case to determine the matter of priorities in the event of shortage.

(1) IT IS NOT SUFFICIENTLY LIKELY THAT SUCH SHORTAGE WILL OCCUR WITHIN THE PREDICTABLE FUTURE THAT THERE IS A PRESENT NECESSITY FOR DETERMINATION OF INTERSTATE PRIORITIES IN THE EVENT THEREOF.

By our Proposed Findings 11.1 and 11.2, and our Proposed Conclusion 11.14 (and see our initial brief, pp. 70–73) we have demonstrated it is unlikely that the main stream water available for consumptive use in the Lower Basin will be less than 7,500,000 acre-feet per year until after the Upper Basin uses exceed 6,200,000 acre-feet per year, which usage, it has been authoritatively estimated, may not be reached until the year 2062. It is especially to be noted that the water supply study which is the principal basis of that demonstration is the study on which the California proposed determination of "safe an-

nual yield" is based, with the minimum adjustments upward which are indicated by the testimony of the author of the study and other California witnesses.

We suppose that the California defendants, at least, will urge strenuously that reservoir losses, the largest single item in our proposed adjustment of the Stetson conclusion respecting the water supply available for consumptive use in the several States, should not be treated as consumptive use for use within the States but merely as a diminution of supply. We do not now enlarge upon the argument made at pages 70–73 of our initial brief in support of our Proposed Conclusion 11.14. However, with reference to the contention of the California defendants at page 81 of Volume One of their brief respecting the impracticability of allocating reservoir losses to consumptive uses within the States, we note that when the water supply becomes so tight that the principle of charging reservoir losses must come into play, there will be little, if any, water stored for purposes other than for consumptive use in the Lower Basin and for satisfaction of the Mexican Treaty burden. Losses attributable to the latter, a relatively small portion of the whole, would be allocated in the same manner as other requirements therefor on the Lower Basin States if it should be deemed necessary to segregate them at all. With reference to the California statement (*id.*, p. 81) to the effect that many users of water are not beneficiaries of the reservoir—"They had natural flow rights, antedating the reservoirs, capable of satisfaction without river regulation" [20]—we note that Section

[20] Even if the California defendants were correct in all they say respecting the validity and quantity of their asserted rights in natural flow, the record is clear that that flow, even without regard to the undeveloped prior rights of the United States with respect to the main stream Indian Reservations and this Nation's obligation to Mexico as ultimately expressed in the 1944 Treaty, was inadequate for satisfaction all of the time of the requirements of the projects using main stream water prior to the construction of Hoover Dam. See Plf. Ex. 45; United States' Proposed Findings 1.14, 1.17. Conservation storage was a matter of as much concern to the California interests which assert rights in the natural flow of the river as it was to anyone else. Moreover, every water using entity in the State of California and in the State of Arizona which is in position to assert natural flow rights has entered into a contract with the United States for stored water. Those contracts, while they may be confirmatory of "presently existing rights," are in substitution for any claims of right which might be made. Those who have sought the benefit of storage and regulated flow cannot reject the concomitant burdens.

4(a) of the Project Act, and the California Limitation Act (in which we believe the principle of allocation of reservoir losses is implicit), provide for a limitation upon the aggregate annual consumptive use "of water of and from the Colorado River for use in the State of California, including *all* uses under contracts made under the provisions of this Act and *all water necessary* for the supply of any rights which may now exist." The statutes do *not say* "all water necessary, exclusive of reservoir losses attributable to water in storage for the supply of any rights which may now exist."

We expect it will be argued that our proposed reduction of witness Stetson's estimate of Upper Basin depletions from 6,500,000 acre-feet per year to 6,200,000 acre-feet would not automatically result in 300,000 acre-feet more available for use in the Lower Basin—that a further study employing different criteria would be necessary to determine just what effect this reduction would have on the Lower Basin supply. We submit that such is not the case. Stetson's study assumed Upper Basin depletions of 6,500,000 acre-feet per year and deliveries at Lee Ferry of 7,500,000 acre-feet a year plus spills. We merely propose an assumed Upper Basin depletion of 6,200,000 acre-feet per year with an increased delivery at Lee Ferry of 7,800,000 acre-feet per year. Instead of being taken out in the Upper Basin or at Lee Ferry, the extra 300,000 acre-feet would be passed down to the Lower Basin and would be released from Hoover each year for use in the Lower Basin. We think no further engineering is required to show that delivery instead of depletion at Lee Ferry would increase the water passing to the Lower Basin in the exact amount that the depletion is reduced.

It may be argued that our proposed adjustment of the Stetson estimate does not take into account waters which may reach the limitrophe section by reason of water ordered but not taken by the irrigator. We submit that when the aggregate uses reach the point where this is a significant factor it will be necessary that the irrigators be required to bear the burden of their own over-orders.

Before concluding these comments, we note that in addition to the unevaluated upward adjustments of the Stetson esti-

mate which might be made on account of possible salvage between Parker Dam and the International Boundary, on account of possible additional deliveries by the Upper Basin in some years, at least, for satisfaction of the Mexican Treaty, and on account of possibly greater utilization of the flood flows of the Bill Williams River, and of the Gila for meeting the Mexican Treaty requirements, than Mr. Stetson estimated, there is at least one upward adjustment not noted in our Proposed Finding 11.2 which should be made in any event.

Stetson's estimate (and also that of Erickson and Riter) of net gain from Lee Ferry to Hoover Dam is the average *historic* flow for the period of his study. If as their contracts require, and as we urge, *supra,* footnote 3, the Nevada and Arizona depletions of the tributaries upstream from Hoover are to be taken into account in calculating the main stream supply, the amount of such depletions should be added to the 950,000 acre-feet of net gain from Lee Ferry to Hoover. If it should be determined that the depletions by Utah and New Mexico of those tributaries should also be included in calculating that supply, they also should be added.

Finally, we invite attention to the inconsistency of the premises on which the estimate of supply under discussion is based: On the one hand, use by the Upper Basin in quantities which it has been estimated will require over a century to reach; on the other hand, estimated evaporation, river, and regulation losses, and control of tributary inflow, on the basis of present-day conditions, present-day knowledge, and present-day techniques. We ask: Is it appropriate that the great issues in this case be resolved around an estimate of water supply which indulges speculation over a period of a hundred years respecting possible Upper Basin developments but speculates not one iota respecting man's ingenuity during the same period to devise methods of conservation of the available supply?

(2) IF SUCH SHORTAGE SHOULD OCCUR, IT WOULD BE BY REASON OF THE MEXICAN TREATY OBLIGATION.

The above caption restates the second point of our Proposed Conclusion 11.15. We think argument is not necessary to support it.

The Stetson estimate of 6,175,000 acre-feet per year of main stream water available for consumptive use in the Lower Basin, is predicated on the assumption that the entire burden of the Mexican Treaty will be paid out of the 7,500,000 acre-feet per year, plus spills, delivered by the Upper Basin at Lee Ferry and the tributary inflow below Lee Ferry. Were it not for the Treaty, that estimate of Lower Basin main stream supply, without any of the upward adjustments we have proposed, would be at least 7,675,000 acre-feet per year.

(3) ALLOCATION BETWEEN THE LOWER BASIN STATES OF THE BURDEN OF THE MEXICAN TREATY IS TO BE DETERMINED BY REFERENCE TO CONSIDERATIONS OTHER THAN PRIORITY OF CONTRACT OR PRIORITY OF APPROPRIATION.

We think it is patently erroneous to assume that the Upper Basin's obligation, whatever it may be, under paragraphs (a), (b) and (c) of Article III of the Compact, can ever be satisfied solely by the deliveries at Lee Ferry required by paragraph (d) of the same Article. However, because that obligation cannot be determined in the absence of the Upper Basin States, we have offered no proposals respecting any definitive quantity of additional water which the Upper Basin States may be called upon to deliver for satisfaction of the Treaty burden. Whatever that quantity might be, it would increase the Stetson estimate of main stream supply available for use in the Lower Basin, adjusted as proposed by our Proposed Finding 11.2 and as discussed *supra,* in subdivision (1) of this section of the brief.

We have proposed, though, that whatever the Lower Basin may be required to contribute from its III(a) and III(b) waters for Treaty satisfaction is to be borne by the States of California, Arizona, and Nevada in accordance with the formula set forth in our Proposed Conclusion 11.11 (and see our initial brief, pp. 67–70), without diminution of uses by the United States under its rights with respect to the Indian Reservations (See United States' Proposed Conclusion 11.12 and our initial brief, pp. 61–62). This formula, without regard to relative priorities of use interstate, contemplates contributions by those States proportionate to their respective aggregate uses of the total supply of Colorado River system water available

for use in the Lower Basin, uses on the tributaries to be calculated in terms of main stream depletion.

The predicate for this proposal is that when the Lower Basin States agreed to Article III(c) of the Compact, they agreed *inter sese* to pay one-half of the Mexican Treaty burden to the extent that burden could not be satisfied out of waters "which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b)." In the absence of further agreement between themselves, we think the reasonable interpretation of their agreement to pay one-half is that as between themselves they would pay in accordance with their interests in the common fund from which payment is to be made, and that it was not contemplated that one or another of the States should have a preference by reason of priority of use, or otherwise.

We recognize that determination of *when* the formula is to be applied cannot be made until there can be a definite determination of what is III(a) water, what is III(b) water, and what is surplus water as those terms are employed in the Compact, rather than what Congress understood the words which it employed in the Project Act to mean. However, we think the necessity for presence of the Upper Basin States for decision of those questions does not mean that there cannot be determined in this case the effect of the agreement by the Lower Basin States between themselves to which we allude, such agreement to be operative whenever, in accordance with determinations later to be made, the waters "which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b)" of Article III of the Compact are insufficient for satisfaction of the Mexican Treaty.

On the other hand, there is probably no present necessity for determining how the Lower Basin States shall bear that Basin's share of the Treaty burden. Under the interpretation we urge of Sections 4(a) and 5 of the Project Act and the water-delivery contracts, and on the basis of the Stetson estimate of main stream water supply adjusted as we have proposed, this question, like the question of interstate priorities generally, does not have to be reached. We have proposed our Conclusion 11.11 primarily as further demonstration, in addition to our Proposed Findings 11.1 and 11.2 and Conclusion 11.14, that

there is no present necessity for the determination of priorities in the event of shortage in the main stream supply.

We are advised that the California defendants will take issue with the formula we have proposed for the sharing by the Lower Basin States of the Basin's share of the Treaty burden. We understand that, among other things, they believe that, because Section 4(a) of the Project Act permits the use for use in California of not to exceed 4,400,000 acre-feet "of the waters apportioned to the lower basin States of paragraph (a) of Article III" of the Compact, uses of III(b) water at least would have to yield before California would be required to give up any part of her first 4,400,000 acre-feet. We have not undertaken to calculate just what the effect of attributing such significance to the Section 4(a) reference to Article III(a) might be. But we think the short answer to such contention, if made, is that Congress did not intend by that reference to give California water users a preference over other water users in connection with contributions to the Treaty requirement. Perhaps intra-state the matter is to be determined by reference to priorities—but not interstate.

We have demonstrated in our initial brief that the III(a) reference in the first paragraph of Section 4(a) was an after thought (pp. 84–85). As first agreed to, the limitation was in terms of not to exceed 4,400,000 acre-feet of the waters apportioned by the Compact. We can find nothing in Senator Phipp's perfecting amendment or in the comments of the Senators respecting the same indicating a purpose to give California any preference with respect to contributing to the Mexican Treaty. As a matter of fact, Senator Hayden expressed the view that that amendment brought the first paragraph of the Section more into conformity with his pending amendment, which became the second paragraph of the Section. It will be recalled that the Tri-State Compact, which the second paragraph consented to, would have provided that California and Arizona will each supply "one-half of any deficiency which must be supplied to Mexico by the lower basin."

Moreover, we think the debates in the Senate, particularly on Senator Hayden's amendment which provided for the Tri-State Compact, indicate rather clearly that the Senators did not understand that the provision of the first paragraph relating to

III(a) established a preference in California with respect to Mexican Treaty contributions or that priorities of use within the respective States would have anything to do with the States' shares of such contributions. Quite the contrary is true. See, e.g., the colloquy between Senators Johnson and Hayden at pp. 174–181 of California's compilation of "Legislative History of Section 4(a) of Boulder Canyon Project Act (Limitation Provision)." The following, from pages 175 and 176 of that compilation is, we believe, especially significant:

> Mr. HAYDEN. Taking the statement that there are three and one-half million acre-feet of water in the Gila River in Arizona, if Arizona obtains 2,800,000 acre-feet, from the Colorado the combined sum amounts to 6,300,000 acre-feet. The State of California has allocated to it——
>
> Mr. JOHNSON. California has allocated to it 4,400,000 acre-feet of water.
>
> Mr. HAYDEN. Is it the Senator's contention that when the time comes to supply water to Mexico the proportion borne by Arizona and California should be in that ratio?
>
> Mr. JOHNSON. By no means; I am not asking that at all, because we hope by the storage in this dam to control Mexican water; and if the Senator from Arizona will follow the testimony of Mr. Hoover, which he has read to-day, he will find that is one of the designs; but what I do not wish to do is to exempt the Gila River at this time and put the whole burden upon the two States subsequently in the proportion the Senator has indicated.
>
> Mr. HAYDEN. The Senator is unwilling that California should divide the burden equally with the State of Arizona?
>
> Mr. JOHNSON. Not a bit; but there would not be an equal division under the system the Senator proposes. * * *

If legally possible to apply it, the formula of equal division of the Lower Basin's Mexican Treaty burden between Cali-

fornia and Arizona, to which Congress gave its blessing when it approved in advance the proposed Tri-State Compact, would be easier to apply than the formula we have proposed. Perhaps the debates above referred to and approval by Congress of the proposed Compact are basis for its application absent some other agreement by the States. Perhaps, once it is determined that the question is not answerable by reference to priorities of use, its application could be accomplished by mutual consent. It would be more advantageous to Nevada, and slightly more advantageous to California, than the formula we believe we have found in the general law of contracts, and Arizona accepts it by her argument respecting the effect of the second paragraph of Section 4(a). Certainly the United States would be agreeable to such a solution.

H. Miscellaneous.

Because of our conviction that a determination need not, and should not, be made of the relative priorities of rights of the water users in the States of California, Arizona, and Nevada to the delivery and use of main stream water, and also because of insufficient time properly to present them in this brief, we do not now discuss a number of propositions which should be presented in the event it is determined that California's contention respecting priority need be dealt with in reaching a solution. Should such determination be made, we would ask leave to be permitted to file a further brief covering those matters. In summarized form, the propositions we refer to can be stated as follows:

A. Should it be decided that there is a present need to determine priorities interstate in event the main stream water supply is less than 7,500,000 acre-feet per year, such determination is to be made by reference to Congress' intent with respect thereto and not by reference to the laws of the respective States relating to prior appropriation and actions taken thereunder.

(1) As against the United States, as a general proposition at least, privately owned rights to the use of the navigable waters of the Colorado River are possible only as Congress may have expressly authorized, or provided for recognition of, the same. See, *e.g., United*

States v. *Twin City Power Co.*, 350 U.S. 222 (1955); *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53 (1912); *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 424 (1940); *United States* v. *Gerlach Livestock Co.*, 339 U.S. 725, 756 (1949) (concurring and dissenting opinion of Justice Douglas).

(2) Except as it authorized diversion of the waters of the Colorado River by Section 25 of the Act of April 21, 1904 (33 Stat. 224) (United States' Proposed Conclusion 7.2), Congress did not expressly authorize the diversion and use of the Colorado River by or for the benefit of persons other than Indians until it enacted the Boulder Canyon Project Act. The Desert Land Act of 1877 does not constitute such an authorization.

(3) It is clear from the language of the Boulder Canyon Project Act and from its legislative history that Congress intended that rights existing at the effective date of the Project Act under authority of the United States and uses then existing under purported authority of the laws of the respective States should be recognized, but that contracts made under the Act should be in satisfaction of and in substitution for all claims of right in recognition of which they might be made.

(4) It does not necessarily follow that Congress thereby provided for administration of the Boulder Canyon Project Act in accordance with a system of interstate priorities. Whether such a system or whether the principle of ratability in the event of shortage is to be applied should be derived from the language of the Boulder Canyon Project Act, reclamation law, and the legislative history thereof, and from the history of federal reclamation.

B. Should it be decided that Congress intended that, rather than the principle of ratability, a system of interstate priorities should be applied in case of shortage in the main stream supply in any year, the system to be applied is not priority of contract, but priority of right under the law of appropriation, the doctrine of reservation of rights by the United States, and the law of riparian rights, with respect to lands in California.

By the Boulder Canyon Project Act Congress has delegated to the Secretary of the Interior operation of the Boulder Canyon Project and administration of the stored waters. In our Proposed Findings and Conclusions and in our initial brief, we have pointed to a number of matters which other parties would have the Court determine and administer which are within the discretionary authority so vested in the Secretary. Should the Special Master be persuaded that the appointment by the Court of a commission, as proposed by either Nevada or California, to administer under decree of the Court matters which are properly delegated to the discretion of the Secretary should be recommended, we would ask leave also to file a further brief respecting that matter.

PART III

A. Reserved and decreed rights of the United States must be recognized and given effect in the apportionment of the Gila and Little Colorado Rivers and their tributaries.

There appears to be agreement among the parties affected that the controversy between New Mexico and Arizona respecting the Gila and Little Colorado Rivers should be determined according to the principles of equitable apportionment.[21] The difference lies in the manner of application of those principles. The effect of New Mexico's proposals for her present and future entitlements would be to diminish further the already inadequate water supply for the San Carlos Project and also to impair the reserved rights of the United States with respect to Indian Reservations on the Gila River. Such a result, we submit, does not comport with the rule of equitable apportionment.

New Mexico seeks as her equitable share of the waters of the Lower Colorado River system for present use 55,000 acre-feet per year measured at site of use or 28,000 acre-feet per year measured at the state line between Arizona and New Mexico.[22] We object on two grounds. First, New Mexico has failed to specify the constituent sources of supply but claims in gross

[21] United States' Brief, pp. 41–45; New Mexico's Brief, Point II; Arizona's Brief, p. 62. As noted at p. 42 of our initial brief it is that doctrine which must be the basis for apportionment of these waters between the States since, unlike the controversy between the States as to the main stream, there are no statutes and contracts to settle the matter.

[22] New Mexico's Proposed Conclusion of Law No. 2.

55,000 or 28,200 acre-feet from whatever source water is available in New Mexico. This, manifestly, would be unjust. It would afford New Mexico the opportunity to curtail uses in the Little Colorado River drainage area and divert the water decreed for such uses from the Gila River, to the detriment of the already parched projects downstream. This could well negative the equity of the apportionment effected by the decree to be entered herein.

New Mexico's Finding of Fact No. 14 shows that her present uses are from the Black Creek, Rio Puerco, Zuni, San Francisco, Gila and San Simon streams. Assuming that the decree to be entered herein will specify these sources and the quantities to be taken therefrom for present uses, we restrict our challenge to the uses made from the San Francisco and Gila Rivers.[23] This leads to our second objection: The quantity claimed—6,000 acre-feet depletion at site or 3,800 acre-feet depletion at state line for the San Francisco River and 21,600 acre-feet depletion at site or 8,700 acre-feet depletion at state line for the Gila River—is excessive since the acres claimed as presently irrigated, forming the basis for the quantity claimed, have been overstated.

New Mexico tabulates the acres which she claims are presently irrigated in her Finding of Fact No. 11. According to that tabulation, there are in New Mexico 5,018 acres presently irrigated from the San Francisco River and 11,121 acres presently irrigated from the Gila. These figures constitute a summary of acreages in these areas established, it is said, by deposition testimony, summarized in Appendix A to New Mexico's Findings, licenses to appropriate, tabulated in Appendix B, and documents respecting use of primary underground water, reflected in Appendix C.

Analysis of the transcript of the New Mexico Silver City depositions, 1st Series, particularly the cross-examination by Arizona, discloses that a great many of the acres included in Appendix A as presently irrigated from the San Francisco River are not in fact presently irrigated and have not been for some time because water has not been available. The deposi-

[23] If the assumption made is ill-founded, some of the acres claimed as presently irrigated from these other sources would be challenged as in fact not irrigated.

tion evidence reveals that, at most, not over 1,438 acres are in fact presently irrigated. A similar situation exists on the Gila River except there the acres are not irrigated because they have been made unfit therefor by floods. Again, at most, not over 9,288 acres are presently irrigated.

If the Court should determine that the acreages tabulated in Appendix B, licenses to appropriate, may be considered, the acreage on the San Francisco would be 1,899 acres and on the Gila 9,466[24] with resultant depletion at State line of 1,300 acre-feet and 5,500 acre-feet, respectively, or a total of 6,800 acre-feet depletion.

If New Mexico should be allocated the quantity which she claims on the San Francisco and Gila Rivers, 12,500 acre-feet depletion at State line, for her "present" uses, it is obvious that New Mexico would be able to *increase* (in fact, almost double) her present depletion of the San Francisco and Gila Rivers. Since these two streams constitute the principal source of supply for the United States' uses downstream in Arizona, any such additional use in New Mexico would be detrimental to the supply available in the Gila River to satisfy the prior rights of the United States for those uses. This should not be allowed. Even without regard to the question whether reserved rights of the United States such as those with which we are here concerned could be limited by the equitable apportionment between States of an interstate stream, that doctrine does not permit the allocation of water for use in a State for future development when the effect would be to deprive an existing project having valid rights of the water supply essential to its existence. *Nebraska* v. *Wyoming, supra*, p. 29, at p. 622.

It is true, as New Mexico argues, that the Supreme Court in *Nebraska* v. *Wyoming* held that factors other than priority of right may have to be considered in order to secure an equitable apportionment; but the Court did not say, or even infer, that priority of right is to play no part in such an apportionment.

[24] These acreage figures for the Gila River include 2,859.80 acres in the Virden Valley, which is the number of acres in that area adjudicated water rights by the Gila Decree. We believe that decree precludes inclusion of the 528 acres in the Virden Valley listed in Appendix C as being irrigated by pumped water. That the water so pumped does affect the surface supply of the Gila River is confirmed by testimony of the New Mexico State Engineer. (Tr. 17,745–17,746.)

The situation here is peculiarly adaptable to the consideration of such rights as a factor in the equitable apportionment to be made—there is one stream, and one tributary, flowing between two states, rights to the use of which are asserted in excess of the supply available. New Mexico's argument that appropriations are not to be considered because of the impossibility of pitting those of New Mexico against those of California misses the mark; appropriative rights on the main stream, if operative at all, have no relevance, in light of the physical facts of this case, to the matter of an equitable apportionment of waters common only to the States of New Mexico and Arizona.

The reserved and appropriative rights to the use of water from the Gila River which the United States is asserting against New Mexico have been largely determined by the Gila Decree. This decree, within the reach of the river encompassed by it, is binding on those who are parties to it, and their successors in interest, and also on the State of New Mexico as *parens patriae,* representative in this litigation of those same interests. See our initial brief, pp. 39–41. Apart from that decree, we have also proved in detail the reserved rights of the United States and the priorities to use of Gila River water arising from the creation of the San Carlos, Gila River and Gila Bend Indian Reservations. United States' Conclusions 4.21, 4.22.1, 4.23.2 and 4.23.4. Such reserved rights transcend state boundaries and must of necessity be accorded full protection in any apportionment effected between the states. See our initial brief, p. 38. New Mexico's proof, on the other hand, does not establish specific dates of priority of its uses. New Mexico attempts to excuse this by saying appropriative rights are irrelevant and difficult to prove (New Mexico's Brief, pp. 6–7). That they are relevant as a factor in equitable apportionment has been shown; New Mexico's inability to prove her priorities is no reason to ignore the priorities which have been proven by the United States.

New Mexico obliquely refers, in Point VII of her Brief, respecting her rights perfected in 1922, to the dates of origin of her various uses of water as a factor to be considered in making an equitable apportionment. Her Finding of Fact No. 12, to which she refers in Point VII, tabulates the dates of origin by specified periods and, according to that table, most of the

acreage which she claims is presently irrigated was first irrigated sometime prior to 1922. She apparently does not equate such to proof of appropriative rights, but rather treats this history of use as an "equity" in her favor. But even as such, the tendered proof lacks both validity and persuasiveness.

The history of use, represented by Finding of Fact No. 12, is based, for the most part, on testimony, in the Silver City depositions, 1st Series, by oldtimers acquainted with the region. Their testimony was that at the date of their earliest recollection, which almost uniformly was when they were five years old, the region about which they were testifying was farmed and irrigated. Overlooking the weakness of such recollections as proof, it seems impossible, with logic, to bridge the chasm between "proof" that a given number of acres were irrigated at some early time and conclude, as New Mexico does, that the same, or nearly the same, number of acres irrigated today were irrigated at the early time or that the uses today relate back to rights initiated at the early time. This is the invalidity of this point. Because it is invalid, it is unpersuasive. But even assuming its validity, it would be unpersuasive. Proof of the fact that acres were irrigated before 1922 is too general to be persuasive as a factor in equitable apportionment when compared with the United States' proof of specific acreages irrigated as of specific dates, with 35,000 acres having an immemorial priority and other acreages having specific dates of priority by decree and establishment of reservations, all prior to 1922.

New Mexico argues that the economy of the areas in which the irrigated land for which claim is made are located is significantly dependent on such irrigation. But comparison of the upstream and downstream areas shows that this establishes no equity in New Mexico's favor. In New Mexico the irrigation is of small, scattered farming tracts, for the most part with but slight physical development. On the other hand, the lands in Arizona for which the United States is making claim are located, for the most part, in an extensive irrigation project, exceeding 100,000 acres, having extensive irrigation facilities, a large diversion dam and a large storage dam, involving an extensive financial investment by the persons served by the fa-

cilities and by the United States. Surely the water requirements of such an extensive project have a much higher equity than those of individual users or small organized projects in New Mexico.

Physical and climatic conditions are also factors resorted to by New Mexico to support its claim. Their significance, she argues, is that they show the consumptive use rate in New Mexico is low and the rate of return flow is high—in essence, New Mexico uses little water for the acreage irrigated. But regardless of whether the use is high or low, the fact remains that uses in New Mexico reduce the supply available for satisfaction of the prior rights of the United States.

New Mexico says it has litle or no available storage. It is true that the lands for which the United States is making claim have storage available but, as shown by our Findings of Fact 4.23.35, 4.23.37, and 4.23.40, the water entering storage has been inadequate fully to supply the demand. Thus, it can hardly be said that the storage facilities available to the lands for which the United States is making claim tip the scales of equity very far in favor of New Mexico.

Accordingly, for all the foregoing reasons, we submit it would be wholly inequitable to allocate to New Mexico the water required from the San Francisco and Gila Rivers to satisfy even New Mexico's present uses which are in fact being made without imposing some qualification to protect the prior rights of the United States. To allow New Mexico to divert water for her present uses regardless of the supply available in the stream to supply all uses would catapult New Mexico's junior priorities and equities to the position of senior priorities since, because they are at the head of the stream, they have first access to the water which is available. It may be that the actual present uses in New Mexico, although all junior to the prior rights of the United States, could be accommodated by some provision similar to the "substitute storage" provision of the Gila Decree. Under that provision, junior appropriators above San Carlos Reservoir may, if there is sufficient water in storage in the San Carlos Reservoir to satisfy prior rights thereto downstream from the Reservoir and if authorized by the Court's representative, divert water from the Gila River in disregard of the prior rights of users below the San

Carlos Reservoir within limitations imposed for the adequate long-run protection of the downstream priorities. A similar provision in the decree in this case might be adopted to protect the superior rights and equities of the downstream United States' rights and yet allow New Mexico to make the fullest possible use of the water available in the San Francisco and Gila Rivers to satisfy her present uses.

B. New Mexico's claim of the right to divert water from the San Francisco and Gila Rivers for future uses must be denied.

New Mexico's claim is not limited to water to satisfy its present uses. In her Conclusion of Law No. 3 she claims 56,700 acre-feet of water per year measured at site or 53,700 acre-feet of water per year measured at the state line for future uses in New Mexico, which includes, according to her Finding of Fact No. 30, the following amounts: San Francisco River—at site 5,400 acre-feet per annum, at state line 5,400 acre-feet per annum; Gila River—at site 32,700 acre-feet per annum, at state line 32,700 acre-feet per annum. We have previously shown, and indeed New Mexico event admits, that such future uses from the San Francisco and Gila would diminish the water supply available to satisfy the rights of the United States downstream in Arizona. New Mexico seeks to justify this by saying that the supply will not be diminished if someone (not identified, but in all likelihood the United States) will construct additional storage structures in Arizona. We cannot agree that this is justificaton for future developments in New Mexico.

It is recognized by all that there is not enough water for the San Carlos Project and other lands in Arizona for which the United States is making a claim. It seems apparent, therefore, that the benefit of any additional storage facilities constructed in Arizona by the United States to alleviate this shortage should inure to the benefit of the lands for the benefit of which they may be built and not to the benefit of new uses in New Mexico. Any other conclusion would in effect place the contemplated future uses of New Mexico in a position superior

to the present prior rights of the United States downstream in Arizona. The arguments made, *supra,* showing that New Mexico's present uses are junior to those of the United States likewise dictate that here, too, New Mexico's proposed uses are junior, and as such, must be denied because of their essential impairment of the supply available to satisfy the United States' rights. We submit that the Supreme Court's rejection in *Nebraska* v. *Wyoming* of Colorado's claim for future use is dispositive of New Mexico's similar claim here.

Respectfully submitted,

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