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

REBUTTAL BRIEF OF THE UNITED STATES OF AMERICA

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REBUTTAL BRIEF OF THE UNITED STATES OF AMERICA

I. By withdrawal of lands from the public domain and reservation thereof for federal purposes the already existing right to use unappropriated appurtenant waters is insulated against appropriation under local laws. The quantum of the right so reserved is at least the quantity of water "necessary for the beneficial uses of the Government property." The right is not limited by past use and is not lost by non-use.

California and Arizona both attack the measure of the reserved rights asserted by the United States with respect to the Indian reservations. In her argument in this connection Cali-

fornia, at page 113 of her response to the initial brief of the United States, says: "We do not agree with the asserted principle that the creation of each Indian reservation is accompanied by the creation of a water right * * *" and elsewhere makes frequent references to the result of establishment of a federal rservation in terms of "creation of a water right" thereby.

The contentions and arguments of both Arizona and California misconceive the basis for and the nature of the rights of the United States to the use of water upon its reserved lands. The withdrawal of lands from the public domain and the reservation thereof for federal purposes do not create a right to the use of water. The right to use the unappropriated appurtenant waters upon such lands exists in the United States at the time of establishment of the reservation. The withdrawal precludes the subsequent appropriation by others of such appurtenant waters. It is because of this result of a withdrawal of lands from the public domain that appropriations subsequent to the date of the withdrawal are subject to the reserved rights of the United States. But it is the date subsequent to which rights cannot be acquired as against the reservation, and not the already existing right to use the waters on such lands, which is established by the act of reservation.

The following discussion demonstrates in greater detail the distinction between the initiation, or creation, of a water right and the reservation of such rights.

As noted in our reply brief, page 31, when the United States acquired by cession from Mexico, in 1848 and 1853, the ownership of the lands within the drainage area of the Lower Basin of the Colorado River, excepting only those of such lands as had been granted by the previous sovereign, it also acquired ownership of the right to use the waters thereon and appurtenant thereto. And as the Supreme Court of California has recognized from a very early time (see our reply brief, pages 30–31), no one could acquire ownership of a right to the use of any of such waters except by grant or authorization from the United States. This result follows not only from general principles of real property law; it follows also from the language of Article IV, Section 3, Clause 2, of the Constitution of the United States: "The congress shall have Power to dispose of and make

all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *."[1]

It was this principle which was recognized by the Supreme Court of the United States in *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690, 703 (1899), when it said: "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."

It is the Desert Land Act of 1877 (19 Stat. 377; 43 U.S.C. 321), and the precursors thereof, Section 9 of the Act of July 26, 1866 (14 Stat. 251, 253; 30 U.S.C. 51), and Section 17 of the Act of July 9, 1870 (16 Stat. 217, 218; 43 U.S.C. 661), which made possible the acquisition by appropriation in accordance with local laws and customs of privately-owned rights to the use of non-navigable waters on the public domain. But, as noted at page 32 of our reply brief, the Desert Land Act did not divest the United States of its ownership of the right to use the unappropriated waters on the lands of the United States which it had had since acquisition thereof by cession from Mexico. That statute merely adopted local laws and customs as providing the procedure by which members of the public might acquire rights to use the unappropriated non-navigable waters on the public domain. But when public lands are withdrawn and reserved for purposes of the United

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[1] It is equally clear that, in the absence of federal legislation authorizing State action, such Government-owned property is immune from regulation or control by the State; properly authorized federal agencies may use and regulate the land, as well as its waters and resources, without regard to State regulatory laws. E.g., *Camfield* v. *United States*, 167 U.S. 518, 526 (1897); *Light* v. *United States*, 220 U.S. 523 (1911); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389 (1917); *Hunt* v. *United States*, 278 U.S. 96, 100 (1928); *Arizona* v. *California*, 283 U.S. 423, 451–2 (1931); *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690, 703 (1899); *Gibson* v. *Chouteau*, 13 Wall. 92 (1871); *United States* v. *Oregon*, 295 U.S. 1, 27–29 (1935). If that were not the rule, the properties of the United States would be "completely at the mercy of state legislation." *Camfield* v. *United States, supra.*

States, the unappropriated waters on or appurtenant thereto are removed from availability for appropriation under authority of the Desert Land Act.

Such is the clear holding of *Federal Power Commission* v. *Oregon,* 349 U.S. 435 (1955), in which, at page 448, the Court said:

> It is not necessary for us, in the instant case, to pass upon the question whether this legislation constitutes the express delegation or conveyance of power that is claimed by the State, because these Acts are not applicable to the reserved lands and waters here involved. The Desert Land Act covers "sources of water supply upon the public lands * * *." The lands before us in this case are not "public lands" but "reservations." Even without that express restriction of the Desert Land Act to sources of water supply on public lands, these Acts would not apply to reserved lands. "It is a familiar principle of public land law that statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated to some other purpose." *United States* v. *O'Donnell,* 303 U.S. 501, 510. See also, *United States* v. *Minnesota,* 270 U.S. 181, 206. The instant lands certainly "are not unqualifiedly subject to sale and disposition * * *."

Such is also the clear holding of *Winters* v. *United States,* 207 U.S. 567, 577 (1908): "The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be * * *."

And see, *United States* v. *Walker River Irrigation District,* 104 F. 2d 334, 336 (9th Cir. 1939) in which the Court said: "The power of the Government to reserve the waters and thus exempt them from subsequent appropriation by others is beyond debate * * *. It is of course well settled that private rights in the waters of non-navigable streams on the public domain are measured by local customs, laws and judicial decisions. * * * But it does not follow that the Government may

not, independently of the formalities of an actual appropriation, reserve the waters of non-navigable streams on the public domain if needed for governmental purposes."; *United States* v. *McIntire*, 101 F. 2d 650, 654 (9th Cir. 1939): "[The Act of July 26, 1866] * * * applies only to public lands * * * lands which are reserved are severed from the public domain * * *. The statute mentioned therefore does not, we think, apply here. Likewise, the Montana statutes regarding water rights are not applicable because Congress at no time has made such statutes controlling in the reservation."; *United States* v. *Ahtanum Irrigation District et al.*, 236 F. 2d 321, 328 (9th Cir. 1956), *cert. denied* 352 U.S. 988: "* * * Rights reserved by treaties such as this are not subject to appropriation under state law, nor has the state power to dispose of them."

Thus, it is apparent that the reservation by withdrawal of lands from the public domain of the right to use at least such quantity of the unappropriated appurtenant waters as may be necessary to accomplish the purposes of the withdrawal is not dependent upon an intent, either express or implied, at the time of the withdrawal, to reserve a specific quantity of water. In this case, however, in order to avoid a necessity for an open-end decree, the United States has proposed that the reserved rights with respect to the several Indian reservations be measured by determination of the quantities of water required for irrigation of the irrigable lands of the reservations and for other presently foreseeable needs of the Indians entitled to reside on such reservations or who may become entitled to reside thereon. We believe that the application of such a measure would be in the best interests of all parties to the case. We believe its application is justified by the decisions of the Supreme Court and the Courts of Appeal with respect to rights to the use of water reserved for use on Indian reservations. See our initial brief, pp. 27–30.

On the other hand, there is no precedent in the authorities for limitation or measurement of the rights of the United States to the use of water on the Indian reservations of the Lower Basin to acreages irrigated in the past in the light of the circumstances which the evidence in this case has demonstrated, notably, a rapidly increasing Indian population and

an urgency for additional irrigated lands to satisfy the needs of the Indians of the Lower Colorado River Basin. See p. 30 of our initial brief and p. 5 of our reply brief.

This urgency pertains, we submit, even to those reservations wherein there is no present irrigation. Despite the repeated reference in California's proposed findings and briefs to the Chemehuevi "no Indian" Reservation, the record shows the existence of approximately 300 Chemehuevi Indians entitled to reside on the Chemehuevi Indian Reservation (Calif. Ex. 2600–5; Tr. 13,765). Counsel for California elicited on cross-examination the further fact that a number of Chemehuevis were enumerated as residents on the Reservation in the course of the 1950 census (Tr. 15,294; 15,308–9). The United States has asserted the right to use Colorado River water for some 1,900 acres of the Chemehuevi Indian Reservation—certainly it cannot be said that such developed acreage is disproportionate to the needs of several hundred Chemehuevis. The purpose of establishment of the Reservation was to provide for those Indians. Without development, however, the lands of the Reservation are of such character that they provide nothing which would enable the Indians themselves to develop an irrigation project. The fact that the United States has not gone forward with such a development does not justify a determination that the rights reserved for the benefit of these Indians should now be foreclosed. As the Ninth Circuit Court of Appeals said in the *Ahtanum* case, *supra*, p. 5, at page 328: "We deal here with the conduct of the Government as trustee for the Indians. It is not for us to say to the legislative branch of the Government that Congress did not move with sufficient speed to appropriate the funds necessary to complete this irrigation system by 1908 rather than by 1915, or that the Government had thus lost or forfeited the rights reserved for the Indians."

Similarly the record discloses a population of several hundred members of the Fort Mohave Tribe entitled to reside on the Fort Mohave Reservation (United States' Proposed Finding of Fact 4.5.7). The record also discloses that a considerable number of these Indians live in a colony in Needles, California, which was established with Tribal funds received upon

sale of some of the Reservation lands. This colony is close to their place of employment by the Santa Fe Railroad. Although great emphasis is placed by both Arizona and California on the fact that what little irrigation there was in times past on this Reservation has been discontinued, the evidence demonstrates that efforts to develop the valley lands of the Reservation were frustrated by the flood hazard prior to the closure of Hoover and Davis Dams (United States' Proposed Finding 1.8). With the completion of the dams referred to and channelization of the river through the lands of the Reservation (Tr. 14,076–8), this hazard is now eliminated and development of the lands of the Reservation for irrigation can now go forward. As held in the *Ahtanum* case, *supra,* delay by the United States in developing the lands of this Reservation to provide for the needs of the Indians entitled to reside thereon is no basis for a determination that rights of the United States to use water thereon have been lost by forfeiture or non-use.[2]

II. The Acts of Congress relating to the Colorado River Indian Reservation afford no basis for argument that the rights to use Colorado River water on the lands of that Reservation are less in quantity than the amount required for irrigation of all the irrigable lands of the Reservation.

Arizona argues that the presently irrigated acreage of the Colorado River Indian Reservation is more than adequate for all future purposes (Arizona's Answering Brief, pp. 95–107).[3] This argument is a conglomerate of irrelevancies and flies in the face of the Congressional policy of development of the

[2] Of course, as noted in our reply brief, pp. 7–8, California, without regard to the doctrine of reservation by the United States and the considerations noted *infra*, pp. 9–11, can hardly question the riparian rights which the law of that State would accord to the riparian lands of the Indian reservations in California. And since the measure of such rights under the law of California is the quantity of water reasonably required from time to time for use on the riparian lands, the right being not limited by past uses and not lost by non-use, we believe California's professed difficulty with the term "appurtenant waters" and her resistance to the application of a similar rule with respect to the reserved rights of the United States is frivolous.

[3] California concedes the full right claimed by the United States for the Arizona portion of the Colorado River Reservation (although assigning that right a later date of priority) but uses some of the same arguments against decree of any right for Reservation lands in California.

Reservation for the Indians of the Colorado River and its tributaries. (Act of May 3, 1865; 13 Stat. 541, 559). Despite the periods of dormancy of this Congressional policy, the fact remains that this is the *present* policy of the United States. As stated in Solicitor's Opinion M–36557, dated February 24, 1959, 66 Interior Decisions 54, 60:

> We are in agreement with former Solicitor Davis that the offer to the Indians "of the river and its tributaries" to settle upon the reservation is a continuing offer which may be accepted at any time until it is withdrawn. Though we may consider, *arguendo,* that a long lapse of time or other implication would indicate that the offer has been abandoned, we need only to look to the Navajo-Hopi Rehabilitation Act of 1950 (64 Stat. 44–47), which indicates the intention of Congress to keep open the offer which has never been rescinded.

It is quite unuseful in the face of this existing Congressional policy to rehash, as Arizona has done, the Act of April 21, 1904 *authorizing* the Secretary of the Interior to include lands of the Colorado River Indian Reservation in a Reclamation project, since such authorization was never carried into effect. Nor do we perceive how Arizona gains any comfort from the Appropriation Act of April 4, 1910, and later appropriation acts referred to which show the Congressional intention through the years to develop an irrigation project on the Colorado River Indian Reservation of the magnitude of 150,000 acres. That Congressional intent had its culmination in the authorization of and appropriation of funds for Headgate Rock diversion dam and other works capable of irrigating by gravity over 105,000 acres of the Colorado River Indian Reservation. It would be preposterous to assume that Congress would permit the benefits of this substantial project to be limited to a relatively few Indians.

The Navajo-Hopi Rehabilitation Act, pursuant to which certain Navajos and Hopis were resettled on the Colorado River Indian Reservation, is a demonstration of the contemporary Congressional intent. But Arizona suggests that the recent income accruing to the Navajo Tribe as a result of

mineral royalties will influence prospective colonists to remain on the Navajo Indian Reservation. Even if the proceeds of these mineral leases were distributed among the Tribe members, the per capita share would be very modest. However, this income is being used for the development of the resources of the Navajo Indian Reservation (United States' Proposed Finding 4.2.13). Even with this development, the resources of the Navajo Indian Reservation are adequate to support only a fraction of the Navajo Indians (United States' Proposed Finding 4.2.11). Furthermore, the Navajos are not the only Indians of the Colorado River and its tributaries residing on Reservations insufficient in natural resources for their support (see our initial brief, pp. 30–31).

The overall effect of Arizona's arguments in this connection is the suggestion that development of the irrigable lands on the Indian Reservations would result in the undue enrichment of the Indians. The absurdity of this suggestion is readily demonstrable by comparison of the aggregate acreage of the Indian Reservations of the natural lower Colorado River Basin for which water rights are herein claimed—little over 250,000 acres—with the present population of the Indians of the Lower Basin, variously estimated as 120,609[4] and 118,730,[5] and the uncontroverted proof that this population will drastically increase in the future.[6]

III. The navigable character of the waters of the Colorado River does not preclude the right of the United States to use those waters on its reserved lands adjacent thereto.

Arizona, while she thus appears to challenge only the quantum of the reserved right asserted for the Colorado River Indian Reservation, seems to dispute the applicability of the *Winters* case with respect to the Fort Mohave Indian Reservation and asserts that the Supreme Court's decision in *Federal Power Commission* v. *Oregon* has no application. She

[4] California Exhibits 2600–1 through 2600–26.

[5] Tr. 12,630–1, 12,635, 12,642, 13,766, 13,764–5, 13,765, 13,767–8, 13,762, 13,760–1, 13,763, 14,647–8, 14,649, 14,642, 14,644, 14,640–1, 14,645–6, 14,643–4.

[6] United States' Exhibit No. 500.

says: "The so-called 'general' reservation doctrine there involved, springing from Article IV, Sec. 3, of the Federal Constitution has no application to navigable waters." Arizona Answering Brief, p. 95.

If this be so it is because Congress has never extended a general authorization for the appropriation of such waters. (The Desert Land Act by its clear and express terms applies only with respect to non-navigable waters on the public domain.) Because there has been no such authorization for the acquisition of privately-owned rights to the use of the navigable waters of the United States there is no occasion to make a reservation of the already existing rights of the United States.[7]

But simply because the United States has not authorized the acquisition by others of rights to use the navigable waters does not mean the United States itself is precluded from using such waters as necessary for the beneficial uses of Government-owned lands bordering on or traversed by the stream. Neither does it mean that the United States is precluded from establishing along the stream a reservation of federal lands for federal purposes requiring the use of such waters. It simply means that no claim of a privately owned appropriative right to use such waters can be asserted against use by the United States on such reservation, regardless of whether such claim of right was initiated before or after the date of establishment of the reservation. The same considerations which establish the power of the United States to reserve rights to use non-navigable waters compel this conclusion with

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[7] Arizona, in her answering brief, pages 36–41, has reviewed some of the authorities which demonstrate convincingly that against the United States, at least, *privately-owned rights* to the use of navigable waters cannot exist in the absence of Congressional action providing that private interests asserted in such waters be treated as property rights. In addition to the authorities so reviewed in the Arizona brief, we invite the Special Master's attention to the concurring and dissenting opinion of Justice Douglas in *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 756 (1950) which opinion begins with these sentences: "I think it is clear under our decisions that respondents are not entitled to compensation as a matter of constitutional rights. For we have repeatedly held that there are no private property rights in the waters of a navigable river." And see *infra*, pp. 48–55.

respect to navigable waters. The fact that the use of the navigable waters as necessary for the beneficial use of Government property bordering on the stream is undoubtedly subject to their use for purposes of *commerce* at the direction of Congress does not militate against the right of the United States to make such use.

IV. Rights of the United States to use the waters of an interstate stream, which arise under and by virtue of the laws of the United States, are not to be limited by allocation between the States of the waters of such stream.

New Mexico objects to the conclusions proposed by the United States which would make the allocation to New Mexico of a share of the waters of the Gila River system subject to the rights of the United States with respect to its downstream uses in Arizona. She says that any apportionment made in accordance with such conclusions would not be an equitable apportionment at all.

This objection and New Mexico's supporting arguments do not take proper account of the nature of the rights of the United States which are involved or of the relationship which must exist between an allocation to the states of the waters of an interstate stream and such rights of the United States. In our initial brief, p. 38, we pointed out that rights of the United States to the use of water which arise under and by virtue of the laws of the United States, and which are in no way dependent upon the laws of a state, transcend state boundary lines and are not affected by the existence of such boundary lines. It follows that such rights are in no sense capable of limitation by determination, either by compact between the states or by judicial decision, of the equitable shares of the states in the waters of the interstate source.

Accordingly, it is necessary that such rights be determined and recognized in the allocations to the respective states and that those allocations be made in terms and in quantities which will not hinder the satisfaction of the rights of the United States with the priorities which attach thereto. It is in this sense that the allocations to the respective states must be subject to such rights of the United States.

V. There is no inconsistency between the United States' reliance on the doctrine of reserved rights to the use of water and its reliance on the Gila Decree.

New Mexico professes uncertainty as to whether the United States bases its claims of rights to use the waters of the Gila River system upon the Gila Decree or upon the reservation theory. We believe that there is no room for such uncertainty in the light of our proposed findings of fact and conclusions of law and our initial brief in support thereof, particularly pp. 36–45. As set forth in that brief, we assert that the Gila Decree is binding upon the parties thereto, including the United States, and also upon the State of New Mexico by reason of its representation here as *parens patriae* of some of the parties to that action. Therefore, the rights of the United States are those rights determined by that Decree. In the alternative, however, if the Decree is not held to be binding on the parties thereto and on the State of New Mexico in the manner that we have asserted, the reserved rights of the United States with respect to the several Indian reservations involved are the rights which we have proved and set forth in our proposed findings of fact and conclusions which arise by reason of the establishment of the several reservations. The appropriative rights held by the United States with respect to the non-Indian portion of the San Carlos Federal Irrigation Project and the lands of the old Florence-Casa Grande Project served through the facilities of the San Carlos Project are, as proved by the evidence relating thereto, reflected in our proposed findings and conclusions.

There is no merit in the suggestion by New Mexico and by California in the latter State's response to our brief in support of our proposed findings and conclusions that the United States' reliance upon the Gila Decree in some manner refutes or invalidates the doctrine of reserved rights as laid down in *Winters* v. *United States, supra,* p. 4. The fact that the United States joined in an agreement for the entry of a stipulated decree in that case is hardly foundation for a contention that it has waived its rights under the reservation doctrine in other litigation.

VI. The rights of the United States to the use of water on the Zuni Indian Reservation are prior to all non-Indian uses in New Mexico upstream from that reservation.

New Mexico objects to the United States' Proposed Findings 4.16, 4.1.17 and 4.1.18 and proposed conclusion 4.1 relating to the 1877 priority asserted by the United States with respect to the Nutria Springs and Pescado Springs on the Zuni Reservation. She contends that the priorities for the units on that Reservation supplied with water from those Springs should be 1883, rather than 1877, and says that this is important because there are non-Indian uses above the Zuni Reservation which "had the date of origin in 1882." As to whether priority of the United States with respect to the units mentioned is 1877 or 1883, we stand on the facts and conclusions to be drawn therefrom as set forth in the proposed findings and in the proposed conclusion referred to. As to New Mexico's statement that non-Indian uses above the Zuni Reservation had a date of origin in 1882, we submit that the New Mexico evidence is wholly insufficient to establish presently valid appropriative rights in that area with a priority of 1882.

VII. The rights and obligations of the United States under its contracts pertaining to the various federal reclamation projects utilizing waters of the main stream of the Colorado River should be determined and protected by the decree to be entered herein.

Arizona asserts that the rights of the United States with respect to the Reclamation projects in Arizona are not justiciable in this action. She bases this assertion on an argument to the effect that the water users under the projects and other water users in Arizona are not parties to the action and she says that "the United States does not have such an interest in the water rights of those projects or of their landowners as to enable it to represent them. *Nebraska* v. *Wyoming,* 325 U.S. 589, 629 (1945)."

We urge that, for the same reasons that the United States' rights to the use of water from interstate sources on the Indian reservations and for other federal purposes, the rights of the United States with respect to the several Reclamation projects must be determined.

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There is nothing in *Nebraska* v. *Wyoming* which says they should not be. In that case the Court simply held that it would not make an allocation to the United States separate from the allocations made to the states. It so held because, on the record in that case, it determined that the landowners under the projects had become the appropriators of the water involved. Apparently state authorities had issued certificates of appropriation in the names of the individual water users and this was apparently consistent with the terms of the contracts which had been made between the United States and the several irrigation districts. 325 U.S. 613.[8] But even though the Court did refuse there to make a separate allocation to the United States, it did determine the quantities of water within the several State allocations which were to be used upon the federal projects.

Here the United States has proposed, by our conclusion 11.3, that its rights with respect to the reclamation projects be included within the respective State entitlements. Nevertheless, the necessity remains for determination of the rights and obligations of the United States under the several contracts which have been made for the delivery and use of water on the projects.

We submit that a determination of such rights is an essential ingredient of any determination of the respective states' allocations.[9] We think there is no merit in Arizona's sugges-

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[8] Such is not the record in this case.

[9] The determinations which should be made with respect to the several Reclamation Projects are those set forth in Section VII of our proposed findings and conclusions. The California proposal that the rights of these several Reclamation projects be quantitatively limited to the estimated consumptive use requirements which were proved by the United States is incorrect. The quantities of water deliverable under the contracts with the respective associations and districts in Arizona are, generally speaking, such quantities as may be reasonably required and beneficially used for irrigation of the project lands. The quantities deliverable under the contracts with the California districts are the quantities specified by the respective contracts with them, subject to the limitation upon the consumptive use of Colorado River water for use in California and the other provisions of said contracts. These contract provisions are the measure of the diversion rights which should be decreed. However, the estimated diversion requirements should be included in the decree as proposed in our conclusions relating to reclamation.

tion that the only contract relevant to a determination of that State's entitlement is her 1944 contract. The contracts which have been made within the framework of that contract are equally relevant.

But beyond that, the United States is entitled in this action to a determination of its rights and obligations with respect to the several reclamation projects and interpretation of the contracts which it has made with respect to those projects and instructions concerning the principles governing the deliveries of water thereunder. The case of *Texas* v. *New Mexico,* 352 U.S. 991 (1957), a suit for enforcement of the Rio Grande Compact, was dismissed because of the absence of the United States, an indispensable party. Although the Court did not find it necessary to write an opinion setting forth the grounds for its determination of the United States' indispensability, the Court will take note that the interests of the United States which were asserted in support of New Mexico's and the United States' position were Reclamation projects and rights of the United States with respect to Indians. In *Arizona* v. *California,* 298 U.S. 558, 571 (1937), in discussing the indispensability of the United States to that suit, the Court said: "The 'equitable share' of Arizona in the unappropriated water impounded above Boulder Dam could not be determined without ascertaining the rights of the United States to dispose of that water in aid and support of its project to control navigation, and without challenging the dispositions already agreed to by the Secretary's contracts with the California corporations, and the provision as well of Section 5 of the Boulder Canyon Project Act that no person shall be entitled to the stored water except by contract with the Secretary."

We think it is plain that where the Court's jurisdiction in an interstate suit depends upon the presence of the United States because of its interest in Reclamation projects utilizing the interstate water source and contracts made with respect thereto, it is not tenable that the United States' interests with respect to such projects and contracts are not determinable when it does intervene and make such suit jurisdictionally possible. The rights and obligations in question arise under and by virtue of the laws of the United States and the contracts concerned

are made in pursuance of such laws. The fact that we have proposed the inclusion of uses thereunder within the State entitlements does not mean they are nonjusticiable here. The States do not represent the United States with respect to its reclamation projects, at least in a case to which the United States is a party and where, as the record here shows, the rights to use water thereon come from the United States and are in no manner dependent upon the laws of the States.

VIII. The rights and obligations of the United States with respect to the use of Colorado River water for the maintenance of Fish and Wildlife Refuges should be determined and protected by the decree to be entered herein.

The responses of the various parties directed to the claims of the United States for water rights for Wildlife Refuges display a variety of misconceptions, both factual and legal. Arizona contends that these claims present no justiciable controversy since the salvage to be expected from development of the Refuges and the prospective uses in this connection are too indefinite and uncertain (Arizona's Answering Brief, p. 91).[10] California goes further and says that the development of the Refuges, at least the Havasu Lake National Wildlife Refuge, will actually reduce salvage and that the rights of the United States to use water on Wildlife Refuges are not supported by international obligations and are subordinate to and included within the rights of the states for beneficial consumptive uses (California Response to our Findings and Conclusions, pp. 62–67; California Response to our Opening Brief, pp. 128–132). Nevada construes these claims as a proposal "that the United States can consumptively use at any time and in any amount all of the water which appropriate officials shall believe to be essential for wildlife refuges" (Answering Brief of Nevada, p. 64). We deny each and every one of these contentions—the record is otherwise.

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[10] We do not limit our claim of right to salvage water which may be effected by the development of substitute refuge areas. The reference to salvage in our Proposed Conclusion 11.13 shows that the quantity of water available for use in the Lower Basin will not be diminished by development of the substitute areas but we claim the right to use the water necessary whether the full quantity of salvage is realized or not. See Section III, *supra*.

The argument of non-justiciability overlooks the fact that the United States has pleaded and proved existing uses of Colorado River water, albeit water in its natural state, on wildlife refuge areas situated on the main stream. We claim the right to continue this present use and ask that the decree to be entered herein recognize such right.

We claim also, in substitution for the present use of water in its natural state, the right to use Colorado River water in the amount necessary for the development of these refuges. The particulars of the development plans and the water requirements therefor—aggregating 92,839 acre-feet per annum to be diverted from the River—have been proved in detail. This specificity of proof, we submit, dispels the bug-a-boo of "open-endedness" raised by Nevada as well as the Arizona-California charge of indefiniteness of these prospective uses.

Nor do we believe there is any contradiction in the record to our proof that the savings of water to be achieved by the development of the Refuges are independent of and in addition to the salvage occasioned by the channelization of the River. California furnishes her "reading" of the testimony of Mr. William V. Taylor, Chief of the Branch of Engineering of the Fish and Wildlife Service. Although California seeks now as she did at trial to confuse this matter, the purport of his testimony is clear and uncontroverted: that, apart from salvage resulting from containment of the River in a well-defined channel, the change in and control of the vegetation in the refuge areas provided by the development of these areas will result in lessened water consumption and that without this development, such savings would not occur (Tr. 15,759–60).

It is because this development of the Wildlife Refuges can be accomplished without increased water use and also because the maintenance of the Refuges are beneficial to the agricultural areas of the Lower Basin generally, that it would be inappropriate, we believe, that their water requirements, either present or future, be charged to the particular entitlements of the respective states. Moreover, the international obligations of the United States in this connection require that these rights of the United States not be submerged in the state allocations.

California quotes the provisions of the Convention between the United States and Great Britain showing that the establishment of refuges is an alternative method by which the treaty obligation can be discharged (see our Proposed Finding 6.3). California neglects to quote the provisions of the Convention of February 7, 1936 between the United States and Mexico, whereby the contracting parties agreed unequivocally to the establishment of refuge zones (Article II(B), United States' Exhibit 2605, p. 2). California says that these international obligations are only tangentially involved and cannot "vitiate" the "express" language of the Boulder Canyon Project Act (California's Response to our Opening Brief, p. 131). The "express" language of the Project Act to which they refer is Section 13(b) providing that the rights of the United States shall be subject to and controlled by the Colorado River Compact. As we have previously stated (reply brief, p. 3), this provision was enacted to insure that the United States would respect the allocation between the Upper and Lower Basins accomplished by the Compact.[11] We submit, therefore, that there is no inconsistency between the Boulder Canyon Project Act and the treaties with Great Britain and Mexico. If there be such, however, it is a well-established principle that a treaty may modify a prior act of Congress to the extent necessary to give such treaty the intended effect. See *Cook* v. *United States*, 288 U.S. 102, 118 (1933); *United States* v. *Thompson*, 258 Fed. 257, 268 (E.D. Ark. 1919).

IX. The provisions of the Boulder Canyon Project Act requiring that the United States, in its construction, maintenance, and operation of the Project, be controlled by and conform to the Colorado River Compact were intended for protection of the Upper Basin's apportionment under the Compact. They have no bearing upon the relationship between the rights of the United States and the respective entitlements of the Lower Basin States.

Throughout the course of this case, great emphasis has been placed by various states, notably California, on the provisions of Sections 8(a) and 13(b) of the Boulder Canyon Project Act

[11] See Part IX, *infra*, and the legislative history of Section 13(b), Appendix A, *infra*.

subjecting the United States and those claiming through it to the Colorado River Compact. These statutory provisions have been pointed to, time and again, as the legal compulsion for all federal consumptive uses being given no independent recognition but instead being treated as within state allocations.[12] This theme reaches its crescendo in California's Response to our Opening Brief (pp. 108 *et seq.*) in which it is stated that the claims of the United States which are not based on past use or appropriative rights are "invalid," and that this invalidity stems from Section 13(b) of the Project Act, which we have "wholly neglected."

We have pointed out in our reply brief, p. 3, the complete illogic of California's contention that the Project Act subjecting rights of the United States to the *inter*-Basin allocation of the Compact could in any way "compel" the merger of federal uses into *State* allocations within the Lower Basin. California's further distortion of the purpose and effect of these provisions of the Project Act is most easily demonstrated by a consideration of their legislative history.

Such legislative history is attached as Appendix A. It is readily apparent therefrom that Sections 8(a) and 13(b) of the Project Act had their genesis in the fears of the Upper Basin States that the construction and operation of the Boulder Canyon Project would encroach upon their rights. It was to allay these Upper Basin fears that the mentioned sections were added to the third Swing-Johnson Bill and carried over into the fourth Swing-Johnson Bill which was enacted into law. The Senate and House Reports on the fourth Swing-Johnson Bill contain this explanation of such provisions:

> With these works constructed and owned and operated by the Government and since the United States is the most considerable owner of lands adjacent to the river through its entire length, including its tributaries, the United States is in position to physically enforce such terms and conditions upon the use of the water as it may determine upon. This bill expressly approves

[12] California's Opening Brief, pp. 173–88; Answering Brief of Nevada, pp. 53–65; New Mexico's Initial Brief, pp. 72–80.

> the compact and assents to all of its terms so far as the United States is concerned. The representatives of the upper-basin States have prepared and submitted numerous protective devices for their own benefit, every one of which has been incorporated in the bill. These amendments not only include the approval by the United States but subjects the United States and each and every agency thereof, to its terms. Not only that, but requires the Secretary of the Interior in the construction and operation of the project, to conform to all of the terms and conditions of the compact and inasmuch as no rights can be acquired in the project except by contract, as specifically required in the bill, this provision is very effective. But in addition to that, all patents, grants, concessions, easements, rights of way, or other evidences of rights from the United States are impressed with all of the provisions of the compact as a matter of law and many other safeguards are incorporated for their benefit. Nothing further has been suggested and nothing further has been thought of which can add to the protection of the upper-basin States. It is thought that their protection is complete.[13]

Senator Johnson of California, the Senate sponsor of the fourth Swing-Johnson Bill, emphasized in debate that:

> We write this bill around the compact. We incorporate in it the very amendments that were presented by the upper-basin States. *The amendments that are in the bill that refer to the Colorado River Compact were written by men of the upper-basin states and inserted at their request* * * *. 69 Cong. Rec. 7249 (1928). [Emphasis supplied.]

California would now transform this "protective device," written into the Project Act for and at the behest of the Upper

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[13] House Report No. 918, 70th Cong., 1st Sess., p. 14; Senate Report No. 592, 70th Cong., 1st Sess., pp. 15–16, contains substantially this same language.

Basin, into a requirement for subordination of rights of the United States within the Lower Basin. Manifestly, there is no basis for the California contention that Sections 8(a) and 13(b) can have an internal or intra-Lower Basin effect. Clearly, the sole effect of these provisions was a Congressional declaration of the awareness of the Compact allocation between the Upper and Lower Basins and an assurance that such allocation would be respected by the United States in the operation of the Boulder Canyon Project.

On and subsequent to June 1, 1959, the United States received a total of 954 pages of brief material prepared by the other parties. Included in this are 309 pages of response by the California defendants to the United States' Proposed Findings of Fact and Conclusions of Law and initial brief in support thereof. Since the California defendants have devoted almost three times as many pages to their response to the United States' Proposed Findings and Conclusions and initial brief as they have devoted to the similar submissions of any of the other parties, we are, of course, more concerned at this time with the attack which California has made upon our position than with the briefs of the other parties. By a process of arguing against sentences taken out of context and arguing against positions attributed to the United States which we have not in fact taken, the California brief does tend to distort and obfuscate the analysis of the case which the United States has in fact presented by its Proposed Findings and Conclusions and brief in support thereof. The remaining portion of this brief is directed primarily to matters of this character in the California brief. However, the quantity of such matters with which we might deal is substantial and we have omitted some of them. We urge that the Special Master refer to our Proposed Findings and Conclusions, our brief in support thereof, and our reply brief for the most complete and accurate statement of the positions and arguments of the United States.

X. The construction of Section 4(a) of the Boulder Canyon Project Act for which the United States contends would not "destroy California projects." On the other hand, the allocation to Arizona which California proposes, and the similar allocation proposed by Nevada, would be far less than sufficient to satisfy the requirements of the projects of the United States utilizing main stream water in Arizona.

California's brief, dated June 11, 1959, in response to the brief in support of the proposed findings of fact and conclusions of law of the United States opens with a strong attack upon the statement made in the concluding paragraph of our initial brief that the construction of Section 4(a) of the Project Act for which we contend would not prejudice continuance of presently existing uses in California and would not reduce, as the construction contended for by California might, the Arizona entitlement to the delivery of main stream water to a quantity less than sufficient for the requirements of main stream projects within that State, including the federal Reclamation projects and ultimate development of the main stream Indian reservations. California says we are wrong in both particulars.

She says that the record shows that the maximum historic use of Colorado River system water by California projects aggregates 4,594,500 acre-feet per year and that under our proposed construction of Section 4(a) of the Project act she would be fortunate to have 3,000,000 acre-feet per year of wet water to apply to use in that State. In making this comparison, California shrinks beyond all semblance of recognition the quantity of main stream water available for use in the Lower Basin which would be available for use in California under the construction of Section 4(a) which we urge. She likewise treats as necessary for maintenance of presently existing uses in that State her asserted "maximum historic use."

Arizona, in her answering brief, pages 74 and 75, arrives at a total requirement of 3,485,400 acre-feet of water for maintenance of presently existing uses in California which she says is derived from California's own exhibits. From her own evidence, Arizona arrives at a total "actual" requirement for that purpose of 2,912,200 acre-feet per annum. We think the Arizona calculation of the total "actual" requirement is too strict

and we think her calculation of requirements from the California exhibits is not realistic in that, among other things, it is based on a statement of *average* acreages during the last five years and does not take into account the requirements for irrigation of the Fort Mohave, Colorado River, and Chemehuevi Indian Reservations in California.

According to our calculations, the requirements to maintain the maximum historic irrigated acreage in California and the maximum historic diversion by Metropolitan Water District as evidenced by the record which has been made is approximately 3,817,000 acre-feet of consumptive use per annum, exclusive of reservoir losses. This calculation has been made on the basis of California's estimate of per acre requirements for the All-American Canal project for the future as testified to by witness Dowd, and where possible is otherwise predicated on California's own evidence and not the evidence of other parties. It includes Metropolitan Water District's maximum annual diversion of 584,000 acre-feet in 1957. Appendix B to this brief is a detailed statement of the calculation, showing the various sources of the data employed therein.

The projects with respect to which this calculation has been made do not include the requirements for irrigation of the irrigable lands on the Chemehuevi, Colorado River, and Fort Mohave Indian Reservations in California. The consumptive use requirements of those Reservations should be added to the figure 3,817,000 acre-feet to arrive at a complete appraisal of the wet water required for the full maintenance of presently existing uses. Those requirements, adding 5 per cent to the United States' evidence of consumptive use by crops on those Reservations, as California has done in her proposed findings (pages IV–33 and 34) with respect to other projects, would range between 58,614 acre-feet per year and 48,780 acre-feet per year, depending upon the disposition which is made of the issues respecting the boundaries of the Fort Mohave and Colorado River Indian Reservations in California.

It is not to be supposed that the United States desires that the wet water available for use in California shall not exceed the quantity which our calculation of the requirements to

maintain presently existing uses discloses. Our minimum direct concern with respect to additional water extends at least to sufficient water for irrigation of the Coachella Indian Reservations and for irrigation of the additional lands under the presently constructed Coachella distribution system. The United States also has a direct concern in the successful operation of the entire All-American Canal project. The considerable number of federal installations on the Coastal Plain of Southern California and the Government's contractual arrangements with the Metropolitan Water District preclude disinterest in satisfaction of the requirements of that District. However, we do not share California's gloomy appraisal of the quantity of water available for use in California under our proposed construction of Section 4(a) of the Project Act.

On the other side, California says that her proposed decree will fully satisfy from "safe annual yield," the reasonable requirements of every existing use in Arizona except for 80,000 acre-feet of miscellaneous uses in Arizona to be satisfied from the "provisional supply." Her calculation of the requirements to satisfy presently existing uses in Arizona is contained in her proposed finding 4D:101, page IV–30 of Volume I. It will be noted that California omits any water for the Fort Mohave Indian Reservation, that she makes no provision for increased use on the Indian reservations in Arizona on the tributaries upstream from Hoover Dam, and that she makes no provision for fish and wildlife uses of the United States on the main stream which, according to California, should be charged to the States in which the refuges are located.[14] Furthermore, the California conclusion that there would be plenty of water in her proposed solution for the main stream projects in Arizona is based on California's estimates of consumptive use on the projects in the Yuma area, without taking into account the diversion requirements at Imperial Dam to make such use possible and the uncertainties as to taking credit for return flow from those projects against the Mexican Treaty obligation.

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[14] The California proposed allocation for use in Nevada likewise makes no provision for the Fort Mohave Indian Reservation in that State.

As demonstrated by our proposed conclusions 7.5, 7.8, 7.11, 7.13, 7.15, 7.17 and 7.19, an aggregate estimated quantity of 1,390,720 acre-feet per year must be diverted at Imperial Dam to satisfy the consumptive use requirements of the presently existing (and Congressionally authorized) federal Reclamation projects in the Yuma area, exclusive of the Special Use and Warren Act contracts which the United States has made in that area and which are referred to in our proposed findings 7.4.1 and 7.4.2 and our proposed conclusions 7.20 and 7.21. This estimated diversion requirement of nearly 1,400,000 [15] acre-feet per year compares with the California statement of requirements for the same projects, set forth in her proposed finding 4D:101, in the amount of 779,500 acre-feet. It will be noted that to the extent the difference cannot be availed of for satisfaction of the Mexican Treaty and that to the further extent of the requirements for irrigation on the Fort Mohave Indian Reservation, increased uses on the Indian reservations on the upstream tributaries in Arizona, and any fish and wildlife uses by the United States on the main stream but within the State of Arizona which would be charged to the Arizona entitlement under the California theory, the proposed California allocation to Arizona for the maintenance of presently existing uses in the amount of 1,209,500 acre-feet per year (including 80,000 acre-feet to be supplied from the "provisional supply") would be deficient.[16]

Because of the nature of the soils on the Yuma mesa and on the mesa lands in the Wellton-Mohawk Division of the Gila Project and because of the present day uncertainties respecting return flow from the project lands in Arizona in the Yuma area (see our initial brief, p. 64), the requirements of those projects must be calculated in terms of the diversion necessary to pro-

[15] This figure is subject to some reduction to place the requirements for presently existing uses in Arizona on a basis comparable to the maximum historic acreages which are the basis for the calculation in Appendix B. This is primarily because the distribution system for the Mesa Division of the Gila Project is not yet fully constructed, and all of the lands included within that Project have not yet been brought under irrigation.

[16] The allocation for use in Arizona in the amount of 1,200,000 acre-feet proposed by Nevada would likewise be insufficient.

vide the irrigation water which must be consumptively used on the project lands. The California calculation of the consumptive use requirements of the main stream projects in Arizona would not provide sufficient water for the full operation of the projects in the Yuma area. The crop and incidental consumptive use requirements of those projects is no more adequate as a basis for calculating the project water requirements than would be a calculation of the consumptive use requirements in the Imperial Irrigation District without taking into account the return flow water which must be wasted into the Salton Sea.

XI. Contracts under reclamation law between the United States and landowners and irrigation districts are the sole source of such "rights" as landowners acquire in the water rights acquired or held by the United States for reclamation projects. Section 8 of the Reclamation Act of 1902 does not subject the United States in its administration of reclamation projects and project water supplies to the laws of the States relating to the appropriation, control, distribution and use of water.

The difference between our and California's conception of the nature and effect of contracts under Reclamation law is, we think, adequately covered by the discussion of such contracts in our reply brief, pp. 38–43. The nature of the rights acquired by landowners under such contracts is not the equivalent of rights acquired by appropriation in accordance with local law. The quotation by California at p. 9 of her response to the United States of Justice Brandeis' description of an appropriation of water is not appropriate to the discussion of Reclamation contracts and does not serve to make out of such contracts what they are not or to make the law of appropriation applicable with respect to the *administration* of federal Reclamation projects.

XII. The legislative history of Section 4(a) of the Project Act in its entirety must be looked to in determining the waters in which California may share.

California says that the United States recognizes that Congress did not intend the terms of the Limitation Act to exclude California from III(b) uses. This is a correct statement of our position, predicated on the proposition that Congress was thinking only in terms of main stream water as we have explained in our initial and reply briefs. But then California—who chides us at great length for what she says is inconsistency[17] between one sentence in our initial brief respecting the water supply in which California may share and a following explanatory sentence prefaced by "In other words"—at page 10 of her response suggests there is agreement that Congress intended to treat III(b) water as a component of "excess or surplus" waters of which California may use one-half. This is not a correct statement of our position. There is a difference between finding a Congressional intent with respect to III(b) and a lack of intent. Our position is predicated on what we believe is a lack of intent by Congress to characterize III(b). The intent we find from the legislative history was that California should be limited to 4,400,000 acre-feet of the first 7,500,000 acre-feet available in the main stream in the Lower Basin and one-half of the excess over 7,500,000. We are not in agreement with California that Congress "*intended* to treat III(b) water as a component of 'excess or surplus' waters * * *."

If California should be right in her assertion (pp. 33 *et seq.* of her response to the United States) that the legislative history may not be used to show what Congress understood by the words 4,400,000 "acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of

[17] The asserted inconsistency, we submit, does not exist, and can be suggested only by the device of isolating single sentences in our Proposed Findings and Conclusions and in our briefs.

the" Compact, she is of course wrong in her assertion that such history is available to show that "excess or surplus waters unapportioned by said compact" include III(b) waters. At page 34 of her response to the United States, she apparently attemps to show that the language last quoted from Section 4(a) of the Project Act is ambiguous while the immediately preceding words are not.

In referring to the provisions of the Compact which she says give rise to uncertainty whether "unapportioned" water includes III(b) or not she carefully avoids reference to Article III(f). But unless it can be said that the waters "unapportioned by paragraphs (a), (b), and (c)" does not mean that the waters referred to in those paragraphs are apportioned, we think III(f) is conclusive against California's claim with respect to III(b) unless resort be made to the legislative history to find that Congress was not really thinking in terms of III(a) and III(b), but only in terms of water available in the main stream.

As a matter of fact, California, while objecting to our reference to the legislative history and the conclusions we have drawn therefrom, says this in her response to Arizona (p. 42) where she found it necessary to make some disposition of the impact of Article III(f) of the Compact: "* * * The characterization in the Compact of III(b) water as 'apportioned' or 'unapportioned' is, we believe, wholly immaterial to the issue of whether Congress, by the terms prescribed for the California Limitation Act intended to exclude California from rights to the use of that water. * * *" And see p. 31 of California's response to Nevada. "* * * We regard the [Compact] characterization of III(b) waters as irrelevant, since the issue is the intent of Congress in the Limitation Act."

XIII. The legislative history of Section 4(a) of the Project Act does not require the exclusion of Lower Basin tributary inflow, other than the Gila, from the gross water supply in which California may share.

At pages 11 *et seq.* of her response to the United States, California professes difficulty in understanding the United States' position as to the water supply in which she may share under our interpretation of the limitation on Cali-

fornia uses. We think our proposed findings and conclusions and our initial brief are quite clear to the effect that the gross supply is the water in the main stream available for use in the Lower Basin including the inflow of the Lower Basin tributaries into Lake Mead or into the main stream in the case of tributaries below Lake Mead, except the Gila. Nowhere have we suggested that tributaries other than the Gila be eliminated from this calculation "except to the extent that use of their waters reduces the flow into Lake Mead." [18] Neither do we assert that the Gila is to be eliminated from inter-basin accounting. We say only that that question need not be reached. But any doubt there might have been under our proposed findings and conclusions and our initial brief respecting our view of how the Lower Basin tributaries bear on calculation of the supply in which California may share is, we believe, completely dispelled by what we have said in our reply brief. See, particularly, pp. 10–11 and footnote 3. We note in passing that California seems to have had little difficulty in calculating the main stream supply, both gross and net, including the inflow from tributaries other than the Gila, and has even proposed that a finding of "safe annual yield" be predicated on that calculation. Apparently it is only the suggestion that Congress did not intend that California might use up to nearly 80 percent of such "safe annual yield" which makes our proposal incomprehensible to the California defendants.

XIV. It is unnecessary to determine in this case whether Congress, by Section 4(a) of the Project Act, viewed in the light of its legislative history, construed the Colorado River Compact.

Answer to California's argument in Part II of her response to the United States to the effect that "The water rights of five States and the United States cannot be determined by construing the California Limitation Act and avoiding decision as

[18] There is a difference, plain, we think, between eliminating tributary inflow from calculation of the main stream supply in which California may share and charging the respective States against their contract entitlements to stored water with tributary uses to the extent such uses diminish the flow into Lake Mead.

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to the effect of the Colorado River Compact" is to be found in our reply brief, pp. 35–44, insofar as the contention that limitation on California does not equal entitlement in the other States is concerned. It should be noted, further, however, that in her argument California does not treat at all of the relationship between contracts *and* limitation. Moreover, we have not suggested, and in fact we deny, that either the Compact or the Project Act aids in determining the equitable shares of Utah and New Mexico in the Lower Basin tributaries. And we deny that there is anything in the provision for the California limitation which aids in determining the rights of the United States.

The contention that the Limitation Act cannot be construed "without regard to what the Compact means" is at least twice refuted by what California herself says. See California's response to Arizona and Nevada respecting III(b) waters. *Supra,* p. 28. And see also her assertion at page 24 of her response to the United States that she does not expect to be bound, in future litigation with the Upper Basin States, by what the Court might decide here respecting the Compact questions. "We ask only that the determination which is made leave the states of the Lower Basin as free as the states of the Upper Basin to reopen inter-basin questions in any future interbasin litigation." If that is to be the effect of a determination in this case of the Compact questions which California says must be decided in order to arrive at an intrabasin allocation, what is the purpose of attempting to determine the Compact questions if Congress' intent can be derived without taking that additional step? [19]

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[19] Of course, the additional step is relatively short and its direction seems quite clear. Congress did not act in disregard of the Compact. What we have said about Section 4(a) of the Project Act is that Congress was thinking only in terms of main stream water, excluding inflow from the Gila, when the provision for limitation of California uses was arrived at. This is as much as need be determined to arrive at a conclusion as to how the water supply in which California may share is to be calculated. But if it should be necessary to go farther, obviously a construction of the Compact not inconsistent with what Congress intended by Section 4(a) of the Project Act is called for. For, as noted at page 86 of our initial brief with respect to its advance consent to a Tri-State Compact, it is not to be supposed that Congress used the language in that Section in a sense differ-

The fact that a determination would have to be made as to how uses shall be measured for purposes of *intra*-basin accounting does not mean that the only basis for such determination is what the—or some of the—Compact negotiators may have thought but didn't say as to *inter*-basin accounting subject, of course, as California requests, to the Lower Basin States being free to challenge that determination in future litigation with the Upper Basin States. If Congress had chosen to require that for the purpose of determining the stored waters deliverable all uses should be measured by black and white atmometers, we think there is no question it could have done so, and what the Compact may have said or not said about measurement of beneficial consumptive use as between basins would be wholly without significance. Since the Compact says nothing, and the Project Act says nothing except as to California uses from the main stream, it is appropriate to solve the problems of measurement of use by reference to the considerations involved in the proposals we have made with respect to this matter. See pages 61–70 of our initial brief, and *infra,* pp. 34–40. And reference to those considerations is appropriate notwithstanding California's assertion that there are Compact questions which must be settled.

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ent from what it understood the Compact to mean. And as the Compact could not become effective without Congress' consent (Article I, Section 10, of the Constitution of the United States), its meaning is as understood by Congress in giving consent. Construction of the Compact in accordance with Congress' understanding of it does not amount to modification or amendment of the Compact, as California, at pp. 57 *et seq.* of her Response to Arizona, seems to argue would be the case. However, that Congress may condition its consent on modification of an interstate compact is a proposition which does not require argument.

While we continue to abstain from the argument whether paragraphs (a) and (b) of Article III of the Compact might be construed, without reference to the legislative history of the Project Act, as referring only to the use of main stream water, we note there are references in the Compact itself, in addition to the fact that $10 \times 7{,}500{,}000 = 75{,}000{,}000$, which are suggestive of such result. For example, the Article VIII provision that when storage capacity of 5,000,000 acre-feet shall have been provided on the main stream claims of "present perfected rights" ("rights which may now exist" is the comparable language in Article III(a)) by users in the Lower Basin against users in the Upper Basin are to be satisfied from such storage.

XV. Neither the general references in the Project Act to the Colorado River Compact nor Section 18 thereof derogate from the specific provisions of Section 4(a) and Section 5.

In Part III of their response to the United States, the California defendants argue in substance that we have misread the legislative history of the Project Act, but that, even so, that history may not be used to determine what Congress understood by its reference to "waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River Compact." [20] They say the language of the statute is clear, the meaning of the Compact is clear, and all questions which might otherwise exist are solved because Congress "enthroned the Compact" and provided that the United States and those claiming under the United States should be subject to it.

We think we need not defend our reading of the legislative history or the availability of that history—placed in evidence and commented on during trial at considerable length by counsel for California—to determine the sense in which Congress used *all*, and not only a selected portion, of the language of Section 4(a) of the Project Act. Likewise we think it is hardly necessary to argue that the meaning of paragraph (a) of Article III of the Compact is not so clear that the Project Act's "enthronement" of the Compact answers all questions respecting the meaning of Section 4(a).

Just what Congress had in mind when, by all the references in the Project Act to which California points, it provided that the Compact should control is clear from the following language in the report of the Senate Committee on Irrigation and Reclamation on S. 728:[21]

> While the project here authorized is vital to many sections in the lower basin, the bill is no less important to upper-basin States. By giving congressional approval to the compact, these States are assured in perpetuity water rights, the value of which can not be over-esti-

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[20] For discussion of the facility with which the California defendants pick and choose the portions of Section 4(a) of the Project Act with respect to which the legislative history is pertinent, see *supra*, p. 27.

[21] S. Report No. 592, 70th Cong., 1st Sess., p. 16.

> mated. It is a mistake to think of this bill as one merely for the benefit of California or Nevada or Arizona. By "enthroning the Colorado River compact" it assures to the States of Colorado, New Mexico, Utah, and Wyoming the water rights so essential to their future.

The step which California appears to argue should be taken by reason of the Project Act's repeated references to the Compact is too long. The Supreme Court of the United States has held that such general references to the Compact do not permit even specific language of the Compact to control specific provisions of the Project Act. *Arizona* v. *California*, 283 U.S. 423, 456 (1931): "But the specific statement of primary purpose in the act governs the general references to the compact." Even less, we submit, do those general references to the Compact serve the office of breathing words into the Compact which are necessary before it can be said that Congress did not correctly understand the Compact when it enacted Section 4(a) of the Project Act or in order to make some other interpretation of the Compact control over what Congress plainly intended the words it used to mean.

Furthermore, we note that in her detailed review of the Project Act's general references to the Compact, California appears to attribute no particular significance to the requirement by Section 8(b) that the United States "shall observe and be subject to and controlled * * * by the terms of such Compact, if any, between the States of Arizona, California, and Nevada, * * * for the equitable division of the benefits * * * arising from the use of water accruing to said States, subsidiary to and *consistent with said Colorado River Compact.*" It seems to us that the clear implication of this section is that the proposed Tri-State Compact to which Congress gave its consent in advance was, in Congress' view, "consistent with said Colorado River Compact." We think also that the express language of the proviso to this section that any such Compact between Lower Basin States concluded after January 1, 1929, should be "subject to all contracts, if any, made by the Secretary of the Interior under section 5 hereof prior to the date of such approval and consent by Congress," plainly refutes the conten-

tion that Section 18 of the Project Act somehow limits the Secretary's authority under Section 5 to contract with respect to use of the stored waters.[22]

XVI. The United States' proposals for measurement of consumptive use.

Part V of California's response to the United States comprises an attack upon each of the proposals which the United States has made respecting measurement of water use in administration by the Secretary of the Interior of the stored waters of the Lower Colorado River.

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[22] At p. 38 of her response to the United States, California quotes Justice Brandeis' language in 283 U.S. 423, 462, to the effect that the Project Act "does not purport to affect any legal right of [Arizona], or to limit in any way the exercise of its legal right to appropriate any of the unappropriated 9,000,000 acre feet which may flow within or on its borders," and says that the Court supported this "holding" by quotation from Section 18. But the Court did not "hold", or even say by way of dictum, that the general language of Section 18 controls the specific language of Section 5. On the contrary, Justice Brandeis made clear that there was no intention to refer by Section 18 to the stored waters of the main stream. "There is no allegation of definite physical acts by which Wilbur is interfering, or will interfere, with the exercise by Arizona of its right to make further appropriations by means of diversions above the dam or with the enjoyment of water so appropriated. Nor any specific allegation of physical acts impeding the exercise of its right to make future appropriations by means of diversions below the dam, or limiting the enjoyment of rights so acquired. * * * If by operations at the dam any then perfected right of Arizona, or of those claiming under it, should hereafter be interfered with, appropriate remedies will be available."

Plainly the Court did not mean that Section 18 of the Project Act created in the States an authority to control use of the stored waters of the main stream contrary to the provisions of Section 5, and it did not mean that Arizona had a "right" to appropriate or to authorize appropriation of the waters of the Colorado River which limited Congress' power to regulate and control the use of such waters. Cf. *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508, 534 (1941): "And the suggestion that this project interferes with the state's own program for water development and conservation is likewise of no avail. That program must bow before the 'superior power' of Congress * * *." With considerably more attention to its choice of words than that which was given in 283 U.S., the Court in *Arizona* v. *California*, 298 U.S. 558, 569 declared: "The Colorado River is a navigable stream of the United States. The *privilege* of the states through which it flows and their inhabitants to appropriate and use the water is subject to the paramount power of the United States to control it for the purpose of improving navigation * * *." (Emphasis supplied.)

First, she says that "the United States disagrees with the United States" in proposing, by our Conclusion 11.14, that net reservoir losses within the Lower Basin are a part of the Lower Basin's beneficial consumptive use under the Colorado River Compact. Since the California studies of water supply all assumed that losses in the Upper Basin in storage of water for use there and for regulation of the Upper Basin's required deliveries to the Lower Basin would constitute use within the Upper Basin's apportionment, we had assumed that California would not object to application of the same principle to losses in storage for use in the Lower Basin. However, our proposal with respect to the treatment of evaporation losses depends more on interpretation of the provision for limitation of "consumptive use for use in California" than on whether such losses are "beneficial consumptive use" under the Compact (see our initial brief, pp. 70–71), and we move on to the next point in California's attack on our proposals for measurement of water use.

It is said that allocation of the Lower Basin waters can be made only in terms of "beneficial consumptive use" as that term is used in the Compact. We deny that this is true, either from a legal or a practical standpoint, and even were the Compact meaning of that term readily determinable in this case. See *supra,* p. 31. And at pages 25 to 26, *supra,* we have shown that determination of diversion requirements is the only means by which the rights of the United States and of the projects diverting at Imperial Dam can be protected.

In order to make possible disagreement with our proposal that main stream uses are to be measured by diversions less determinable return flow, California insists that our proposed treatment of reservoir losses is a component of that proposal. It is not. Our proposed treatment of reservoir losses is a result of so measuring consumptive use. Apparently for the same purpose, California twists our statement at p. 72 of our initial brief that "we believe it is unnecessary to consider whether natural river losses on the main stream are 'beneficial consumptive uses' within the Lower Basin's apportionment under the Compact" into a suggestion that such losses are such use and then argues at various points in her response against the as-

serted suggestion.[23] We think the California position is not strengthened by such argument against what we have not said.

The California attack on our proposal for measuring tributary uses above Lake Mead, (and see our reply brief, p. 10, footnote 3, with respect to the Bill Williams), which is expressly provided for in Article 7(d) of the Arizona contract and is implicit in the Nevada contract, appears largely to be predicated on an asserted inability of the Secretary of the Interior to make the determinations required by the provisions of the contracts he has made. The testimony of Mr. Gerald Keesee, an Irrigation Engineer for the Bureau of Indian Affairs, is cited in support of such assertion. He was asked, by counsel for California, as indicated in the footnote on page 76 of California's response to the United States, if he had an opinion as to whether it would be practicable to attempt to "calculate the man-made depletion of the virgin flow of the Colorado River at the lower international boundary occasioned by [the] Indian projects [in the Little Colorado River watershed]", something quite different, it is to be noted, from calculation of the extent to which tributary uses diminish the flow into Lake Mead. His answer was: "I don't think it would be. *I don't know.* * * * [I have] *Never tried it.*" (Emphasis supplied.) We submit that such testimony is hardly foundation for determining that the Secretary will be unable, when the need is present, to make the determinations which his contracts contemplate will be made.

Notwithstanding California's combination of an attack on what we have said about the method of sharing between the Lower Basin States of any contribution which must be made for the Mexican Treaty burden from waters otherwise available for use in the Lower Basin with her attack on what we have said in that connection about determination of consumptive

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[23] Since California's method of measuring "beneficial consumptive use" allows no credit for the salvage of water which would be lost to natural causes, if not beneficially used, we are puzzled by her strong position that the losses themselves are not chargeable in the same manner as the uses which prevent the water going to waste. We wonder what she would say about the transportation losses, and about the chargeability inter-basin of the water saved, if a lined canal from Hoover Dam to Imperial Dam were substituted for the river's natural channel.

use in Arizona and Nevada of tributary water, there is no substantial difference between our proposals for measuring tributary uses for this purpose and our proposal for measuring tributary uses for the purpose of calculating the stored waters otherwise deliverable under the various water-delivery contracts.[24] We have recognized (p. 69 of our initial brief) that measurement at the international boundary of main stream depletions by tributary uses would perhaps be more appropriate for determining the States' aliquot shares of the treaty burden. We have suggested, however, that no injustice would be done by adopting for this purpose the calculations which must otherwise be made with respect to uses above Lake Mead, and that calculation of the extent to which uses on the tributaries below Lake Mead diminish the flow into the main stream would be sufficiently precise for the purpose.

The main point of the California attack on what she denominates our "Mexican Treaty Method" for calculating consumptive use seems to be that main stream depletion is not the Compact method for measuring "beneficial consumptive use" on tributaries. As we have pointed out in our initial brief, pages 63 and 66, we think that is not the question for determination in this case. If it is, we submit that the Compact does *not* require the measurement of tributary uses by a method

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[24] We have not said that New Mexico and Utah uses are to be excluded in determining when the Upper Basin agreement to deliver additional water for the Mexican Treaty becomes operative. Since this involves a question which need not be reached in this case, we take no position on it. Our proposal to exclude them in determining the California, Nevada, and Arizona shares of the Treaty burden involves entirely different considerations. We do not agree with the California contention that the only valid reason for not requiring contributions from New Mexico and Utah is that the uses in these States are III(a) uses. As noted in our reply brief, pp. 50–52, there is no indication in the Project Act or in the legislative history thereof that Congress intended the reference in Section 4(a) to paragraph (a) of Article III of the Compact to give a preference to III(a) uses in connection with the Mexican Treaty. In fact, the inferences to be drawn from the legislative history are to the contrary. So also is the language of Article III(c) of the Compact. There is no implication there that water for Mexico is to be supplied "from III(b) uses before III(a) uses." Rather, by express provision, if there is no "surplus" over "*the aggregate of the quantities specified in paragraphs (a) and (b)*," the burden of the deficiency is to be *equally* borne by the two basins.

which would discourage and penalize the salvage and conservation of available tributary supplies. The Compact negotiators surely did not intend that the Upper Basin's obligation to the Lower Basin should diminish as the Lower Basin found ways to keep its tributary waters from evaporating in the desert. It is illogical in the extreme to contend that by interpretation of the Compact or otherwise, either New Mexico, Utah, Nevada or Arizona, or the Lower Basin States in the aggregate, can be charged with a greater quantity of use from the tributaries than that quantity by which the common supply would have been augmented had no use of such tributary water been made.

In lumping what we have said respecting the meaning of the phrase "beneficial consumptive use" as employed in the Gila Project Reauthorization Act of 1947 (see our initial brief, p. 52) into our proposals respecting the measurement of main stream and tributary consumptive uses for the purpose of calculating the quantities of stored water deliverable in accordance with the aggregate State entitlements, California confuses the purpose and effect of our proposal concerning the Gila Project measurement.

California can have no concern with the quantity of use on that project except from the standpoint of its impact on the main stream supply—that is, what is the amount of the charge against the aggregate Arizona entitlement on account of use on that project. Such charge is to be determined in the same manner as the charge for use on other projects diverting from the main stream. With this we should think California would be content. But because of the peculiar framework of the Gila Project Reauthorization Act, in providing alternative limitations on project acreage and consumptive use, the Secretary of the Interior has the additional problem of knowing how much of the water within the Arizona entitlement is permitted by that act of Congress to be diverted for use on the project. The Court's instructions on this problem are sought, separate and apart from the problem of measuring the quantity of consumptive use chargeable to the Arizona entitlement with respect to such diversions. The quantity which Congress obviously intended might be diverted is the

quantity necessary to provide that quantity of crop consumptive use without which the authorized acreage cannot be successfully operated. It is this question to which the administrative interpretation of the act in the process of designing and constructing the Wellton-Mohawk Division of the Project is material. It is wholly unrealistic to suppose that Congress, by using in this Act a phrase which appears also in the Colorado River Compact, intended that future definition of the phrase as used in the Compact might control in determining the water which might be diverted for use on the project, without regard to the actual requirements for the successful operation of the authorized acreage for which project works had been constructed.

To round out and make complete her disagreement with what we have said concerning measurement of consumptive use, California objects to our proposal that determination of the quantity of return flows and of the quantity of main stream (Lake Mead, in the case of tributaries above) depletions by tributary uses should be made by the Secretary of the Interior in his administration of the Boulder Canyon Project Act.[25] As noted in our initial brief, pp. 65, 67, 70, these are plainly administrative functions which are necessarily involved in the operation of Hoover and other main stream dams for the delivery of stored water in accordance with the contracts which have been made. Congress has authorized such functions to be performed by the Secretary. Determination of the rule for measuring consumptive use is a judicial function—administration of the Boulder Canyon Project and of the Project Act in accordance with the rule so determined is not.

But California injects into her objections to our proposed conclusions that the actual measurement, and the selection from time to time of the precise mechanical methods for such measurements, are for the Secretary, statements such as these: "We disagree very strongly * * * that the Secretary of the Interior is both the water giver and the law giver * * *."

[25] Nevada appears to share this view, and asserts that the Supreme Court, by appointment of a Commission which might or might not include a representative of the Secretary, should take over the Secretary's administrative functions under Project Act.

"* * * [the Secretary] cannot retain, if indeed he ever had, an ambulatory discretion to determine, as policy or fancy may dictate, the water rights of all who are served from the Colorado River system or the method of measurement of those rights." "Congress has manifested its intent that no unlimited discretion reside in the Secretary of the Interior as to whether he has or has not complied with the 'law of the river'."

We respectfully submit that measurement and calculation of consumptive uses in accordance with the rule therefor which the Court may prescribe, but employing those mechanical methods which within the engineering profession are from time to time deemed most acceptable, does not involve either the giving of laws, "the determination of water rights," the measurement of such "rights," or "unlimited discretion." California's reference (p. 87 of her Response to the United States) to Section 14 of the Colorado River Storage Project Act of 1956 shows that the Secretary's performance of this function would be subject to judicial review. Even without that Act, provision for such review could, we believe, easily be accomplished by the Court's retaining jurisdiction herein. But this does not mean that the Court should assume in the first instance the performance of these functions.

XVII. Chargeability of reservoir losses to State entitlements.

In the main, we believe there is no need to add to what we have said in our initial brief, pp. 70–73, and in our reply brief, pp. 45–46, by way of response to California's argument (pp. 88–99 of her response to the United States) respecting the chargeability to the several State entitlements of reservoir losses. With reference to her contention that such losses should not be charged to "Rights in natural flow" or "Present perfected rights," we solicit the Special Master's attention particularly to footnote 20 on page 45 of our reply brief. Even if California were to prevail as to the existence of such rights, and even were it to be held that, intrastate, uses junior in time should absorb the state's share of reservoir losses before uses under such rights would be subject to diminution on account thereof (a result which we do not advocate), still the principle of chargeability to the state entitlement by reason of the

express language and the implication of the limitation of consumptive use for use in California would be applicable. Application of this principle does not involve rewriting the California contracts because they are all subject to the Limitation Act.

We think the California argument that reservoir losses should not be charged because "this loss necessarily occurs in the process of conserving water for use" is unpersuasive. We note an inconsistency between this contention and California's position that transportation and application losses are a part of project consumptive use. We note an even more striking inconsistency between this contention and California's position that the use of water salvaged is chargeable in full measure, at site of use, as "beneficial consumptive use."

XVIII. Allocation of Mexican Treaty burden.

By way of answer to California's argument respecting our proposal for allocation between the Lower Basin States of the impact of the Mexican Treaty burden (Part VII of her response to the United States), we refer to pages 47–52 of our reply brief. And see pages 3–4 of that brief and *supra,* footnote 24, and pages 36 to 37.

XIX. It is not sufficiently likely that the main stream waters available for use in the Lower Basin will be less than 7,500,000 acre-feet per year that there is need to determine the manner in which such shortage shall be borne as between the States. The controversy here presented respecting the main stream is nevertheless justiciable.

In their response to the brief of the United States in support of its proposed findings and conclusions, the California defendants devote 32 pages to our proposed findings 11.1 and 11.2 and our proposed conclusions 11.15 and 11.16. The entire argument is based on an apparent misconception of the scope and purpose of those findings and conclusions, and is replete with references to what is said therein and to related positions of the United States which are at best inaccurate.

Our proposed findings and conclusions respecting water supply bear the closest relationship to, and should be considered

in connection with, our proposed findings and conclusions respecting the interpretation and effect of Section 4(a) of the Project Act and the water-delivery contracts made under authority of Section 5. It is our position that under Section 4(a) of the Project Act the consumptive use of Colorado River water for use in California may not exceed 4,400,000 acre-feet of the first 7,500,000 acre-feet per annum available in the main stream for use in the Lower Basin (see page 10 of our reply brief, footnote 3, and pages 73 *et seq.* of our initial brief) and one-half of the water so available in the main stream in excess of 7,500,000 acre-feet. So long as the supply so available in the main stream is 7,500,000 acre-feet per annum or more, there is presented as between the States no issue of priority of right (see page 13 of our reply brief). It is only if the supply of main stream water available for use in the Lower Basin is likely to be less than 7,500,000 acre-feet per annum that there is any need to determine whether Congress intended the principle of ratability or a principle of priority to apply interstate in the event of shortage.[26]

In demonstration of the proposition that there is no need to determine now what Congress intended in such eventuality, we have shown, by our proposed findings 11.1 and 11.2 (and see our reply brief, pp. 44–48), and by our proposed conclusion 11.14, that there is no likelihood in the predictable future that the main stream waters available for use in the Lower Basin will be less than 7,500,000 acre-feet per annum. We have done this by accepting as basically correct the study made by

[26] The shortage referred to is a deficiency under 7,500,000 acre-feet per year of main stream water available for use in the Lower Basin—not a supply insufficient to satisfy all the demands for Lower Basin main stream water, as evidenced by the water-delivery contracts which have been made and those claims of the United States which are in addition thereto. That insufficiency of the supply to meet all such demands is imminent is, we believe, denied by none. But this does not mean that determination of dependable supply must be made to resolve the issues in this case (see our proposed conclusion 11.16), because the portions of the supply which may be used for use in the different states, subject, of course, to certain rights of the United States, are governed by Section 4(a) of the Project Act, the California Limitation Act, and the several water-delivery contracts.

California's witness Stetson [27]—the study on which, we note again, California's proposed findings as to "safe annual yield" are predicated.[28]

The principal adjustment of the Stetson conclusion which we have proposed is that reservoir losses be not treated as a diminution of supply. This involves no engineering at all, but the mere application of legal principles to the facts at hand.[29]

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[27] California appears now (pp. 154–164 of her response to the United States) to attempt to reject the Stetson study, both as to period used and results reached. She says now, in the face of her proposed findings as to "safe annual yield", her proposed decree, and all her arguments in support thereof: "* * * the Lower Basin's dependable main stream supply is very substantially less than 5,850,000 acre feet per annum * * *." Mr. Stetson said that the period 1909–1956 was the only proper period for making a hydrologic study on the basis of the records then available. Says California now: "* * * if the period 1922–1956 is selected (and it has great merit, constituting the full period of actual measurements)." California says that "in order to test whether there would be water enough for the Central Arizona Project on the legal hypothesis then sponsored by Arizona" *she* studied the period 1909–1956. Mr. Stetson testified that *he* selected the 1909–1956 period because in his judgment it was the best period to use as the basis for projecting the long-term supply of main stream water available for use in the Lower Basin. We believe the California argument questioning the reliability of their own witness' testimony on the basis of which they have heretofore asked the Court to make a finding of "safe annual yield" tends very strongly to support the Arizona argument that the evidence before the Court is too speculative to permit a determination of dependable supply in any event.

[28] California attempts, by arguing at length our incidental references to the Erickson and Riter testimony, to divert attention from the fact that it is the Stetson study which is the predicate for our proposed conclusion respecting the likelihood of there being less than 7,500,000 acre-feet in the main stream available for use in the Lower Basin. But it is the Stetson study, and not any other, which our proposed findings and conclusions follow through.

[29] California's contention at page 149 of her response to the United States that the Colorado River reservoirs must be operated on a safe annual yield basis suggests a compelling reason, in addition to those heretofore noted, why reservoir losses cannot simply be written off as a diminution of supply. Her witness Stetson testified to annual reservoir losses of 950,000 acre-feet with a water supply in the quantity which California says would produce a "safe annual yield" of 5,850,000 acre-feet. Of that safe annual yield, she says she is entitled to 4,600,000 acre-feet per year. How can it reasonably be contended that she is entitled to have water held over in the reservoir for as long as the Stetson study contemplates, evaporating away at the rate of 950,000 acre-feet per year, without her being charged with a share of those losses proportionate to her claimed 80 per cent of that safe yield?

That adjustment, plus correction of Mr. Stetson's estimate, in accordance with his own admission, for an error in his estimate of channel losses, brings his estimate to 7,125,000 acre-feet per year.

The next adjustment involves only a revision downward of his estimate of annual Upper Basin depletions from 6,500,000 acre-feet to 6,200,000. This accords with the testimony of California's witness Riter that the Bureau of Reclamation has estimated that by the year 2062 Upper Basin depletions will not exceed the latter figure. In our reply brief, page 46, we have shown that this adjustment also involves no marvel of engineering analysis.[30] California herself has disproved the validity of her repeated statement that our proposal respecting the supply available for use in the Lower Basin should not be accepted because it includes some Upper Basin water. Her own proposal for determination of "safe annual yield" is predicated on the proposition that the Upper Basin will use only 6,500,000 acre-feet of her 7,500,000 acre-feet of III(a) apportionment.[31] The only real difference between her and the United States in this connection is that we propose the Court postpone to a future day, when there is evidence available rather than speculation only, determination of Lower Basin questions which are dependent entirely on the extent to which the Upper Basin makes use of its apportionment.

Stetson conceded that inflow from the Gila which could be used for meeting the Mexican Treaty obligation, if quality of water were disregarded, would amount to 50,000 acre-feet per year. This adds another 50,000 acre-feet to his estimate.

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[30] California's jousting with the problem of reservoir capacity in the Lower Basin to handle additional water (see footnote 13, p. 157 of her response to the United States) is, we believe, pointless. By increased releases from Hoover Dam each year in accordance with the increased deliveries at Lee Ferry the space to regulate such additional deliveries would be provided. Insofar as Mr. Riter's testimony is concerned, he did not say he could not regulate an average inflow into Lake Mead of 8,500,000 acre-feet per year. His average annual discharge of 7,900,000 based on such inflow came about by reason of his estimate of average annual evaporation loss in Lake Mead at 600,000 acre-feet.

[31] For a statement of the Upper Basin view in event of collision between its obligation under Article III(d) of the Compact and its entitlement under III(a), see footnote 15 at page 159 of California's response to the United States.

His estimate is brought to 7,600,00 acre-feet per year by addition for salvage by channelization between Topock and Davis Dam in the amount of 130,000 acre-feet. Mr. Stetson agreed that some salvage of his estimated channel losses would be effected by channelization of the river (Tr. 12,189–12,191) but he had no opinion as to the quantity thereof. (Cf. our reply brief, page 47.) However, California's witness Mitchell, River Control Engineer for the Bureau of Reclamation at Boulder City, Nevada, agreed that salvage of 130,000 acre-feet per year will be effected by channelization in the reach of the river mentioned. The final definite adjustment of the Stetson estimate which we have proposed to arrive at a minimum of 7,-700,000 acre-feet per year is reduction of his estimate of excess water reaching Mexico from 200,000 to 100,000 acre-feet per year. This was on the basis of testimony by the same California witness Mitchell that deliveries at Imperial Dam can be regulated to within 100,000 acre-feet of the annual order. We submit that if channel losses are reduced below the Stetson estimate of such losses by salvage, and if deliveries to Mexico can be regulated as closely as the California evidence says they can be, additional engineering opinions are not required to establish that the Stetson estimate of main stream waters available for use in the Lower Basin must be increased by reason thereof.

But, contrary to California's statement that our proposed findings and conclusions would, "in virtually every instance * * * accept the highest of each component of the various water supply studies in evidence," there is at least one additional factor requiring upward adjustment of the Stetson estimate but which we have not attempted to evaluate. This factor is the Stetson utilization of historic flow as the quantity of tributary inflow above Hoover Dam. His estimate of inflow to Lake Mead should be increased by the quantites of tributary depletion above Lake Mead by use in Arizona and Nevada and possibly by use in Utah and New Mexico (see our reply brief, pp. 46–47 and p. 10, footnote 3).

Other possible upward adjustments which should be considered are noted at pages 46 and 47 of our reply brief and in our proposed finding 11.2. The possibility of additional sal-

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vage of river losses between Parker and Imperial Dams was not denied by Mr. Stetson, but he professed insufficient knowledge of the area to express an opinion (Tr. 12,190–12,191). However, California's witness Mitchell said that channelization in that reach of the river will result in some salvage, although he considered the Erickson estimate of 170,000 acre-feet per year "a little bit high." (Tr. 21,131). Although we have not, as California says, proposed a finding "which assumes that the Upper Basin will supply the lion's share of the Mexican water, although water to supply the Upper Basin's III(a) apportionment is unavailable," we think even California does not really think that the Mexican Treaty burden will ever have to be fully satisfied out of the Upper Basin's III(d) obligation. At page 152 of her response to the United States, she says: "* * * it cannot be assumed, in the absence of the States of the Upper Division, that the water which they must supply to meet the Mexican burden is *entirely* 'in addition' to that which must come down in obedience to Article III(d)." (Emphasis supplied.) We have not contended that it is. We say this is a question which cannot be answered in the absence of the Upper Basin States. But we further say it is unrealistic to suppose, as the Stetson estimate does, that *no* water in addition to the III(d) deliveries is required of the Upper Basin for satisfaction of the treaty burden (see our reply brief, p. 48).

We submit that the evidence does not establish with reasonable certainty that the main stream waters available for use in the Lower Basin will be less than 7,500,000 acre-feet per year in the predictable future, and that there is accordingly no present need for determination how such a shortage shall be borne as between the several States if such should occur.[32] But California is wrong when she says that if we are

[32] The proposal we have submitted with respect to allocation among the several States of the Lower Basin's share of the Mexican Treaty burden (see pages 48–52 of our reply brief), demonstrates even further the remoteness of any real question with respect to whether the Project Act contemplates that a principle of ratability or a principle of priority is to be applied if any such shortage is even greater than the amount of the Lower Basin's contribution to the Treaty.

correct in this conclusion, there is no justiciable controversy. There is certainly a controversy respecting the issues on a decision of which the conclusion is predicated, and, as noted *supra,* footnote 26, the claims upon the available water supply are probably in excess of that supply even though, in the light of the controlling statutes and contracts, there is no evidence of a shortage of the kind which would require or justify the consideration of the problem of priorities as between the party States.

XX. The Boulder Canyon Project Act construed in accordance with the United States' contentions is constitutional.

At pages 6–9 of California's Response to the proposed findings and conclusions of the United States, and at pages 164–167 of her Response to the brief of the United States, California discusses the constitutionality of the Project Act, and of Sections 4(a) and 5 thereof.[33] She agrees with the United States that the act is constitutional and that the limitation of use for use in California is constitutional, and she says that "We do not contest the validity of the requirement in Section 5 of the Project Act which requires a contract as a requisite to the right to appropriate and use stored water." But this agreement is conditioned on interpretation of these provisions according to the California theory. It is asserted that if construed in accordance with our contentions, these provisions are unconstitutional.

California's acceptance of the Act's constitutionality seems to rest on her assumptions (a) that the statute interferes neither with "vested appropriative rights nor with rights to appropriate unappropriated water," and (b) that Section 5 of the Project Act gives the Secretary of the Interior no real authority to make contracts for storage and delivery of water but somehow requires that he contract with whomever State authorities may direct.

We are in complete accord with the proposition that the Project Act interferes neither with "vested appropriative rights nor with rights to appropriate unappropriated water."

[33] The questions suggested by Arizona and Nevada (and by California as to delegation of authority by Congress to the Secretary of the Interior) are dealt with in some detail at pages 22–35 of our reply brief.

But as California's agreement with us as to constitutionality is contingent on a construction of the Project Act different from the construction we assert, so also is our agreement with the quoted statement dependent on assumptions quite different from those which California makes.

A. AS AGAINST THE UNITED STATES, PRIVATELY-OWNED RIGHTS TO THE USE OF THE NAVIGABLE WATERS ARE NOT POSSIBLE IN THE ABSENCE OF EXPRESS PROVISION THEREFOR BY CONGRESS.

We believe that any authorization even by Congress of the use of the waters of a navigable stream is, under the Constitution of the United States, perpetually subject to the exercise by Congress of its power to regulate and control the use of such waters. But, in any event, the decisions of the Supreme Court of the United States make it clear beyond all question that no claim of interest or right in the use of the navigable waters of the United States can be asserted against the United States in the absence of action by Congress expressly authorizing such.

In their opening brief, Volume II, p. A3–3, the California defendants asserted that there "is no doubt that navigable waters are subject to appropriation. Text writers have confidently so asserted." We submit that quite to the contrary are the decisions of the Supreme Court. As Mr. Justice Douglas pointed out in his concurring and dissenting opinion in *United States* v. *Gerlach Live Stock Co., supra,* footnote 7:

> * * * [W]e have repeatedly held that there are no private rights in the waters of a navigable river. See *United States* v. *Appalachian Power Co.,* 311 U.S. 377, 424; *United States* v. *Commodore Park,* 324 U.S. 386, 390–391; *United States* v. *Willow River Co.,* 324 U.S. 499, 510. That is true whether the rights of riparian owners or the rights of appropriators are involved. See *Gibson* v. *United States,* 166 U.S. 269; *United States* v. *Rio Grande Irrigation Co.,* 174 U.S. 690. As the *Appalachian Power* case makes plain (311 U.S. 424, 427), the existence of property rights in the waters of a navigable stream are not dependent upon whether the

> United States is changing the flow of the river in aid of navigation or for some other purpose.

And in the recent case of *United States* v. *Twin City Power Co.*, 350 U.S. 222 (1955), the Court at page 228 repeated the unqualified assertion in *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53 (1912), "that the running water in a great navigable stream is capable of private ownership is inconceivable."

It is true that these cases dealt with claims for compensation against the United States arising from the actual exercise of federal power. California contends that until and unless the United States has acted in this field, "firm legal rights" to navigable waters can be acquired (see A3–17 of her opening brief).

But the language and authorities above cited are no less persuasive and conclusive on this issue because of the fact such decisions were dealing with an exercise, as distinguished from non-exercise, of federal power. It is difficult to discern how "firm legal rights" may be acquired in something that the Supreme Court has unequivocally stated is incapable of private ownership. We think it is plain they cannot come from an exercise of purported state authority. Most recently the Court has said in *Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320, 334 (1958):

> It is no longer open to question that the Federal Government under the Commerce Clause of the Constitution (Art. 1, § 8, cl. 3) has dominion, *to the exclusion of the States,* over navigable waters of the United States. (Emphasis supplied.)

And see *United States* v. *Willow River Power Co.,* 324 U.S. 499, 510 (1945):

> * * * Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights of a navigable stream relative to the function of the Government in improving navigation. Where these interests conflict they are not to be reconciled as between equals, but the private interest must give way to

> a superior right, or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all.

We recognize that the California defendants have cited cases that, at first glance, seem to support their position. And we further recognize the Supreme Court did in *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690, at 703 (1899) say:

> * * * It is true there have been frequent decisions recognizing the powers of the State, in the absence of Congressional legislation, to assume control of even navigable water *within its limits* to the extent of creating dams, booms, bridges and other matter which operate as obstructions to navigability. The power of the State to thus legislate for the interests of its own citizens is conceded, and until in some way Congress asserts its superior power, and the necessity of preserving the general interest of the people of all the States, it is assumed that state action, although involving *temporarily an obstruction* to the free navigability of a stream, is not subject to challenge. A long list of cases to this effect can be found in the reports of this court. See among others the following: *Wilson* v. *Black Bird Creek Co.*, 2 Pet. 245; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Escanaba Co.* v. *Chicago*, 107 U.S. 678; *Williamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1. (Emphasis supplied.)

It is to be noted, however, that factual analyses of the cases cited by California, which include those referred to in the foregoing quotation from *Rio Grande*, reveal that the holdings are restricted to a view that as to navigable waters which were wholly intrastate in nature, states might act with regard to purely local facilities in the absence of federal legislation. Accord: 34 Op. Atty. Gen. 410, at 413 (1928). The italicized language cited above alludes to such a restriction. It is therefore difficult to relate the applicability of those holdings to the Colorado River, a stream of interstate and international character and significance. Any action with regard to appropriating

its waters is not restricted to an effect that is purely or even essentially local. Witness this lawsuit.

Involved in *Chandler-Dunbar, supra,* the earliest compensation case to which we have referred, was a claim that water power inherent in a navigable stream due to its fall in passing riparian lands belonged to the shore owner as an appurtenance to his lands. Set aside by the Court were, *inter alia,* questions relating to the rights of riparian owners on either navigable or non-navigable streams as between each other. The Court also laid aside as not of prime importance the question whether the claimed right to the use of the flow of the water was based upon the "qualified" title which the shore owner had to the bed of the river over which it flows or the ownership of land bordering upon the river.

"In neither event," the Court asserted, "can there be said to arise any ownership of the river." 229 U.S. at 69.

At page 61 the Court noted:

> * * * *This claim of a proprietary right* in the bed of the river and *in the flow of the stream* over that bed *to the extent that such flow is in excess of the wants of navigation* constitutes the ground upon which the company asserts that a necessary effect of the Act of March 3, 1909, and of the judgment of condemnation in the Court below, is a taking from it of a property right or interest * * *. (Emphasis supplied.)

"But," the Court answered, "the flow of the stream was in no sense private property, * * *." *Id.,* at 66.

The Court also said:

> * * * [T]he Chandler-Dunbar Company * * * had * * * no right to place in the river the works essential to any practical use of the flow of the river, * * *. The Government had *dominion* over the water power of the rapids and falls and cannot be required to pay any hypothetical value to a riparian owner who had no right to appropriate the current to his own commercial use. These additional values represent, therefore, no actual

> loss and there would be no justice in paying for a loss suffered by no one in fact. * * * *Id.*, at 76.

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

> * * * The Federal Government has domination [*sic*] over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property; * * *.

It was further said:

> * * * *The point is that navigable waters are subject to national planning and control* in the broad regulation of commerce granted the Federal Government. * * * (Emphasis supplied.) *Id.*, at 427.

In the recent *Twin City* decision, the Court noted at page 227 that the decision in Chandler-Dunbar was controlled by the federal government's "dominion" over the water power.

And it explained the interest of the United States in the flow of a navigable stream this way:

> The interest * * * originates in the Commerce Clause. That Clause speaks in terms of power, not of property. But the power is a dominant one which can be asserted to the exclusion of any competing or conflicting one. The power is a privilege which we have called "a dominant servitude" [cases cited] or "a superior navigation easement." * * * 350 U.S. at 224–225.

At page 227, the Court referred to interests ostensibly acquired under state law:

> It is no answer to say that these private owners had interests in the water that were recognized by state law. We deal here with the *federal domain,* an area which Congress can completely pre-empt, leaving no vested private claims that constitute "private property" within the meaning of the Fifth Amendment. * * * [T]o attach a value of water power of the Savannah River due to location and to enforce that value against the United States would go *contra* to the teaching of *Chandler-Dunbar*—"that the running water in a great

navigable stream is capable of private ownership is inconceivable." 229 U.S. at 69. * * * What the Government can grant or withhold and exploit for its own benefit has a value that is peculiar to it and that no other user enjoys. Cf. *U.S. ex rel. T.V.A.* v. *Powelson,* 319 U.S. 266, 273 et seq. *To require the United States to pay for this water-power value would be to create private claims in the public domain.* (Emphasis supplied.)

We are aware that compensation has been allowed for interests recognized under local law that have been taken by the United States. See, *Federal Power Commission* v. *Niagara Mohawk Corp.,* 347 U.S. 239 (1954); *United States* v. *Gerlach Live Stock Co.,* 339 U.S. 725 (1950). Both of these cases can be explained very simply on the ground that Congress by the statutes involved in each case had chosen not to exercise its navigation servitude and had indicated its intent that claimants of private interests in the use of the navigable waters in question be compensated for interference with such uses.

It can thus be readily observed that the question whether any interests in a navigable stream are recognized depends entirely upon the will of Congress. And to hold that Congress, as in *Niagara Mohawk* and *Gerlach, supra,* made provision for the recognition of interests asserted under state law is not the equivalent of holding that in the absence thereof such rights would exist. Any claim that the Boulder Canyon Project Act is unconstitutional because of interference with "vested appropriative rights" or "with rights to appropriate unappropriated water" is obviously without foundation.[34] Even if appropriative rights were possible without Congressional authorization, such claim would be without foundation because any person aggrieved would have a remedy under the Tucker Act. See our initial brief, p. 6.

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[34] We do not here address the question of the extent to which Congress intended to provide for recognition of previously existing uses The foregoing serves, however, to demonstrate the validity of our position that the question whether a principle of priority or a principle of rotability should apply in determining how shortage in the main stream supply under 7,500,000 acre-feet per year is to be borne must be answered, if and when there is need to answer it, by reference to those considerations which are relevant to deriving Congress' intent in enactment of the Project Act. See our reply brief, p. 53.

There is nothing in Justice Brandeis' opinion in *Arizona* v. *California,* 283 U.S. 423 (1931), which is inconsistent with the foregoing analysis. That decision establishes beyond any question that the Boulder Canyon Project Act was enacted in exercise of Congress' power under the commerce clause of the Constitution. With respect to the references in that opinion to the "right" of Arizona and her citizens to appropriate the waters of the river it is to be noted that the Court did not even purport to determine whether or not there was in fact any such "right." At p. 463 of the opinion Justic Brandeis said: "There is no occasion for determining now Arizona's rights to interstate or local waters which have not yet been, and which may never be, appropriated."

Furthermore, the opinion must be read in the light of the Arizona claim to which it was directed: "* * * that the mere existence of the act will invade quasi-sovereign rights of Arizona by preventing the state from exercising its right to prohibit or permit under its own laws the appropriation of unappropriated waters flowing within or on its borders." Five years after the first decision, the Court spoke in terms of the "privilege" of the states and their inhabitants to appropriate and use the water of the Colorado River. 298 U.S. 558, 569. And ten years later, in *Oklahoma* v. *Atkinson Co.,* 313 U.S. 508, 534, it summarily disposed of Oklahoma's similar claim of invasion of its sovereignty by construction of a federal project authorized by Congress in exercise of its commerce power in these words:

> Since the construction of this dam and reservoir is a valid exercise by Congress of its commerce power, there is no interference with the sovereignty of the state. * * * Nor can a state call a halt to the exercise of the eminent domain power of the federal government because the subsequent flooding of the land taken will obliterate its boundary. And the suggestion that this project interferes with the state's own program for water development and conservation is likewise of no avail.

> That program must bow before the "superior power" of Congress. *United States* v. *Rio Grande Dam & Irrigation Co., supra,* p. 703; *New Jersey* v. *Sargent,* 269 U.S. 328, 337; *Arizona* v. *California,* 298 U.S. 558, 569; *United States* v. *Appalachian Power Co., supra.*

And see *Tacoma* v. *Taxpayers of Tacoma, supra; Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275 (1958).

With reference to our reliance on the Supreme Court's decision in *Ivanhoe Irrigation District* v. *McCracken, supra,* California says: "Neither section 4(a), section 5, nor any other provision of the Project Act converts these pre-existing appropriative rights into 'federal property and federal privileges'." (See California's Response to our proposed findings and conclusions, p. 9.) But without regard to whether use under any such claim of "right" involves a use of federal property, it is certainly a federal privilege.[35]

B. THE PROVISIONS OF SECTION FIVE OF THE BOULDER CANYON PROJECT ACT FOR DISPOSITION OF THE STORED WATERS BY CONTRACT MADE BY THE SECRETARY OF THE INTERIOR ARE CONSTITUTIONAL.

Since there can be no question of Congress' power to impose conditions on the use of Colorado River water and receipt of the benefits the federal projects involved, there can be no

[35] Of course, under the *Ivanhoe* decision, it is really unnecessary to get to the question whether use of the water itself involves a use of either federal property or federal privilege. Expenditure of the funds of the United States upon the works constructed for regulation of the waters of the river is all that is necessary to support any reasonable conditions which Congress may have imposed in receiving the benefits of those works. That the conditions which Congress has imposed extend to all uses of these works (and to all uses of Colorado River water) is clear from the provisions of the Project Act. Section 4(a) makes no distinction, as California attempts to establish, between natural flow and stored water, Congress required that California agree to a limitation upon "the *aggregate* annual consumptive *use of water* of and from the Colorado River for use in the State of California." Section 4(a) makes no reference at all to stored water.

question of its power to delegate to the Secretary of the Interior the authority to administer those projects, including disposition of the stored waters by contract. We have dealt with the validity of this delegation in our reply brief from the standpoint of the sufficiency of the Congressionally imposed standards for exercise of the discretion granted to the Secretary. *Supra,* footnote 33. That there is no basis for contention that Section 5 of the Project Act is invalid if construed as giving the Secretary authority to do more than issue slips of paper to persons seeking to make appropriations in accordance with State procedures is apparent from the authorities above reviewed.

C. THE CONSTITUTION OF THE UNITED STATES CANNOT BE AMENDED BY INTERSTATE COMPACT.

At page 7 of her response to the United States' proposed findings and conclusions California says: "A power in the Secretary of the Interior to create water rights resting exclusively in federal contracts, destroying previously vested water rights,[36] would be invalid as * * * (4) contrary to the provisions of the Compact."

We read this statement as suggesting that if the Project Act is construed as giving to the Secretary such authority, the Act is invalid because contrary to the provisions of the Compact.

Such suggestion that the Constitutional powers of the United States can be limited by interstate compact is so novel that, although it is obviously groundless, we are constrained to notice it. In effect, it is an assertion that the Constitution of the United States can be amended by an agreement between two or more States consented to by Congress. We submit that this would be a strange result to flow from the Constitu-

[36] This seemingly refers to California's suggestion that the Secretary has made contracts for more water than there is in the river and that by so doing the contract entitlements of her agencies cannot be diminished. That the Secretary has not "oversold" the river is clear when consideration is given to the fact that all the California contracts are subject to the provisions of Section 4(a) of the Project Act. The California agencies can have no better contracts than the Project Act permits.

tional prohibition against interstate compacts without the consent of Congress. And although we assert Congress' Constitutional powers to their fullest extent, we deny that it can limit the powers delegated to it by the Constitution by giving its approval to an agreement between the States which would purport to impose such a limitation.

Respectfully submitted.

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JUNE 30, 1959.

APPENDIX A

Legislative History of Sections 8(a) and 13(b) of the Boulder Canyon Project Act

I. 67TH CONGRESS

A. House

H.R. 11449 was introduced during the second session on April 25, 1922, by Representative Swing, and was referred to the Committee on Irrigation of Arid Lands. 62 Cong. Rec. 5985.

Section 9 provided:

> That nothing contained in this Act shall be construed as limiting, diminishing, or in any manner interfering with any vested rights of the States above said reservoir, or of the citizens of said States, to the use, within the Colorado River watershed, of the waters of said Colorado River.

The committee submitted no report.

B. Senate

S. 3511 was introduced during the second session on April 20 (calendar day, April 25), 1922 by Senator Johnson, and was referred to the Committee on Public Lands and Surveys. 62 Cong. Rec. 5929.

Section 9 quoted from H.R. 11449, *supra*, is the same as its numbered counterpart in S. 3511.

The committee submitted no report.

II. 68TH CONGRESS

A. House

H.R. 2903 was introduced during the first session on Dec. 10, 1923, by Representative Swing, and was referred to the Committee on Irrigation of Arid Lands. 65 Cong. Rec. 217.

Section 8 provided:

> That nothing contained in this Act shall be construed as limiting, diminishing, or in any manner interfering with any right of the States above said reservoir, or of the citizens of said States, to the use of the waters of said Colorado River or its tributaries.

No report was submitted by the committee.

B. Senate

S. 727 was introduced during the first session on Dec. 10, 1923, by Senator Johnson, and was referred to the Committee on Public Lands and Surveys. 65 Cong. Rec. 146. The reference was changed on Feb. 7 (calendar day, Feb. 9), to the Committee on Irrigation and Reclamation. 65 Cong. Rec. 2165–66.

Section 8 quoted from H.R. 2903, *supra*, is identical to its numbered counterpart in S. 727.

The committee issued no report.

III. 69TH CONGRESS

A. House

1. H.R. 6251 was introduced during the first session on Dec. 21, 1925, by Representative Swing, and was referred to the Committee on Irrigation and Reclamation. 67 Cong. Rec. 1323. This bill was the first [1] of the proposed acts dealing with the Colorado River project to which approval of the Colorado River compact was attached.

Section 8 of H.R. 6251 provided in pertinent part:

> (a) That the United States, in managing and operating the dam, canals, and other works herein authorized, including the delivery of water for the generation of power, irrigation, or other uses, shall observe and be subject to and controlled by the Colorado River Compact as signed at Santa Fe, New Mexico, on November 24, 1922, and particularly described in section 13 herein.

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[1] Along with its Senate counterpart, S. 1868, *infra*, which was introduced in that body on the same day.

> (b) Also all rights of the United States in or to waters of the Colorado River howsoever acquired, as well as the rights hereafter arising of those claiming under the United States, shall be subject to and controlled by said compact.
>
> * * * * *

No report was submitted on this bill by the committee.

2. H.R. 9826 was introduced during the first session on February 27, 1926, by Representative Swing, and was referred to the Committee on Irrigation and Reclamation. 67 Cong. Rec. 4730.

Sections 8(a) and (b) carried language almost identical to, and comparable in content with, their numbered counterparts quoted from H.R. 6251, *supra.*

In H.R. Rep. No. 1657, submitted during the second session on Dec. 22, 1926, the Committee recommended a substitute for H.R. 9826. 68 Cong. Rec. 962.

In the Committee draft of the substitute, set out in the appendix of the report, section 8(b) provided:

> (b) The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried, and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide.

Section 12(b) stated:

> (b) The rights of the United States in or to waters of the Colorado River and its tributaries howsoever claimed or acquired, as well as the rights of those claiming under the United States, shall be subject to and controlled by said Colorado River compact.

The following quoted materials are excerpts from the report itself.

> In 1920 Congress, by the Kinkaid Act, directed an investigation of the lower Colorado River. This indicated the serious purpose of the Federal Government to proceed with the development of the river. As works on the lower river would be certain to create permanent water rights, a movement was started by States in the upper drainage basin of the river to settle between the States rights respecting the waters of the river, so that these would not be affected or impaired by any development which might be authorized.
> Commissioners were appointed by the seven States to negotiate an interstate treaty or compact. * * * *Id.*, at 10.
>
> * * * * *
>
> While the project here authorized is vital to many sections in the lower basin, the bill is no less important to upper basin States. By giving congressional approval to the compact these States are assured in perpetuity water rights, the value of which can not be over-estimated. It is a mistake to think of this bill as one merely for the benefit of California or Nevada or Arizona. By "enthroning the Colorado River compact" it assures to the States of Colorado and New Mexico, Utah and Wyoming the water rights so essential to their future. *Id.*, at 11.
>
> * * * * *
>
> * * * Provisions to settle water rights on the river have come largely from the official representatives of upper basin States. * * * *Id.*, at 19.

A letter from the Secretary of the Interior, attached as part of the appendix to the report, discussed H.R. 6251, which was introduced prior to H.R. 9826 and was discussed herein, *supra.* Of the section of H.R. 6251 pertinent to the review herein, the Secretary said, *inter alia:*

> Section 8, which provides for the distribution and use of all water for irrigation, power and otherwise, in ac-

> cordance with the Colorado River Compact, seems well conceived and is a necessary part of this legislation. This appears to afford ample protection and assurance to those States included in the upper division of the watershed against the creation of a priority of right through the building of these works, which would impair in any way their right to the volume of water guaranteed to that division in the compact. * * * H. R. Rep. No. 1657, *id.*, at 23.

During debate on the committee-amended version of H. R. 9826, Representative Winter of Wyoming, speaking in support of the bill, said:

> The rights of the upper-division States are protected in the bill as follows:
>
> * * * * *
>
> Section 8 provides that the United States, its permittees, licensees, and contractees, and all users and appropriators of water connected with the project shall be subject to the Colorado River compact in the management of the project and in the use of water therefrom. This protects the upper States against any uses of project water for any purpose in Arizona.
>
> Section 12(b) subjects the right of the United States in the waters of the Colorado River system and the rights of all persons claiming under the United States to the terms of the Colorado River compact. So that, from and after the passage of the bill, any and all persons making appropriations of water within Arizona or any other Colorado River State shall take them limited by the terms of the compact. 68 Cong. Rec. 3294 (1927).

3. H.R. 15349 was introduced during the second session on December 17, 1926, by Representative Swing, and referred to the Committee on Irrigation and Reclamation. 68 Cong. Rec. 687.

Provisions of Sections 8(b) and 12(b) are the same as such denominated sections quoted herein, *supra*, from the committee substitute for H.R. 9826, as set out in the materials on H.R. Rep. No. 1657.

The committee submitted no report on H.R. 15349.

B. Senate

1. S. 1868 was introduced during the first session on December 21, 1925, by Senator Johnson, and was referred to the Committee on Irrigation and Reclamation. 67 Cong. Rec. 1232.

Section 8 provided in pertinent part:

> (a) That the United States, in managing and operating the dam, canals, and other works herein authorized, including the delivery of water for the generation of power, irrigation, or other uses, shall observe and be subject to and controlled by the Colorado River Compact as signed at Santa Fe, New Mexico, on November 24, 1922, and particularly described in section 13 herein.
>
> (b) Also all rights of the United States in or to waters of the Colorado River howsoever acquired, as well as the rights hereafter arising of those claiming under the United States, shall be subject to and controlled by said compact.
>
> * * * * *

No report was submitted by the committee.

2. S. 3331 was introduced during the first session on Feb. 26 (calendar day, Feb. 27), 1926, by Senator Johnson, and referred to the Committee on Irrigation and Reclamation. 67 Cong. Rec. 4683.

Section 8(b) was nearly identical in language and comparable in content to the like-numbered section quoted in the immediately foregoing materials on S. 1868.

The bill was reported with amendments on April 19 (calendar day, April 23), 1926, in S. Rep. No. 654. 67 Cong. Rec. 8020. In the amended version, what was previously section 8(b) became 12(b). The latter provided in the amended version:

> The rights of the United States in or to waters of the Colorado River and its tributaries howsoever claimed or acquired, as well as the rights of those claiming under the United States, shall be subject to and controlled by said the Colorado River compact.

Section 8(c) in the amended version provided:

> The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this Act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide.

The report itself, in the section dealing with analysis of the bill, stated on page 25: "Many rather technical provisions intended for the protection of upper basin States originated with the water commissioners of Colorado, Wyoming, and Utah."

In the same section of the report, it was said:

Section 8 "subordinates the project to the terms of the Colorado River compact." *Id.*, at 27.

Section 12(b) "makes any rights of the United States to the waters of the Colorado River subordinate to the terms of the compact * * *." *Id.*, at 28.

IV. 70TH CONGRESS

A. House

H. R. 5773 was introduced during the first session on Dec. 5, 1927, by Representative Swing, and was referred to the Committee on Irrigation and Reclamation. 69 Cong. Rec. 97.

Section 8(b) provided:

> The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried, and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, any-

thing in this Act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide.

Section 12(b) provided:

The rights of the United States in or to waters of the Colorado River and its tributaries howsoever claimed or acquired, as well as the rights of those claiming under the United States, shall be subject to and controlled by said Colorado River compact.

The committee reported the bill with amendments on March 15, 1928, in H.R. Rep. No. 918. 69 Cong. Rec. 4868.

The report stated, on page 14:

With these works constructed and owned and operated by the Government and since the United States is the most considerable owner of lands adjacent to the river through its entire length, including its tributaries, the United States is in a position to physically enforce such terms and conditions upon the use of the water as it may determine upon. This bill expressly approves the compact and assents to all of its terms so far as the United States is concerned. The representatives of the upper-basin States have prepared and submitted numerous protective devices for their own benefit, every one of which has been incorporated in the bill. These amendments not only include the approval by the United States but subjects the United States and each and every agency thereof, to its terms. Not only that, but requires the Secretary of the Interior in the construction and operation of the project, to conform to all of the terms and conditions of the compact and inasmuch as no rights can be acquired in the project except by contract, as specifically required in the bill, this provision is very effective. But in addition to that, all patents, grants, concessions, easements, rights of way, or other evidences of rights from the United States are impressed with all of the provisions of the compact as a matter of law and many other safeguards are incorporated for their benefit. Nothing further has been suggested and nothing further has been thought of

which can add to the protection of the upper-basin States. It is thought that their protection is complete.

B. Senate

S. 728 was introduced during the first session on Dec. 6 (calendar day, Dec. 9), 1927, by Senator Johnson, and was referred to the Committee on Irrigation and Reclamation. 69 Cong. Rec. 341.

Sections 8(b) and 12(b) were the same as the like-numbered sections quoted from H. R. 5773, *supra.*

The committee reported the bill with amendments on March 20, 1928, in S. Rep. No. 592. 69 Cong. Rec. 5025. What was section 8(b) became 8(a) in the amended version.

The report said, *inter alia:*

> With these works constructed and owned and operated by the Government and since the United States is the most considerable owner of lands adjacent to the river through its entire length, including its tributaries, the United States is in position physically to enforce such terms and conditions upon the use of the water as it may desire. This bill expressly approves the compact and assents to all [*sic*] all of its terms so far as the United States is concerned. The representatives of the upper-basin States have prepared and submitted the numerous protective devices for their own benefit. These amendments not only include the approval by the United States but subjects the United States and each and every agency thereof, to its terms. Not only that, but requires the Secretary of the Interior in the construction and operation of the project, to conform to all of the terms and conditions of the compact, and inasmuch as no rights can be acquired in the project except by contract, as specifically required in the bill, this provision is very effective. But in addition to that, all patents, grants, concessions, easements, rights of way, or other evidences of rights from the United States are impressed with all of the provisions of the compact as a matter of law, and many other safeguards are in-

corporated for their benefit. It is thought that their protection is complete. *Id.*, at 15–16.

While the project here authorized is vital to many sections in the lower basin, the bill is no less important to upper-basin States. By giving congressional approval to the compact, these States are assured in perpetuity water rights, the value of which can not be overestimated. It is a mistake to think of this bill as one merely for the benefit of California or Nevada or Arizona. By "enthroning the Colorado River compact" it assures to the States of Colorado, New Mexico, Utah, and Wyoming the water rights so essential to their future. *Id.*, at 16.

During debate on S. 728, Senator Johnson said, *inter alia:*

We write this bill around the compact. We incorporate in it the very amendments that were presented by the upper-basin States. The amendments that are in the bill that refer to the Colorado River compact were written by the men of the upper-basin States, and inserted at their request; and in every conceivable fashion that the upper-basin States can be protected, in every way in which we can make this scheme and the lands that are watered by the Colorado, from the storage and the regulated flow of that river under these works, subject to the Colorado River compact, we have done it in this bill.

What a travesty it is for these people from the upper basin States to say to us, "You must give us a seven-State compact or you never can get relief, and the Colorado River will never be harnessed." Even though we be destroyed, into this bill has been written every single, solitary, conceivable provision that will protect the Colorado River compact and the upper basin States.

The land that will be reclaimed and will utilize the waters of the Colorado belongs to the United States, and so we have impressed upon those waters that will be stored by the United States Government the Colo-

rado River pact—impressed it so that they can only be used in accordance with the Colorado River pact; and everything has been done in this bill that it is possible to do, even to writing in an amendment at the instance of the Senator from Wyoming by which California binds herself for all time never to utilize more than 4,600,000 acre-feet, the maximum that she may utilize in all the years to come. So we have done all that we could in order to protect the other States and in order to protect the Colorado River compact and to write it into the bill. 69 Cong. Rec. 7249 (1928).

Subsequently in his remarks, Senator Johnson explained:

> Section 8 is entirely an upper basin amendment. * * * I want to call his [another senator's] attention to the fact that in paragraph (a) of section 8 again we endeavor to protect the upper-basin States, and this is one of the amendments written by the upper-basin States:
>
> > "The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried, and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide." *Id.*, at 7251.
>
> * * * * *
>
> Section 12, it will be observed, binds the United States with the Colorado River compact. As if that were not enough, in paragraph (c) we find all grants, concessions, and so on, bound with the Colorado River compact. We impress everything that is done under this

> measure with the Colorado River compact. Nothing that is undertaken, nothing that is designed, no place where it is possible to render any measure of protection, is excepted from the compact. The design has been to protect as best we could that compact which has no value whatsoever, so far as California is concerned, save there be storage in the Colorado River, and storage of the character that is indicated under the measure. *Id.*, at 7252.

H.R. 5773 was substituted for S. 728 in the Senate during the second session on Dec. 5, 1928. 70 Cong. Rec. 67–68.

APPENDIX B

Requirement to maintain maximum historic acreage in California and maximum historic use by Metropolitan Water District

District	Net average (Ac.)	Consumptive use (A.F.) (Ac.)	Total consumptive use (A.F.)
Metropolitan Water District			[1] 584, 000
Palo Verde Irrigation District	[2] 74, 000	[3] 3. 6	[4] 266, 400
Reservation Division (Yuma Project:			
Indian	[5] 7, 743	[6] 3. 3	[7] 25, 808
Non-Indian	[8] 6, 867	[9] 3. 3	[10] 22, 887
Imperial Irrigation District	[11] 474, 600		
Coachella	[12] 49, 405	[13] 5. 5	[14] 2, 882, 027
			[15] 20, 000
			[16] 15, 754
Total			3, 816, 876
(Rounded to)			3, 817, 000

[1] Diversion 1957 Tr. 19,968.

[2] Tr. 8,772.

[3] Average 1951–55 Calif. Ex. No. 356.

[4] 74,000 Ac.×3.6=266,400 A.F.

[5] U.S. Finding of Fact 4.8.6, p. 84.

[6] U.S. Ex. No. 1121 (3.3+256 A.F. of nonagricultural use).

[7] U.S. Ex. No. 1121.

[8] U.S. Finding of Fact 7.1.11.

[9] 3.3 plus domestic use.

[10] U.S. Finding of Fact 7.1.13 (48,695−25,808=22,887).

[11] Calif. Ex. No. 275 (1955).

[12] Calif. Ex. No. 318, table 2 (1955).

[13] Calif. Ex. No. 275 (ave 5.52+5.48 item 98). This is assumed for Imperial Irrigation District and Coachella at Pilot Knob, Dowd Tr. 8205. It would take 20–30–40 years to achieve this. (Tr. 8165).

[14] (474,600+9,839+49,405)×5.5=2,936,142.

[15] Consumptive uses Imperial Dam-Pilot Knob, Calif. Ex. No. 279.

[16] Incidental consumptive uses Reservation Division and Palo Verde Irrigation District estimated at 5 percent of (25,808+22,887+266,400)= 15,754 (Calif. Proposed Findings, p. IV–33, footnote 1).

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