IN THE

Supreme Court of the United States

October Term 1961

No. 8 Original

STATE OF ARIZONA,

Complainant,

v.

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

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

Legislative History Appendixes Accompanying the Reply Brief of the California Defendants to the Answering Briefs of the United States, Arizona, and Nevada

October 2, 1961

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Legislative History Appendixes
Accompanying California Reply Brief

October 2, 1961

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Introduction

Arizona's answering brief disputes the following two California contentions:

(1) "[O]ne of the major areas of legislative agreement expressed throughout the legislative history of the four Swing-Johnson bills (the last of which culminated in the Project Act) by proponents and opponents of the measure alike" was that "Congress could not make an interstate allocation of the waters of the Colorado River system, because interstate compact or litigation in this Court were the only two ways in which an interstate allocation could be accomplished." Calif. Op. Br. 181.

(2) "The Project Act preserved priority of appropriation and equitable apportionment in the 'mainstream' and in every other part of the Colorado River system in the lower basin." *Id.* at 159.

Arizona asserts that the legislative history does not support either contention:

> (1) "The legislative history is directly to the contrary. It unequivocally discloses that one of the major areas of *disagreement* between proponents and opponents of the bills was whether Congress had the constitutional authority to make such an interstate allocation of water. We repeat, no one denied that the various Swing-Johnson bills

provided for a federal allocation of water among the states. The bitter cry of the opposition was that, because of this federal allocation, the bills constituted an unconstitutional invasion by Congress of the rights of the states. On the other hand, the defenders of the bills argued vigorously for their constitutionality." Ariz. Ans. Br. 35.

(2) "[T]he true legislative history shows overwhelmingly the full realization by both friend and foe of the Swing-Johnson bills that they would inevitably supersede the interstate operation in the Lower Basin of the doctrines of prior appropriation and equitable apportionment." *Id.* at 17-18.

In these appendixes we demonstrate that Arizona's interpretation of the legislative history is wholly erroneous or misleading in five important respects.[1]

Appendix A

There was no disagreement between proponents and opponents of the Swing-Johnson bills that Congress did not possess the power to make an interstate allocation of water.[2] The Senators and Representatives who played key roles either in support of or in opposition to the Swing-Johnson bills were in agreement that an inter-

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[1]To some extent, we repeat the legislative history presented in our opening and answering briefs in order that all legislative history on this issue may be gathered in one place for convenient reference.

[2]Arizona does not accurately identify the major area of disagreement. The issue was not whether Congress possessed the power to make an allocation of the waters of the Colorado River system; it was whether the Swing-Johnson bills purported to make any such allocation. We treat that issue in appendix B.

state division of water could be accomplished only by allocation by an interstate compact or litigation in this Court.

We here use the word "allocation" to describe the creation of any interstate right (whether characterized by parity or priority) like that created by an interstate compact. Article III(a) of the Colorado River Compact is an "allocation" in this sense. In a different sense, an appropriation made under state law and given recognition across state lines by the doctrine of *Wyoming v. Colorado,* 259 U.S. 419 (1922), may be an "allocation" both to the appropriator and to the state whose rights are recognized in the original jurisdiction. Likewise a contract with a water user who thereby acquires a right to water stored in Lake Mead may be called an "allocation." However, it is only the assertion that the Secretary made compact-like "allocations" to states which creates any issue in this case.

In appendix A, we present representative statements which demonstrate Congress' view that it could neither make nor authorize the Secretary to make any compact-like allocation.

Appendix B

Arizona's assertion that "no one denied that the various Swing-Johnson bills provided for a federal allocation of water among the states" (Ariz. Ans. Br. 35) is demonstrably wrong. The authors and proponents of the Swing-Johnson bills consistently pointed out that the bills did not purport to make or authorize a federal

allocation of any kind.[3] The charge by the Arizona and Utah opponents that approval of the Colorado River Compact without ratification by all seven basin states would constitute a "federal allocation" was repeatedly denied.[4] In appendix B, we detail the refutations of the arguments of the Utah and Arizona opponents that the bills purported to effect a kind of compact-like "federal allocation."[5]

Appendix C

The "bitter cry of the opposition" to which Arizona refers[5a] was not directed to any purported *intra*-lower basin allocation which Arizona argues Congress authorized in sections 5 and 4(a) of the Project Act. Rather, numerous statements Arizona quotes and cites in support of her argument relate primarily to the "federal allocation" which Arizona and Utah opponents of the bills argued Congress was attempting by approval of the Colorado River Compact with less than seven-state ratification.[6] The remainder of the citations provided by Arizona relate to two issues: (1) whether the alleged

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[3]It was pointed out by the bill's proponents that no state could be bound by the Compact without its consent, a truism subsequently acknowledged by Mr. Justice Brandeis in Arizona v. California, 283 U.S. 423, 462 (1931).

[4]We have pointed out in our answering brief (Calif. Ans. Br. 50-56) that the arguments of the Arizona and Utah opponents of the bills with respect to § 5 (see Ariz. Ans. Br. 33-34) were thoroughly and repeatedly refuted by the authors and other proponents of the measure.

[5]Views expressed by opponents of an act are not persuasive legislative history. See Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951); Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 288 & n.22 (1956).

[5a]Ariz. Ans. Br. 35, quoted *supra* p. 2.

[6]Arizona had not ratified the Compact; in 1927 Utah had withdrawn her earlier six-state ratification. See Rep. 24-25.

federal ownership of the unappropriated, nonnavigable waters of the western states obviated the necessity for a compact among the seven states (an assertion which Congress rejected); and (2) whether Congress should use its power to condition the use of federal facilities and public lands to substantially effectuate the *inter*basin allocations of the Colorado River Compact. In appendix C, we provide this context for Arizona's extracts from the legislative history.

Appendix D

Whatever any member of Congress may have thought about the function of the contracts authorized by section 5 of the Swing-Johnson bills, both "friend and foe" assumed that the Project Act would not supersede the doctrine of priority of appropriation among the states of the lower basin as Arizona argues. All but one of the statements of the authors of the bill quoted by Arizona in support of her argument related solely to *inter*basin, not *intra*basin, matters. The context of the other statement quoted by Arizona (Senator Johnson in debate with Senator Walsh) demonstrates that Senator Johnson intended that priority principles would guide the Secretary of the Interior in executing contracts under the act. The views of the "foes" of the Swing-Johnson proposals, which Arizona does not cite, show that Arizona refused to ratify the Colorado River Compact and opposed all four Swing-Johnson bills because she feared that California appropriations would preempt most of the lower basin Compact allocation in the absence of an interstate agreement in the lower basin expressly limiting those priorities. In appendix D, we

present this view that priority principles were unimpaired by the Project Act.

Appendix E

In her answering brief (pp. 12-13, 31 n.35, 34 n.41) Arizona reiterates a basic argument presented in her opening brief (pp. 84-99): The requirement of section 5 of the Project Act that contracts shall "conform to" section 4(a) manifests a congressional intention to impose a federal allocation upon "mainstream" waters. The Master has rejected Arizona's argument that by the "conform to" language Congress required that the Secretary's contracts allocate "mainstream" waters to Arizona and Nevada precisely as specified in the unratified and inoperative tri-state compact specified in the second paragraph of section 4(a). See Rep. 162-63, 202. The legislative history of the "conform to" language demonstrates that Congress did not intend thereby to authorize or make any federal allocation; Congress intended to require the Secretary's contracts to conform to any interstate agreement specified in section 4(a) if it were ratified and thus became operative. In appendix E, we present the legislative history of the "conform to" language.

APPENDIX A

STATEMENTS BY PROPONENTS AND OPPONENTS OF THE SWING-JOHNSON BILLS EVIDENCE CONGRESS' VIEW THAT CONGRESS HAD NO POWER TO ALLOCATE THE WATERS OF THE COLORADO RIVER SYSTEM

Proponents*

Senator Bratton of New Mexico

Senator (and later Judge) Bratton was "one of the principal architects of Section 4(a)." Rep. 175 & n.34.

Speaking on the necessity of ratification of the Colorado River Compact, Senator Bratton made this assertion during debates on the fourth Swing-Johnson bill on December 10, 1928 (70 CONG. REC. 330-31):

> "There are only two ways known to me through which title to water of an interstate stream, either for purposes of irrigation or development of power, may be adjudicated. One is by a compact or agreement—the method sought to be followed in this case—and the other is by a [331] decree rendered in a suit instituted originally in the Supreme Court of the United States."

As Arizona recognizes (Ariz. Ans. Br. 46-47), Senator Bratton objected to imposing a tri-state compact on the states. There can be no dispute on this, as the following exchange between Senators Pittman and

*We categorize as proponents of the Swing-Johnson bills those Senators and Representatives who favored passage of the bill as evidenced by their recorded votes. See 69 CONG. REC. 9989 (1928) (House of Representatives vote on motion to recommit H.R. 5773, which would, in effect, have defeated the bill); 70 CONG. REC. 603 (1928) (Senate vote on H.R. 5773); *id.* at 837 (House vote on H.R. 5773 as amended by the Senate).

Bratton on this point during debates two days later on the proposed tri-state compact authorization clearly reveals. Senator Pittman, referring to the amendment, had just explained the situation as follows (70 CONG. REC. 470):

> "The amendment is in its present form because it has been modified by the Senator from Arizona. I can not see why any one of the three lower States should object to such an amendment. *It is not imposed as a condition of ratification. It is purely optional with them whether they want to agree to it or not.*" (Emphasis added.)

Senator Bratton then explained that he was opposed to the Pittman-Hayden tri-state compact amendment, even though permissive, because it might hamper and restrict state sovereignty (70 CONG. REC. 470-71):

> "Mr. President, I want to ask the Senator from Nevada whether, in his opinion, it is good policy, assuming that we have the power so to do, to provide in advance what shall be embodied in an interstate or tri-State agreement? In other words, the Federal Government is a sovereign government. Each State is a sovereign State. I seriously doubt the wisdom of the Congress embarking upon the policy of consenting in advance to the execution of an agreement or compact between States with such conditions, provisions, or limitations implied. In other words, I think what the Constitution contemplates is that when States desire to negotiate and agree among themselves, the Congress shall give its consent in advance that they may do so, and when they have done so and

submit the agreement here, the Congress shall either approve or disapprove what the States have done.

"But I seriously question the wisdom of the policy. No one in this body is more anxious than I am to see the three States in the lower basin agree mutually among themselves, but I doubt whether we can afford to embark upon such a policy in order to secure that result and that outcome. Unless the suggestion is mutually satisfactory to the three States I doubt very much the wisdom of our doing such a thing.

"I simply suggest that. I do not want to delay action on the bill. I want to expedite it in every way. But I am unwilling to have us take the step without pointing out the inherent danger that I believe I see in the establishment of such a precedent. *We ought to consent that the three States treat among themselves, unhampered and unrestricted by the Federal Government.* Then when they have reached an agreement let them submit it here for the consent of the Federal Government. *It partakes too much of hampering the States in the exercise of sovereignty. That alone would cause me to vote against the amendment, because I shall never give my consent to the Federal Government undertaking to control the States in negotiating with each other by saying, 'We point out in advance what you must do; you must put this and that in your agreement; you must embody this and that in your agreement.'*

"When we are dealing with sovereignties we should be exceedingly careful to keep within the

scope of our authority. So far as I know, the Federal Government has never done such a thing. I may be in error about it, but I think the usual course is to [471] consent that the States may enter into a compact without even indicating what shall be contained in the agreement, and then when it has been executed and reflects the combined agreement of the parties thereto and is submitted to Congress, we either approve or disapprove it. *To say that they may negotiate and agree under limitations of this kind, in my judgment, transcends the proper functions of the Federal Government.* This alone would control my vote upon the amendment if all other considerations were waved aside. I do not believe we can afford to pay this price in order to bring the three States into agreement." (Emphasis added.)

Senator King of Utah

Senator King, author of section 18 of the Project Act, opposed the Swing-Johnson proposals until the final debates on the fourth and final bill. After the adoption of his amendment which became section 18 of the act, he voted for the bill. See 70 CONG. REC. 593, 603.

On April 18, 1927, Senator King wrote Hon. Hubert Work, Secretary of the Interior, in connection with the Secretary's appointment of special advisors to report to him on various matters relating to the proposed development of the Colorado River. One of the principal objections raised by Senator King concerned what he believed was an implied assertion of federal ownership or control of all unappropriated waters in the

Colorado River basin. He forcefully asserted his opposition to this view as follows:[1]

> "I respectfully submit that no course should be taken by the Interior Department that would tend to prevent the six States from reaching an amicable and satisfactory agreement among themselves with respect to the development of the Colorado River and the utilization of the waters thereof. These States and their inhabitants are the ones who are principally concerned in the development of the Colorado River. They own the bed and banks of the stream; and the States referred to, not the Federal Government, control the waters of the Colorado River and its tributaries. The laws of these States determine how appropriations of water shall be made; and the control of the waters of the river, including its tributaries, is exclusively within the States through which the river and its tributaries flow. The Federal Government, as I shall show, has no control over these waters, except if the Colorado River is navigable, to prevent interference with navigation.
>
> "I respectfully submit that the instructions given to the advisers will be calculated to prevent the ratification of the compact by all the States. They will be regarded as an expression of the purpose of the Interior Department to take control of the waters of the river, regardless of the rights of the States, and to allocate them to the States without reference to the compact, and to construct

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[1] *Hearings on S. 728 and S. 1274 Before the Senate Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 441, 443-44 (1928).

a dam at Boulder Canyon and carry out the essential provisions of the so-called Swing-Johnson bill. Certainly these instructions will be regarded as an expression of a desire on the part of the Interior Department that advice shall be given that will tend to relegate the States to a subordinate position and assign to the National Government the undisputed control and ownership of all unappropriated waters of the Colorado River." (P. 441.)

"The most serious and important provision in the [Secretary of the Interior's] letters of instructions given to the advisors is found in the provision which, in effect, assumes that the Federal Government controls the waters of the Colorado River, or the water rights in the Colorado River. The language employed is as follows:

> Some of the major questions to be determined include the following: "Whether the Federal Government, by control of water rights, has power to allocate the unappropriated waters of the Colorado River to the basin States and make unnecessary a compact between the States."

"If it had not been for this instruction I would not have troubled you with this communication, but my interpretation of these words has constrained me to submit this letter. As I interpret these words, it seems that you take the position that the Federal Government 'controls the water rights' of the Colorado River. Obviously the waters of the Colorado River are referred to, and, of course, if the Federal Government has control of the waters of this river, or the 'water rights' therein, it possesses the same authority over the

waters of all other streams, navigable and unnavigable, in the United States. It seems to me that the position taken in these instructions is a challenge to a doctrine and policy which has prevailed in the United States from the beginning of the Republic. The meaning of these words can not be mistaken. The words assume that the Federal Government 'controls the water rights' of the Colorado River. The words 'water rights' undoubtedly mean the waters, certainly the unappropriated waters, of the river. That this is the interpretation intended to be placed upon these words is clear when the concluding words of the sentence are examined.

"The position boldly stated in this sentence is this:

> The Federal Government controls the waters of the Colorado River, and that being true, it has the power to allocate unappropriated waters to the States interested therein and therefore no compact among them is necessary.

"The premise of the sentence is that the Federal Government 'controls the water rights' of the river. So controlling them, the Interior Department is willing to have the opinion of the persons named upon the question of the power of the Government to allocate the unappropriated waters among the States of Utah, Nevada, Colorado, Wyoming, Arizona, and California, thus making unnecessary any compact. Of course, if the Government owns and controls the unappropriated waters of the river, it would seem that it would have the right to make disposition of the same and the States would have no voice in their allocation.

"I can place no other interpretation upon these words than an intent upon the part of the Interior Department to deny to the States the right to enter into an agreement among themselves with respect to the waters of the Colorado River and the tributaries thereof. If not, why are the advisers not permitted to investigate and pass upon the question as to the rights of the States in and to the waters of the Colorado River and the tributaries thereof? Why assume that they have no control over or rights in these waters, and that the Federal Government alone has the authority to control them? It would seem as though the Interior Department was making it impossible to obtain any other opinion from the advisers than that which is apparently desired; namely, [444] that the Federal Government can allocate all unappropriated waters of the river as it pleases, to individuals or to States, and that the latter have no voice in the matter.[2]

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[2](Footnote ours.) Senator King's fears were not realized. Only two of the advisers appointed by the Secretary (Calif. Op. Br. 181 n.3) directly responded to the question, and their answers were in the negative. The answer submitted in the report of Hon. Frank C. Emerson, Governor of Wyoming (and Wyoming's Compact Commissioner), is set out in our opening brief. *Ibid.* Hon. James G. Scrugham, former Governor of Nevada (and Nevada's Compact Commissioner), replied to the Secretary as follows:

"(*c*) It is the opinion of eminent constitutional authorities that the Congress of the United States, through its constitutional prerogative of regulating commerce among the several States, has full authority to construct such works of river control without further permission from the interested States. The Supreme Court of the United States has held that such constitutional authority carries with it the power to control and equate the flow of navigable streams such as the lower Colorado River. While the beds and banks of a navigable stream are owned by the State through which the stream flows, or by the States abutting upon such streams, and while the States have sovereignty over

"I respectfully protest against this position of the Interior Department and its officials. I protest against the proposition that the Federal Government controls the unappropriated waters, or any of the waters or water rights of the Colorado River." (Pp. 443-44.)

Subsequently, in debates upon the fourth Swing-Johnson bill on May 28, 1928, Senator King explained to the Senate the position he had taken in his letter to the Secretary (69 CONG. REC. 10262):

"In my letter I contested the position of the Secretary of the Interior which in effect was that the Federal Government has the authority to control the waters of the Colorado River and the right to 'allocate the unappropriated waters of the basin States so as to make unnecessary any compact between them.' This position is taken by some of the officials of the Interior Department. They contend that the States have no authority over the streams, whether navigable or nonnavigable, or the waters thereof, found within their borders. This position indicates the progress being made by bureaucracy in the United States. It seeks to superimpose the Federal Government upon the States and to concentrate not only all political

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the waters within and upon their borders, they can not use such title and sovereignty to prevent the Congress of the United States from exercising a constitutional authority that has been specifically delegated to it by the States. *The right of the United States Government to construct works of control does not appear to carry with it the right to allocate the unappropriated waters of the Colorado River to the interested basin States. Such allocations should properly be made through compacts between the interested States, approved by Congress.*" (Emphasis added.)

Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation, 70th Cong., 1st Sess. 515 (1928).

power but economic power in the National Government."

Again, on December 6, 1928, Senator King made his position abundantly clear in an exchange with Senator Hayden during discussion of Senator Hayden's proposed amendment to the fourth Swing-Johnson bill specifying the terms of a tri-state compact among Arizona, California, and Nevada which California would have been required to ratify as a condition precedent to the effectiveness of the Project Act (70 CONG. REC. 169):

> "Mr. HAYDEN. . . . The only thing required in this bill is contained in the amendment that I have offered, that there shall be apportioned to each State its share of the water. Then, who shall obtain that water in relative order of priority may be determined by the State courts.
>
> "Mr. KING. If the Senator means by his statement that the Federal Government may go into a stream, whether it be the Colorado River, the Sacramento River, or a river in the State of Montana, and put its powerful hands down upon the stream and say, 'This is mine; I can build a dam there and allocate water to whom I please, regardless of other rights, either suspended, inchoate, or perfected,' I deny the position which the Senator takes.
>
> "Mr. HAYDEN. The amendment that I have offered contemplates no such possibility."

And, finally, it is clear that Senator King did not consider that section 5, taken in conjunction with section 4(a), authorized the Secretary of the Interior to

make a contractual allocation among Arizona, California, and Nevada. On December 14, 1928, shortly before he offered the amendment which became section 18 of the Project Act, Senator King engaged in an exchange with Senator Pittman over the significance of the limitation on California and the tri-state compact authorization previously added to section 4(a) which makes clear that both Senators were fully aware of the permissive nature of the tri-state compact authorization (70 CONG. REC. 576):

> "Mr. KING. But, as I understand, that limitation of 4,400,000 acre-feet exists only in the event of a 6-State compact, not a 7-State compact. We hope, of course, that there will be a 7-State compact, because, if not, the upper States will not be fully protected.
>
> "Mr. PITTMAN. But now, under the so-called Hayden amendment, there is exactly the same apportionment of the water.
>
> "Mr. KING. Assuming that that shall be accepted by California and Arizona?
>
> "Mr. PITTMAN. Exactly.
>
> "Mr. KING. But, of course, we may not coerce either of those States into an acceptance of the so-called Hayden-Pittman amendment.
>
> "Mr. PITTMAN. If there is a 7-State compact, it will be in accordance with the treaty which the Senate consented to, which gives the same amount of water to California that she would get under a 6-State compact, and it provides also that the 6-State compact ratification holds, unless all three of those States do ratify."

Senator Phipps of Colorado

Senator Phipps was chairman of the committee which held hearings on and favorably reported the fourth Swing-Johnson bill. See Calif. Op. Br. 119-20 & n.7.

On February 23, 1927, during debate on the third Swing-Johnson bill, Senator Phipps asserted that interstate agreement or litigation were the only alternatives available to settle the interstate controversy between the upper and lower basins (68 CONG. REC. 4515):

> "As I said in a statement recently made in Denver, Colorado, regarding this interstate agreement, I am firmly convinced that there must be voluntary ratification on the part of each interested State in order to make the compact effective. This is the only method of settling possible controversies permanently and of putting the water of the stream to its highest beneficial use. It is the only satisfactory method; it is the only legal method to avoid proceedings in the courts which would prove costly and almost interminable."

On December 7, 1928, speaking on the fourth Swing-Johnson bill, Senator Phipps discussed the stalemate between Arizona and California over a tri-state compact as it related to the larger problem of seven-state ratification of the Colorado River Compact. His discussion of the possible resolution of these problems mentions only interstate agreement or litigation, and does not suggest that Congress could resolve the problem by making a compact-like allocation (70 CONG. REC. 244, 245):

> "Mr. President, there seems to be an unfortu-

nate difference of opinion between two of the States, the two that are chiefly interested in this enterprise; the two to which it is most important, much more important than it is to the other five States of the basin. California and Arizona are not very far apart in the matter of water allocation. That difference should be composed.

". . . .

"The upper basin States—perhaps I might more properly speak for Colorado alone—have only this selfish interest in the Boulder Dam proposal, other than a naturally friendly one. Their selfish interest is that, coincident with the authorization of the dam, must be an agreement under the compact of the seven States for division of the water of the Colorado River, which will prevent, for all time, discussions, disputes, and lawsuits which would go to every court up to the Supreme Court of the United States before they were determined. There are so many points which come in that even one lawsuit as between Colorado and Kansas does not decide all of the points involved, and, as the Senator from Kansas who sits before me [Mr. CURTIS] knows, our two States are to-day in the Supreme Court of the United States, and have just argued another case involving a water dispute.

"We have had our differences with Wyoming, unfortunately, and while we have come into compact for division of the water of one of the streams that is interstate, and are endeavoring to cover the waters of another stream that flows through Colorado, through Wyoming, and into Nebraska, we have not yet been able to get to-

gether in an amicable settlement as to that river.

"We are also endeavoring to arrange and have progressed in arranging for agreed divisions of water of the interstate streams flowing between Colorado and New Mexico. On one stream we have already agreed. As to others we are in negotiation.

"It does seem reasonable, fair, and proper that where there is this God-given opportunity to use the waters of a stream to the best advantage, the States should use every endeavor to get together and agree amicably upon the division of those waters, rather than resort to struggles in the courts of the United States to settle their differences."

Senator Pittman of Nevada

Senator Pittman was influential in the final debates on the fourth Swing-Johnson bill and was the moving force in converting Senator Hayden's proposed amendment requiring a tri-state compact as a condition precedent to the effectiveness of the act into a permissive authorization to enter into that compact. Rep. 162-63; Calif. Op. Br. 186-87. He was also a member of the Senate Committee on Irrigation and Reclamation which held hearings on and favorably reported the fourth Swing-Johnson bill.

Senator Pittman was a staunch advocate of states' rights in water resource development. This is well illustrated by the so-called Pittman resolution, prepared by Senator Pittman for, and approved by, the Governors' Conference at Denver in August 1927, which Senator Pittman inserted in the *Congressional Record* on April 28, 1928, during debate on the fourth Swing-

Johnson bill (69 CONG. REC. 7392-93). The text of the resolution follows (*id.* at 7393):

> "Resolution offered by Senator KEY PITTMAN on behalf of the Nevada commission to the Conference of Governors and the Commissioners of the Colorado Basin States in session at Denver, Colo., August 29, 1927.
>
> "Whereas it is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by navigable waters within the limits of the several States of the Union belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interests of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States; and
>
> "Whereas it is the settled law of this country that subject to the settlement of controversies between them by interstate compact or decision of the Supreme Court of the United States and subject always to the paramount right of Congress to control the navigation of navigable streams so far as may be necessary for the regulation of commerce with foreign nations and among the States, the exclusive sovereignty over all of the waters within the limits of the several States belongs to the respective States within which they are found, and the sovereignty over waters constituting the

boundary between two States is equal in each of such respective States; and

"Whereas it is the sense of this conference that the exercise by the United States Government of the delegated constitutional authority to control navigation for the regulation of interstate and foreign commerce does not confer upon such Government the use of waters for any other purposes which are not plainly adapted to that end, and does not divest the States of their sovereignty over such waters for any other public purpose that will not interfere with navigation: Therefore be it

"*Resolved,* That it is the sense of this conference of governors and duly authorized and appointed commissioners of the States of Arizona, California, Colorado, New Mexico, Nevada, Utah, and Wyoming, constituting the Colorado River Basin States, assembled at Denver, Colo., this 23d day of September, 1927, that:

"The rights of the States under such settled law shall be maintained.

"The States have a legal right to demand and receive compensation for the use of their lands and waters, except from the United States, for the use of such lands and waters to regulate interstate and foreign commerce.

"The State or States upon whose land a dam and reservoir is built by the United States Government, or whose waters are used in connection with a dam built by the United States Government to generate hydroelectric energy, are entitled to the

preferred right to acquire the hydroelectric energy so generated or to acquire the use of such dam and reservoir for the generation of hydroelectric energy upon undertaking to pay to the United States Government the charges that may be made for such hydroelectric energy or for the use of such dam and reservoir to amortize the Government investment, together with interest thereon, or in lieu thereof agree upon any other method of compensation for the use of their waters.

"We, the undersigned committee, to which has been referred the foregoing resolution, as presented to the conference on August 29, 1927, by Senator KEY PITTMAN, having adopted certain amendments unanimously, which are now incorporated therein, we recommend that the resolution set out above be adopted.

KEY PITTMAN,
FRANCIS C. WILSON,
WM. R. WALLACE,
CHARLES E. WINTER,
A. H. FAVOUR,
DELPH E. CARPENTER."

During debate on the third Swing-Johnson bill, Senator Pittman unqualifiedly asserted (68 CONG. REC. 4410):

"The bill does not grant any water to anyone. *The bill can not grant any water to anyone.* . . .

"Under the law which gives the States sovereignty over the water within their borders, the water can not be removed without permission of the States." (Emphasis added.)

During debate on December 11, 1928, on the Phipps amendment to section 4(a) of the fourth Swing-Johnson bill providing for the California limitation, Senator Pittman clearly stated that Congress could not impose that allocation on California without her consent (70 CONG REC. 386):

> "The Phipps amendment does not do anything else except that it states how California shall ratify. The Congress of the United States could not impose it upon California unless California assented to it, because California already has sovereign rights over the water, and the law recognizes her right to use as much as she can put to beneficial use. . . ."

Similarly, Senator Pittman made it clear in an exchange with Senator King of Utah that the terms of the tri-state compact authorization which he had successfully urged be made permissive could not be imposed on Arizona or California by Congress without the consent of those states. 70 CONG. REC. 576. See *supra* p. 17.

Representative Taylor of Colorado

Representative Taylor was a leading supporter of the Swing-Johnson bills in the House of Representatives. In testimony in 1928 during the House Rules Committee hearings on H.R. 5773, Representative Taylor asserted that there were only two ways of apportioning the waters of the Colorado River system among the seven basin states: by compact or litigation in this Court. Failing that, he asserted that the only way to assure to the upper basin states the protection they desired was to enact the Swing-Johnson proposal

providing for federal approval of the Compact upon six-state ratification, and containing the numerous upper basin amendments designed to subject the use of the proposed dam and public domain to the Compact:[2a]

> "Now, what the four upper States are afraid of is this: There are only three ways of protecting our rights. One is by an interstate agreement, authorized by Congress and consummated by the States and approved by Congress. . . .
>
> ". . . . But we have no way of coercing Arizona or Utah. They, or either of them, can prevent that agreement as long as they want to. The next way to ascertain or protect our rights would be by bringing a suit in the United States Supreme Court, which I have always favored, to have the Supreme Court adjudicate the respective water rights between these seven States. That is the orderly, honest, fair, decent, practical, just, and proper way of settling this matter.
>
> ". . . . That suit ought to be brought; the States ought to take this matter into the United States Supreme Court and have that court determine, adjudge, apportion, and allocate the division of those waters and their use by each of those seven States. But they have not agreed to that, and they will not agree to that.
>
> "So those two best ways of determining our respective rights and settling this controversy are lost and gone.

[2a] *Hearings on H.R. 5773 Before the House Committee on Rules,* 70th Cong., 1st Sess. 15, 16, 17 (1928). *Accord,* 69 CONG. REC. 9764-65 (1928). See also pp. 135-36 *infra.*

". . . . Now, there is only one other way of protecting the upper States, and the rights of the lower States, too, for the future development of the waters of that stream.

". . . .

". . . . When those seven States are unable or unwilling to come to an interstate agreement, and are unwilling to take the matter into the United States Supreme Court to settle it, then by this bill is the only other way those upper States can protect their rights; by having Congress enact a law making those lower appropriations subject to and subordinate to the conditions and provisions of an agreement that all of those States have acknowledged was a fair apportionment between the upper basin of four States and the lower basin of three States. . . ."[2b]

Opponents*

Representative Colton of Utah

During House hearings on the fourth Swing-Johnson bill, Representative Colton commented as follows on the question of federal power to allocate water:[3]

[2b]For an analysis of the upper basin's proposals to protect its apportionment under the Colorado River Compact failing seven-state ratification, which were embodied in the bill under discussion, see appendix C.

[3]*Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 414 (1928).

*The primary opposition to the Swing-Johnson proposals came from the Arizona and Utah delegations: Senators Hayden and Ashurst of Arizona, King and Smoot of Utah; Reps. Douglas of Arizona, Colton and Leatherwood of Utah. As we point out *supra* p. 10, however, Senator King voted for the bill after his amendment which became § 18 of the act was accepted. The basis of the Arizona and Utah opposition, as it related to federal approval of the Colorado River Compact with less than seven-state ratification, is discussed in appendix C *infra.*

"I have been informed that an attorney for the Reclamation Service of the United States claims that Congress has the power to allocate and apportion all of the Colorado River among the States regardless of their wishes in the matter. Such a theory is abhorrent to our whole plan of government and particularly to the theory on which our whole system of water rights has been built up."

Subsequently, during debate on the bill on May 23, 1928, he made these unqualified assertions (69 CONG. REC. 9648, 9650):

"Congress can not allocate water. . . .

". . . .

". . . . There are only two ways by which this water may be allocated—by a compact between the States and by decision of the Supreme Court."

Representative Douglas of Arizona

In his testimony in 1928 during the House Rules Committee hearings on H.R. 5773 Mr. Douglas asserted:[4]

"I think, sir, the Federal Government has no right whatsoever to go into the boundaries of a State against its will and against its laws and appropriate, either for its use or for any of its beneficiaries, or allocate the waters of that State."

Senator Hayden of Arizona

During hearings on the third Swing-Johnson bill be-

[4] *Hearings on H.R. 5773 Before the House Committee on Rules*, 70th Cong., 1st Sess. 67 (1928).

fore the House Committee on Rules in 1927, Senator (then Representative) Hayden asserted:[5]

> "Mr. HAYDEN. There are only two ways in which this controversy can be settled. Either the States can agree upon an equitable apportionment of waters of the Colorado River or, in the absence of a compact, the Supreme Court of the United States can determine what the rights of the various States are on that stream.
>
> ". . . .
>
> ". . . . Arizona denies that it is within the power of Congress to apportion the waters of an interstate stream among the States. The States themselves must do that by agreement, or it must be done by the Supreme Court of the United States. The withdrawal of the State of Utah from the six-State compact, merely emphasizes the position of Arizona that the Federal Government and any three States or four States or six States can not apportion the waters of the Colorado River. Nor can anything less than all of the seven States apportion the water in which they are all interested."

Representative Leatherwood of Utah

During hearings in 1927 on the third Swing-Johnson bill before the House Committee on Rules Mr. Leatherwood testified:[6]

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[5] *Hearings on H.R. 9826 Before the House Committee on Rules,* 69th Cong., 2d Sess. 75, 76 (1927). *Accord,* H.R. REP. No. 1657, 69th Cong., 2d Sess., pt. 3, at 1 (1927), quoted *infra* p. 41 note 10. See also *supra* p. 16.

[6] *Hearings on H.R. 9826 Before the House Committee on Rules,* 69th Cong., 2d Sess. 31 (1928). Rep. Leatherwood reasserted his views. *Id.* at 55.

"May I say here, incidentally, gentlemen, that there are only two agencies that can allocate the waters of this great river, the States themselves by treaty ratified by the Congress of the United States, or by the judicial branch of the Government; for the Congress has no power to allocate any of the waters of this river or any other river where the doctrine of prior appropriation is in force.

"Let me say again, that you may follow me, that every one of these States, if they will be true to their conviction, will tell you that they deny, and deny emphatically, that the United States Government owns and controls the unappropriated waters within their boundaries."

Rep. Leatherwood reiterated his convictions the following year during the House Rules Committee hearings on H.R. 5773:[7]

"In substance, I understood the gentleman from Colorado to say that there were but two ways by which this question of the allocation of the waters of the Colorado River could be settled, under the theory of the doctrine of prior appropriation, which we all hold the Supreme Court of the United States has never rejected; first by a compact or a contract between the States ratified by the Congress of the United States; and secondly by a decree of a court of competent jurisdiction.[8]

"That, Mr. Chairman, raises the question that has been raised before, that Congress does not

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[7]*Hearings on H.R. 5773 Before the House Committee on Rules,* 70th Cong., 1st Sess. 41 (1928).

[8](Footnote ours.) The remarks referred to are those of Rep. Taylor of Colorado, set out *supra* pp. 24-26.

have power to allocate the waters, the unappropriated waters of a stream, where the law of prior appropriation governs.

"And I still maintain that the Congress of the United States has no power to allocate these waters, and what I understood the gentleman from Colorado to say was that there were the two ways which I have referred to."

APPENDIX B

PROPONENTS AND SUPPORTERS OF THE SWING-JOHNSON BILLS CLEARLY AND CONSISTENTLY DENIED THAT THE BILLS PURPORTED TO MAKE OR TO AUTHORIZE ANY FEDERAL ALLOCATION OF WATER AMONG THE STATES

In this appendix we marshal legislative history directed to the following Arizona assertion (Ariz. Ans. Br. 35):

> "[N]o one denied that the various Swing-Johnson bills provided for a federal allocation of water among the states. The bitter cry of the opposition was that, because of this federal allocation, the bills constituted an unconstitutional invasion by Congress of the rights of the states. On the other hand, the defenders of the bills argued vigorously for their constitutionality."

The legislative history conclusively refutes Arizona's assertion. It is factually correct that the Arizona and Utah opponents of the bills did vigorously argue that the bills attempted to make an unconstitutional interstate allocation.[1] But the authors and other proponents of the bills repeatedly and consistently replied that the bills presented no constitutional questions because the bills did not purport to make or to authorize an interstate allocation of any kind. In fact, the pro-

[1]As noted in appendix C *infra*, the Arizona and Utah opponents were concerned primarily about a purported "federal allocation" imposing the interbasin allocation of the Colorado River Compact upon nonratifying states, not about any interstate allocation among Arizona, California, and Nevada.

ponents denied that Congress had any such power (appendix A *supra*).

Arizona bases her argument that Congress provided for a federal allocation upon language in section 5 which appeared for the first time in the third Swing-Johnson bill. Hence, we begin our review of the legislative history at that point.

A. The Third Swing-Johnson Bill

1. *House of Representatives*

Representative Swing introduced H.R. 6251, the third Swing-Johnson bill, on December 21, 1925.[2]

The hearings, begun on February 5, 1926, were barely underway when Representative Hayden of Arizona sounded the keynote of the Arizona theme in opposition to the bill:[3]

> "The bill, in its latest form, however, is based upon the fallacious idea that Arizona can be absolutely ignored; that my State has no rights which must be recognized.
>
> ". . . .
>
> "Then there is another question which to my mind is of much greater importance that will also have to be decided by the Supreme Court; the question of the jurisdiction of the States over appropriations of water within their limits. I doubt very much whether Representatives in Congress

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[2]H.R. 6251, 69th Cong., 1st Sess., is Calif. Ex. 196 (Tr. 7709). On February 27, 1926, Mr. Swing introduced H.R. 9826 (Calif. Ex. 197, Tr. 7760), containing a revised financing plan.

[3]*Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. 15, 16 (1926).

from the arid West, where the doctrine of riparian rights does not and has never prevailed, will be in any hurry to accept the theory of this bill that Congress can make appropriations of water; that Congress, without the consent of the State, can take water for beneficial use for power or irrigation or other purposes.

"Mr. LEATHERWOOD. Without the consent of the State?

"Mr. HAYDEN. Not only without the consent of the State but utterly ignoring the State, yet such are the terms of this bill. It represents the first attempt to pass legislation by Congress whereby the Federal Government is assumed to have that power.

"Members of Congress from the West have always contended that the United States has no jurisdiction over appropriations of water for irrigation, power, or other uses. There is no law upon the Federal statute books asserting such a right, and Congress has in many instances declined to interfere with the laws of any State relating to the appropriation, use, or distribution of water. Two good examples of an acknowledgement that the States, and the States alone, have control over appropriations of water are to be found in the reclamation act and the Federal water power act.

"Jurisdiction over appropriations of the waters of streams is one of the highest attributes of sovereignty in the States of the arid region. Water to them means life. Their entire future is bound up in its conservation and beneficial use. To strip

them of their exclusive control over it by a transfer of authority to the Federal Government would leave the States of the West a mere aggregation of dependencies subject to the whims of Congress controlled by a majority membership from States where the value of water for irrigation is little known and slightly appreciated.

"I am sure that the serious minded Congressmen from the West will not fail to realize that the passage of a law which denies the right of Arizona to control appropriations of water within her borders would be but the first step toward the nationalization of every stream where the Federal Government may desire to take charge. Self protection will compel every one who is jealous of the rights of his State to oppose the adoption of so far reaching and such an evil precedent. After the Colorado River is nationalized, what river in the West will next be arbitrarily taken over from the States?"

Representative Leatherwood of Utah, who was to become an opponent of the bill, urged that Mr. Hayden's position as to the bill's purported assertion of overriding federal authority presented a question "to which every member of the committee, every western representative who hails from a Simon-pure appropriation State, should give very careful consideration and study."[4]

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[4] *Id.* at 19. The committee numbered 11 western Representatives among its 17 members: Chairman Smith (Idaho), and Congressmen Sinnott (Oregon), Leatherwood (Utah), Leavitt (Montana), Winter (Wyoming), Swing (California), Arentz (Nevada), Hayden (Arizona), Hudspeth (Texas), Hill (Washington), and Morrow (New Mexico). *Id.* pt. 1, facing p. 1.

Dr. Elwood Mead, Commissioner of Reclamation, was the first witness. During his testimony in support of the bill, Representative Sinnott of Oregon asked Dr. Mead to state his "position towards the views advanced by Mr. Hayden as to the rights of the State."[5] We set forth Dr. Mead's reply and the ensuing colloquy in which the basic conflict between the views of Mr. Hayden, representing the Arizona opponents, and Mr. Swing, author of the bill, as to the effect of Mr. Swing's bill is presented:[6]

> "Doctor MEAD. As far as the bill is concerned, I do not see where this bill treats Arizona any differently from Nevada and California, the three States that are concerned. They are all on the Colorado. What Mr. Hayden speaks of there is, as he states—it is a difficult question, and it is a question that I think is unsettled, as to just what are the respective rights of the State and the Federal Government in determining a matter of this kind. Here is the State of Arizona with a certain kind of water law. Here is the State of California on the other side, or Nevada, with a different water law, and there must be some way to reconcile and adjust this matter.
>
> "Mr. LEAVITT. They all have the principle of appropriation, do they not?
>
> "Mr. ARENTZ. But the Government does not.
>
> "Mr. HAYDEN. The theory of the bill—and it is perfectly plain—is that whatever the water law of Arizona or California or Nevada may be, the

[5] *Id.* at 31.
[6] *Id.* at 32.

United States proposes to commence this construction and prosecute it regardless of State law.

"Mr. SINNOTT. But to distribute the water equally between you.

"Mr. HAYDEN. There is no proposal in the bill for an equal distribution of water between the States.

"Mr. SINNOTT. The doctor says you are all treated the same.

"Mr. HAYDEN. The bill provides that the distribution of water shall be as the Secretary of the Interior may arrange by contracts. It is entirely in his hands.

"Mr. SWING. *But the distribution will either be by agreement between the States or under their respective laws, as they may avail themselves.*

"Mr. HAYDEN. No; the bill states that the Secretary may make any kind of contract with anybody he pleases, to furnish water at any place.

"Mr. SWING. Other things being equal, Arizona is treated equally here. Those that are on the same footing are treated equally, are they not?

"Mr. HAYDEN. The bill absolutely ignores the water laws of all three States. In that sense Arizona, Nevada, and California are on an equality."

Mr. Hayden refused to accept Mr. Swing's explanation that the distribution of water from the project would "either be by agreement between the States or under their respective laws, as they may avail them-

selves," a position later amplified by Mr. Swing's assertion that his bill did not authorize the Secretary to create water rights and that any rights acquired under the project would derive from beneficial use in accordance with state law. See *infra* pp. 42-43, 55-57.

Later in the hearings, an amendment to the bill was proposed to add what is now the last sentence of the first paragraph of section 5 (Rep. app. 385):

> "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

That sentence is improperly relied upon by the Master and the other parties to prove that the Project Act imposed a federal allocation upon the "mainstream" waters. It was an upper basin amendment, presented and explained to the committee (and to Mr. Hayden of Arizona, in particular) by Delph E. Carpenter, the upper basin spokesman. That explanation, which conclusively disproves the Master's construction, is as follows:[7]

> "Mr. HAYDEN. The purpose of this amendment is that no person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.
>
> "Mr. CARPENTER. 'Except by contract made as herein stated' means this: If the flow of the Colorado River is controlled and regulated by the construction of the Black Canyon Dam, and any per-

[7] *Id.* at 163.

son in the State of Arizona attempt to take any water out of the stream which has been discharged from the reservoir and is being carried in the stream bed, as a natural conduit, for delivery to lower users, this law would be brought into effect and he would be prevented from using any of that water independent of the Colorado River compact but unincumbered by any other condition for the benefit of California and Nevada. In other words, the compact does not disturb the rights between Arizona, California, and Nevada, *inter sese,* as to their portion of the water.

"Mr. SWING. The water which is stored by the Government at its own expense would be disposed of by contract as provided in this bill. There should be that privilege given Arizona to secure water on the same terms as is afforded to Nevada and California.

"Mr. HAYDEN. How tight would you tie Arizona?

"Mr. CARPENTER. *The thought of this amendment* is that any water stored in this reservoir under the terms of the compact, when released from storage shall be burdened by the compact wherever it goes. As far as water is concerned, existing claims of the lower States are protected by the compact. Water must pass through this reservoir to take care of the present existing lower claims.

"As to future development from the main river, we insist that water stored in this structure by the United States be stored and released upon the express condition that the persons who receive the

water shall respect and do so under the compact. *It has nothing to do with the interstate relations between Arizona and California.*" (Emphasis added.)

When Mr. Carpenter concluded that "it has nothing to do with the interstate relations between Arizona and California," he meant "it" to refer to "the thought of this amendment" adding the last sentence to the first paragraph of section 5.

Neither the Master nor the United States attempts to explain this legislative history; each argues only on the basis of the language of the sentence. Rep. 151; U.S. Ans. Br. 27. Arizona, however, asserts that by "it" Mr. Carpenter meant only to refer to the Colorado River Compact. Ariz. Ans. Br. 31. Arizona is only partly correct. Mr. Carpenter would have said, had he written out his statement: *"Our amendment (the last sentence of the first paragraph of section 5), which would subject all uses of stored water to the Colorado River Compact and thus afford some measure of protection to the upper basin's Compact apportionment against a non-ratifying Arizona,* has nothing to do with the interstate relations between Arizona and California." Our emphasized interpolation identifies what, from the context, Mr. Carpenter meant by "it."

Mr. Carpenter made equally clear that the proposed amendment to section 5 was designed to protect the upper basin's allocation under the Colorado River Compact, and was not to supplant interstate agreement as the basis for resolution of any controversy in the lower basin:[8]

[8] *Id.* at 161, 164-65.

"That amendment is proposed by the upper States for the fundamental reason I assigned at the outset of my statement to-day, which is that we insist that no use occur by reason of this structure which may later be said to be independent of the compact and be asserted as adverse to the upper States. . . .

". . . .

". . . . Her [Arizona's] quarrel is not with the upper States, but is a fear of future conditions between herself and California. It is a local situation. Under the compact we make no attempt to allocate between those three lower States. We allocate to the lower group so much water. We do the same with the four upper States.

"In the upper country we had a controversy between New Mexico and Colorado over the La Platte [Plata] River. We settled that by a local **[165]** compact entered into immediately after and in harmony with the main compact. It is intended that these local problems, involving only two or more States, shall be settled by supplemental compacts. And so here we would leave to Arizona, California, and Nevada, the disposition of the water given to the lower basin under the Colorado River compact."

Arizona asserts that "much has been omitted from California's version of Mr. Carpenter's testimony which makes clear his recognition that § 5, even as it then stood, authorized the Secretary to contract for the delivery of stored water *regardless of any alleged prior appropriative rights.*" Ariz. Ans. Br. 31-32. (Emphasis

added.) We treat that argument in appendix D *infra* pp. 108-11.

Throughout the hearings Mr. Hayden adhered to his contention that the bill was an assault on the rights of the states, particularly Arizona, to control the unappropriated waters within their borders.

However, the bill was favorably reported out by the committee on December 22, 1926, by a vote of 12 to 3.[9] Representative Hayden submitted his minority views on January 12, 1927, reiterating his opposition to the bill for, among others, substantially the same reasons urged before the committee.[10]

The House Rules Committee held three days of hearings on the bill on January 20-22, 1927, receiving testimony from the proponents and opponents of the meas-

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[9]H.R. REP. No. 1657, 69th Cong., 2d Sess., pt. 1 (1926); 68 CONG. REC. 2633 (Rep. Swing); *id.* at 3076 (Rep. Smith).

[10]H.R. REP. No. 1657, 69th Cong., 2d Sess., pt. 3, at 1 (1927):

"On behalf of the State of Arizona I recommend that the bill H.R. 9826 do not pass for the following reasons:

"1. The bill violates the law, as established by the constitutions or laws of all of the States of the arid West, and the consent of Congress, that the right to appropriate water for irrigation, power, and other beneficial uses shall be obtained from the State and not from the Federal Government. For the first time in the history of Federal irrigation and water power legislation Congress by this bill proposes to assert the right of the United States to appropriate water for the generation of hydroelectric power and for irrigation and domestic purposes regardless of State law. The avowed object of the bill is to use the power of the Federal Government to seize the waters of the Colorado River in defiance of the State of Arizona.

"2. It is not within the power of Congress or the legislatures of the six States to divide and apportion the waters of the Colorado River and its tributaries in which seven States are interested, as proposed in this bill. Such apportionment or allocation of the waters of an interstate stream can only be accomplished by a decision of the Supreme Court of the United States or by a complete agreement among the seven States and the United States."

ure. Representative Hayden and Representatives Leatherwood and Colton of Utah led the opposition. Representative Swing's statement in support of the bill met the opponents' objections head on. Here is how he explained the effect of his bill on interstate water rights as among Arizona, California, and Nevada:[11]

> "On the question of Arizona's rights in and to the water of the river, let me say that the Government is not undertaking to create or to assert or to deal in or to dispose of water rights. It proposes to go in and construct a dam and store water for reasons which have been set out, and then it turns the water loose. The Secretary's power, as given by this act is not to sell water. The act says 'The Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water.' Whose water? It does not say. It might be a community like Imperial Valley that has already acquired a water right, and wants its water stored, or it may be someone who hereafter will acquire a water right, but that right will not be acquired under this bill; not from the United States Government. He will acquire his water right, if he acquires one, from the State and under the laws of the State, in which he puts the water to a beneficial use. There is nothing in this bill which puts the Government in conflict with the water laws of Arizona or Utah or any other State. As a matter of fact, the reclamation law is adopted by section 13 [now 14] of this bill, and

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[11] *Hearings on H.R. 9826 Before the House Committee on Rules,* 69th Cong., 2d Sess. 116 (1927).

section 8 of the reclamation act says that what the Government does must not be in conflict with the water laws of the States, so there can be no violence done State laws on this score.

"If the water is used in Arizona, the water right must be acquired under the laws of Arizona; if in Nevada, under the laws of Nevada; if in California, under the laws of California."

Representatives Hayden and Leatherwood renewed their arguments during debate on the bill while it was still before the Rules Committee. On February 5, 1927, Mr. Leatherwood explained why Utah had rescinded her ratification of the Compact on a six-state basis, stressing his fear that the bill's purported attempt to "allocate" the waters of the basin by approving the Compact without seven-state ratification was invalid and hence could not adequately protect Utah's interests (68 CONG. REC. 3065):

"Mr. PERKINS. Will the gentleman tell us why Utah withdrew from the compact?

"Mr. LEATHERWOOD. Yes; if the gentleman will follow me I think he will get an answer from my remarks, and if I do not cover the matter fully I will be glad to yield later; but, briefly, we withdrew from the compact because it was sought to put this legislation through Congress and accomplish all that our sister State of California wanted, and by so doing and with only a six-State compact we would be left at the mercy of any State that failed to ratify the agreement, and under the law applicable to the appropriation of unappropriated waters in those western streams

any appropriation made by a State in the lower basin not bound by the agreement would create a priority as against my State and the other upper-basin States in the compact. Briefly, that is why we withdrew. . . .

". . . .

"It should be clearly understood that in the absence of consent on the part of the States to Federal control of the waters to the extent here proposed there is no power in the Congress to exercise that control. The rights of the seven States in the waters of the Colorado River can only be finally determined by the Supreme Court of the United States.

"May I say here, gentlemen, that you must bear in mind that there are only two sources from which an allocation of the unappropriated waters of these western streams can be had; one by the States themselves entering into a voluntary agreement or treaty by and with the consent of the Congress; and the other through a court of competent jurisdiction. But Congress has no power to allocate the waters of one of these western streams where the doctrine of prior appropriation applies. Action by Congress at this time would only result in forcing this issue into the Supreme Court."

Representative Smith of Idaho, chairman of the reporting committee, rose in response to Mr. Leatherwood's remarks. In answer to a question from Mr. Hayden, Mr. Smith clearly asserted that the bill did not purport to divide the waters of the river or make any kind of federal allocation (*id.* at 3076):

"Mr. HAYDEN. *Does the gentleman believe it is within the power of the Congress of the United States to divide the waters of the Colorado River or any other river by definite allocations to the States?*

"Mr. SMITH. *We are not trying to do that.* We propose to let the States agree among themselves, if possible; but the Federal Government certainly has the right to construct a dam on its own property upon a stream which is not navigable without the consent of either of the States. Otherwise, the Federal Government would have to acknowledge that it is not superior to the States.

"Mr. HAYDEN. Does not this bill propose to ratify on the part of Congress an allocation and apportionment of waters amongst the States?

"Mr. SMITH. Absolutely not; except as between the upper basin States and the lower basin States.

"Mr. HAYDEN. The States have not yet agreed upon that, and is it within the power of the Congress to make that kind of division when the States do not agree?

"Mr. SMITH. I think it is competent for Congress in advance to consent to the States so agreeing, and it is certainly competent for Congress to provide that the United States shall be subject to the provisions of this compact.

"Mr. HAYDEN. That is exactly what the situation is.

"Mr. SMITH. There is one thing I can not understand. If the gentlemen opposed to this legis-

lation think their position is so well taken and can be so ably fortified, why do they not allow this bill to come up on the floor of the House? When we had the special rule under consideration before the Committee on Rules to give this bill a privileged status on the floor of the House of Representatives, whom did we find there opposing it? *Only the gentleman from Utah* [Mr. LEATHERWOOD] *and the gentleman from Arizona* [Mr. HAYDEN]. *They were the only two Members from the entire western country who are opposing the bringing out of this bill.*

"We feel very confident of our position, and we believe if the bill is brought out on the floor of the House of Representatives the Members are capable of weighing all the arguments, and we are sure that the conclusion you will reach will be a wise one. In any event that is our manner of enacting legislation. When there is a controversy over measures they are brought into the open House, and arguments are presented for and against, and a conclusion reached by a vote. *But for two men to attempt to prevent the Committee on Rules from bringing out this piece of legislation supported by practically all the people in the western country is unfair and unreasonable.* [Applause.]" (Emphasis added.)[1]

In further response to the Hayden and Leatherwood arguments, Mr. Swing inserted his statement before the Rules Committee in the *Congressional Record*,[2] which

[1]See *supra* p. 34, referencing Rep. Leatherwood's admonition to all western Representatives to resist the bill's purported encroachment on western water law.

[2]68 CONG. REC. 3082-88 (1927).

included his explanation that "the Government is not undertaking to create or to assert or to deal in or to dispose of water rights" and that, under the reclamation law adopted by the bill, all water rights would be acquired under the laws of the state in which the water was put to beneficial use.[3]

On February 8, 1927, Representative Winter of Wyoming spoke in support of the bill.[4] With obvious reference to the Arizona arguments, Mr. Winter asserted that a federal-state controversy was nonexistent, since Congress was only exercising its recognized control of the public lands to subject subsequent Arizona uses to the Compact (68 CONG. REC. 3292, 3294):

> "It is impossible in 15 minutes or 50 minutes to begin an attempt to cover this subject. I am therefore going to try to cover but a few outstanding features of the situation.
>
> "It has been said that this bill presents to the Congress and to the country two new radical propositions, the first one being that it involves the country in Government ownership and operation of a public utility, more particularly referring to the power element; and the other proposition is that it is an attempt to extend Federal authority over rights and realms that have been recognized up

[3] *Id.* at 3087.

[4] Mr. Winter was a member of the committee which held hearings on the bill. See p. 34 *supra* note 4. In response to Mr. Hayden's views on the bill, he had stated that Wyoming would stand "on the rights of the State to control the waters within its boundaries and shall insist upon the necessity of securing the consent of the State in any appropriation thereof." *Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. 20 (1926). After hearing the arguments of the Arizona and Utah opponents, he had nevertheless voted to report the bill.

to this point as State rights, involving, of course, the interstate-commerce clause of the Constitution and the relative rights of the States and of the Federal Government to a navigable river and the uses of its water.

". . . .

"Regardless of the theories of State rights as to the bed of the stream and control of the use of the water of this stream by the States, it being navigable, with which I agree, the Government controls the public lands above high-water mark, where the dam will be built and the land flooded by a storage of the water, and the public lands over which the canals must run to divert the water around the dam for power, or to distant areas for reclamation in California and Arizona. Hence, the Government can require Arizona, before she perfects any water rights, even though she is out of and not bound by the compact, to conform therewith, which means that the rights of the upper States to their equitable division of the water will be protected. . . .

". . . .

". . . . Under this, whether the Government has a proprietary interest in the water or not, it is enabled to control the way and the extent to and in which the Government land in Arizona may be used for the purpose of storing water thereon or transporting it thereover."

The House Rules Committee granted the bill a rule on February 23, 1927,[5] but the Congress adjourned

[5]H.R. REP. No. 2212, 69th Cong., 2d Sess. (1927).

shortly thereafter without any action having been taken on the measure.

2. *Senate*

Senator Johnson introduced S. 1868 on December 21, 1925.[6] No hearing was held on that bill, presumably because the Senate Committee on Irrigation and Reclamation, at the direction of the Senate, had concluded extensive general hearings on Colorado River basin problems the day after the bill was introduced.[7]

Senator Johnson favorably reported his bill from the Senate Committee on Irrigation and Reclamation on April 24, 1926.[8] The vote was 12 to 3, Senators Ashurst and Cameron of Arizona, and Phipps of Colorado, opposing the bill.[9] Senator Ashurst filed minority views.[10] However, the first session of the 69th Congress ended without any action having been taken on the bill. Following the reconvening of Congress for the second session in December 1926, the bill met with determined Arizona resistance. Senator Johnson, asserting that he believed the Arizona opposition "not to be well founded at all" (68 CONG. REC. 4228), answered the Arizona argument that the bill authorized a "federal allocation" invading Arizona's sovereign interests in the waters of the system. Speaking in support of

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[6]S. 1868, 69th Cong., 1st Sess., is Calif. Ex. 2054 for iden. (Tr. 11,177). On February 27, 1926, Senator Johnson introduced S. 3331 (Calif. Ex. 198, Tr. 7760), containing a revised financing plan.

[7]*Hearings Pursuant to S. Res. 320, 68th Cong., 2d Sess., Before the Senate Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. (1925).

[8]S. REP. No. 654, 69th Cong., 1st Sess., pt. 1 (1926).

[9]67 CONG. REC. 8020 (1926).

[10]S. REP. No. 654, 69th Cong., 1st Sess., pt. 2 (1926).

the bill on February 21, 1927, he stressed that the Arizona assertions were groundless (*id.* at 4290-91):

> "It is utterly erroneous to assert that there is any endeavor by this measure, sir, to take anything that belongs to the State of Arizona or to interfere in any degree with the **[4291]** laws of Arizona or the property to which Arizona may claim title. State rights are as far from this bill as is the transit of Venus itself; that doctrine has no more relation to the particular matter than any other irrelevant or any other detached proposition. The property of Arizona is taken by this bill not at all; rights of Arizona are invaded not in the slightest degree by this measure; and when the Senator from Maryland [Mr. BRUCE] asked the other evening of the Senator from Arizona if it is not a fact that California proposes to take Arizona's water without her consent, and the Senator from Arizona answered quickly that is the fact, both were absolutely and wholly in error, for this measure does not in the slightest degree impinge upon the rights of the State of Arizona; nor does California propose by this bill to take any water or anything else that belongs to Arizona of any kind or of any character at all. I can not overemphasize this fact, and a reading of the measure and an understanding of the situation and the law will demonstrate that I am entirely accurate in the assertion that I make. This bill is in accord with the constitution of the State of Arizona; it follows the enabling act of Arizona; it follows the reclamation law from which Arizona has derived so much benefit so generously extended by the United States of America; and it

does naught of any kind or of any character at which Arizona really can cavil or concerning which Arizona can in the slightest degree complain.

". . . .

"Under this bill, sir, we make the entire project a part of the reclamation law. This is a reclamation measure; and by section 13[11] of the bill it is distinctly provided:

> This act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided.

"The very first section to the act provides for what purposes the act is presented and what are its designs. The act itself says:

> That for the purpose of controlling the floods and regulating the flow of the lower Colorado River, providing for storage and delivery of the waters thereof for reclamation of public lands and other beneficial uses within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior is hereby authorized—

"And so forth.

"First, we provide for flood control and river regulation.

"Secondly, we provide for irrigation and domestic use.

"And, thirdly, after providing for these, we provide for the byproduct of the bill—power out of which the project may be paid for.

"I repeat to you that this is a reclamation measure, made so by section 13 of the bill. Adverting,

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[11] (Footnote ours.) This provision is now § 14 of the Project Act. Rep. app. 394.

then, to section 8 of the reclamation law, let us see how much there is in this statement that is made about appropriating the water of Arizona and taking the property of that State.

"Section 8 of the reclamation act provides:

> That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

"So, first, our act is a reclamation act.

"Secondly, under the reclamation law we can no more affect the rights of Arizona in the waters that flow through Arizona than we could affect the title of any Arizona resident to any particular property. In passing, I may remark that it is entirely a misnomer to say that Arizona or any other State in the West, after all, has title to water. Under western law, the appropriator of water has a title to the use when the application is beneficially made of the water that he thus appropriates; but to talk of title of the State to water is entirely a misapprehension and misapplication of terms."

Senator Pittman later pointed out to the Senate that the bill could not make an allocation of water to any state and did not purport to do so (68 CONG. REC. 4410, 4412):

> *"The bill does not grant any water to anyone. The bill can not grant any water to anyone.* It

does make the water in existence available for irrigation and power, because it provides for the storage of the flood waters for use in irrigation during the irrigation season.

"Under the law which gives the States sovereignty over the water within their borders, the water can not be removed without permission of the States. But of course a peculiar situation is met where there is a river forming the dividing line between two States. In such case both States have an equal sovereignty in the water running between them, each of them, possibly, to the middle of the river. But how can one of them control the amount of water the other may take out of that river? California may take out of the Colorado River all the water that has not been appropriated when the river reaches a point in California, and so Arizona may, on its side of the river, take out of the river all the water that has not been appropriated.

". . . .

"Mr. KENDRICK. I desire to ask the Senator whether he believes in case this bill should be enacted into law and Arizona should remain out of the compact, as she is out of the compact at the present time, that it would in any way adversely affect her rights to her water in the Colorado River or its tributaries?

"Mr. PITTMAN. *It would not do so in the slightest degree. I have no doubt about it.* If a dam shall be built at Boulder Canyon it will impound certain waters and equate the flow be-

low. The water below will be subject to appropriation and use by both California and Arizona, and Arizona, according to the evidence, can use water for 298,000 acres by gravity, and she can irrigate 600,000 acres additional by pumping; that is all; and in California there can be an additional three hundred or four hundred thousand acres irrigated. That is all.

"Mr. KENDRICK. In other words, the compact between the States which ratified deals only with such equities as the respective States have in the water and will not interfere in any way whatsoever with the right of those States which failed to ratify?

"Mr. PITTMAN. *In other words, there is nothing in this proposed legislation that could prevent Arizona from appropriating from the Colorado River within her borders all of the water she could use for irrigation.*" (Emphasis added.)

However, because of the parliamentary maneuvers of the Arizona Senators, capped by a successful filibuster just before adjournment,[12] the Swing-Johnson bill was not acted on by the Senate in the second session.

B. The Fourth Swing-Johnson Bill

1. *House of Representatives*

The fourth Swing-Johnson bill, H.R. 5773, was introduced by Mr. Swing on December 5, 1927.[1] During the hearings on the bill in January 1928, Arizona and Utah renewed their opposition to the bill.[2] Ari-

[12]68 CONG. REC. 4896-900 (1927).

[1]Calif. Ex. 200, Tr. 7712.

[2]Arizona was now represented in the House of Representatives by Lewis W. Douglas, succeeding Mr. Hayden who had been elected to the Senate.

zona's position was again put before the committee by Mulford Winsor, representing the Colorado River Commission and Governor Hunt of Arizona.[3] During Mr. Winsor's presentation, Representative Swing reiterated his assertions that his bill neither created water rights in any state nor authorized the Secretary of the Interior to do so, and that any water rights acquired under the act would "only come into existence by reason and under and by virtue of the laws of the State in which the water is put to beneficial use":[4]

> "Mr. SWING. May I ask, as to the item with which you have just gotten through, that the appropriation laws of the State of Arizona shall govern the water rights within the State of Arizona. If I should give it as my interpretation of this bill that the Secretary of the Interior here is not authorized to deal in water rights, that this law does not undertake to create water rights for the Secretary to sell, nor does it undertake to sell water or water rights, but that he merely contracts for the service of storing water, perhaps for the benefit of communities that now have a right already acquired, [57] based upon beneficial use; or if a right is to be hereafter acquired under this bill, as I interpret it, it must be acquired under the appropriation laws of the State in which the water benefits are to be used, I do not see where there is any violation of the No. 3 point that you have now made.

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[3] *Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 19-86 (1928).

[4] *Id.* at 56-58.

"Mr. WINSOR. Yes; the right of the State to control the appropriation, use, and distribution of water within the State, coupled with the other rights that the States have as to the ownership of the lands over which navigable waters flow, undoubtedly would be violated.

"Mr. SWING. *The water rights that are already in existence are created under and by virtue of the water laws of the States in which the water is being used, and that will still be true under this bill as to any future water rights hereafter acquired. The water right itself can only come into existence by reason and under and by virtue of the laws of the State in which the water is put to beneficial use.*

"Mr. WINSOR. It is your theory, then, that if the Secretary of the Interior, under the provisions of this law, should store all of the waters that are allocated by the compact to the lower-basin States, that then, without any violation of the rights of the State, California under California law could appropriate all of that water so stored and made available to the lower-basin States? Is that your theory?

"Mr. SWING. *My theory is this: That the water after it is stored by the Secretary of the Interior is equally available on identical terms for use by the citizens in any State, whether it is Arizona, Nevada, or California, and that their water rights from this reservoir or from the stream after the water is let out of the reservoir is acquired solely and only by virtue of the water laws in the State where it has to be put to use.*

"Mr. WINSOR. And it would be put to use in the State of California.

"Mr. SWING. Or Arizona or Nevada, yes.

"Mr. HUDSPETH. Would that mean, Mr. Swing, the waters impounded?

"Mr. SWING. Yes.

"Mr. HUDSPETH. Then Arizona could control all the water, couldn't they? Isn't the dam in Arizona?

"Mr. SWING. Between Arizona and Nevada.

"Mr. HUDSPETH. I thought it was in the State of Arizona.

"Mr. WINSOR. No, Mr. Swing's idea is that after the water is stored in Arizona and Nevada, and flows on down the river, it might thereafter be appropriated, all of it appropriated by the State of California under California water laws, and thereby not violate the right of the States to control the appropriation of water, as I understand it.

"Mr. HUDSPETH. I did not so understand him. I understood him this way, that the water that flowed through Arizona, Arizona would have its proportion under its laws.

"Mr. WINSOR. Of course, the theory that Mr. Swing has advanced, as I understand him, sets forth the very situation that Arizona is afraid of.

"Mr. SWING. Well, there is nothing in the bill that you know of, is there, which would prevent you from taking water, getting water [58] from the Secretary of the Interior and from this reservoir on identically the same terms that the citizens of any other State do?" (Emphasis added.)

The committee favorably reported the bill on March 15, 1928.[5] Representatives Douglas and Leatherwood subsequently submitted minority views.[6] Mr. Douglas reiterated the Arizona contention that the bill was an unconstitutional attempt to impose the Compact on Arizona without her consent and thus nullify Arizona's right to control the use and appropriation of water within her boundaries.[7] Mr. Leatherwood also asserted that the bill provided for a federal allocation of the waters of the basin which was beyond the power of Congress.[8]

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[5]H.R. REP. No. 918, 70th Cong., 1st Sess., pt. 1 (1928).

[6]*Id.* pts. 2 (Douglas) and 3 (Leatherwood).

[7]*Id.* pt. 2, at 39:

"The Swing-Johnson bill in its ratification of the six-State compact and in its elimination of the State of Arizona completely ignores and nullifies the well-established doctrine that a State has the right to control the use and appropriation of water within its boundaries, at least in so far as the State of Arizona is concerned.

"The Swing-Johnson bill, in effect, then proposes to transcend the Constitution in that it provides for legislation by six States and the Federal Government for a seventh State antagonistic to such legislation. I contend that six States can not constitutionally so legislate."

[8]*Id.* pt. 3, at 30, 31:

"It is often represented that this bill has as one of its purposes the completion of the Colorado River compact, yet the bill undertakes to provide that the United States may proceed with the construction of this dam and reservoir when six of the seven States have ratified this interstate compact. In other words, it undertakes to impose this inchoate contract upon a State which has not agreed to it, if and when the other parties thereto have agreed. That this is beyond the power of the Congress of the United States must follow from the fact that it does not control the Colorado River for any such purpose.

". . . .

"Once this bill is enacted into law, Congress has declared that it has the right and power to allocate the waters of the Colorado, to determine how they shall be divided between the States, and to what use they shall be put. . . ."

On April 24 and May 2, 1928, the House Rules Committee held hearings on H.R. 5773.[1] Representatives Leatherwood and Douglas restated their objections to the proposal to approve the Compact without Arizona's ratification, contending that this purported "federal allocation" was invalid.[2]

On May 15, 1928, the Rules Committee favorably reported H.R. Res. 208, providing for eight hours of general debate on H.R. 5773 to be divided equally between opponents and proponents of the bill.[3] The res-

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[1]*Hearings on H.R. 5773 Before the House Committee on Rules,* 70th Cong., 1st Sess. (1928).

[2]Mr. Leatherwood explained his position as follows (*id.* at 44):

> "The question, and the serious question which arises in this case, is whether a less number than all of the States in the basin can by contract settle any of the rights of the nonratifying State, assuming that the doctrine that the States own and control the unappropriated waters of the river, is the law of the land out there. We contend that it is, and it never has been set aside by the courts. In other words, I contend that this bill could not traffick or barter away or in any way bind a nonratifying State as to its rights in the river, and that a lesser number as between themselves might bind themselves but could not traffick in the property in which the nonratifying State has a common interest."

Mr. Douglas agreed (*id.* at 65, 67):

> "If you, and you must concede that States have control over, with the exception of the constitutional authority of the Federal Government to regulate commerce, and are sovereigns of the unappropriated waters flowing within their boundaries, then, Mr. Chairman, you must, and the members of this committee must, conclude that the Federal Government in conjunction with six States, can not allocate waters among seven, and yet, Mr. Chairman, that is exactly what this bill in effect would do. It contemplates a ratification of a 6-State Colorado River compact to which 7 States are parties, but to which only 6 are signatories.
>
> "
>
> . . . .
>
> "I think, sir, the Federal Government has no right whatsoever to go into the boundaries of a State against its will and against its laws and appropriate, either for its use or for any of its beneficiaries, or allocate the waters of that State."

[3]H.R. REP. No. 1666, 70th Cong., 1st Sess. (1928).

olution was agreed to on May 22, 1928,[4] and the bill came on for debate.

On May 23, 1928, Representative Douglas spoke at length in opposition to the bill. 69 CONG. REC. 9623-35. At the outset of his speech, he restated the Arizona argument (*id.* at 9623):

> "That is the project which this bill authorizes. In addition, and as a separate and distinct part of the legislation, there is a provision for the ratification of a compact allocating waters between seven States and to which seven States are by the terms of the compact woven into the fabric of the compact upon the ratification of but six of the seven States.
>
> "The bill further provides for congressional amendments of State water codes. Further than that, it vests in the Secretary of the Interior complete and absolute control over the waters of the Colorado below Boulder Dam.
>
> "The compact phase of the measure could be adequately taken care of by a resolution or an act providing for ratification. I point out to Members of the House that there are two very distinct and separable portions of the bill, the first providing for the construction of the project, and the second dealing with allocation of waters as between States."

Representative Swing responded to Mr. Douglas' long and detailed speech as follows (*id.* at 9635):

> "I only wish I had the time to go fully into each and every one of the contentions made by the gentle-

[4] 69 CONG. REC. 9486, 9490.

man from Arizona.[5] They ought to be answered. They can be answered. They have been answered in the investigations made of the project and in the hearings held on this bill."

With respect to the Arizona argument concerning the purported allocation made by the bill, Mr. Swing's obvious reference was to refutations of this argument by himself and other proponents during the recently concluded hearings as well as in hearings and debates in the previous session (*e.g., supra* pp. 36, 42-43, 44-45, 50-54, 55-56). Further refutations followed.

Representative Colton of Utah then spoke at length in opposition to the bill, asserting that Congress lacked the power to allocate water and that he viewed the Swing-Johnson proposal as an attempt to accomplish that end. Representatives Bankhead and White[6] both responded that the bill did not purport to make any such allocation (69 CONG. REC. 9648-49):

"Mr. COLTON. . . . So that when you say that the Government of the United States owns and controls waters within that State, can not you see that you strike at the very basis of our industrial life? You are saying that you are going to

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[5](Footnote ours.) A substantial part of the proponents' four hours under H.R. Res. 208 had expired. 69 CONG. REC. 9491-99, 9506-09, 9510-13.

[6]Mr. Bankhead supported the measure and voted for the bill. 70 CONG. REC. 837.

Mr. White was a member of the committee which considered the fourth Swing-Johnson bill (*Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess., pt. 1, at II (1928)) and which reported favorably on the bill. H.R. REP. No. 918, 70th Cong., 1st Sess., pt. 1 (1928). He spoke in favor of the bill (69 CONG. REC. 9781) and voted against a motion to recommit, which would have defeated it (*id.* at 9989). He voted for the bill (as amended by the Senate), which became the Project Act. 70 CONG. REC. 837.

take it away from the States and place it in the Federal Government, and section 5 of this bill asserts that very principle. It provides that the Secretary of the Interior shall have control of all of the water stored in the reservoir and its delivery to any part of the river below. We deny that in principle and say it is against the very contract that this country has entered into with our Western States and contrary to the decisions of the United States Supreme Court.

"Mr. BANKHEAD. *As I understand, the whole theory of this bill is predicated on the recognition of the right that the gentleman is now asserting, for the reason that nothing can be done by Congress under this bill until the States acting through this compact shall determine what their respective rights are in reference to this matter.*

"Mr. COLTON. I will answer in this way: If the gentleman from Alabama were stating the proposition correctly, there would not be the slightest objection to this bill other than from the engineering and economic standpoint. I feel sure that it is not fully understood. We do not get full protection under this bill, for there is no seven-State compact. Arizona is not a party at all to this compact.

"She and her citizens may appropriate water at any time.

"Mr. DOUGLAS of Arizona. Arizona is a party to it, but Arizona has not ratified it.

"Mr. COLTON. Yes. The gentleman's statement is more accurate. Arizona can grant applications for water if my theory is correct, and

her citizens can acquire rights by prior usage to every bit of water belonging to the upper States. There is absolutely no protection against her and her citizens. The gentleman from Alabama [Mr. BANKHEAD] has stated the principle for which Utah is contending. We have been pioneers in the development of the Colorado River. We are anxious to see California prosper. This development, however, must not be made at the injury and expense of other States.

". . . .

". . . . And then this question is in my mind: Can Congress at this late date set aside the doctrine of first in use, first in right? Therefore, I say it is a serious question for us to allow this plant to use 10,500,000 acre-feet of water in the dam. Prior usage may give a right to it, and we may be estopped in the courts, at least, in asserting our right to it after it has been put to a beneficial use.

"Mr. ARENTZ. Mr. Chairman, will the gentleman yield?

"Mr. COLTON. Yes.

"Mr. ARENTZ. Following that line of 'first in use, first in right,' you know the land in Utah will not be subject to cultivation possibly for 50 years or 75 years. You want to stop the appropriation of water that should go to the land in Utah, and is there any other way of doing that except by a definite allocation of water to Utah, so that

you can hold it in perpetuity? I do not see what can be done.

"Mr. COLTON. *Congress can not allocate water.*

. . .

". . . .

"Mr. WHITE of Colorado. Will the gentleman yield?

"Mr. COLTON. Yes.

"Mr. WHITE of Colorado. *A while ago the gentleman stated that he doubted whether or not Congress had the power at this late date to nullify, abrogate, or change the doctrine of priority in the use of the water.*

"Mr. COLTON. *I think they have not that power.*

"Mr. WHITE of Colorado. *There is no attempt to do anything of that kind by this bill.* On the contrary, the bill expressly provides for a compact among six States, and the only State that has shown the slightest tendency to stay out of the compact is Arizona. Now, how can that affect a State that is not a member of the compact?

[9649]

"Mr. COLTON. It can not. Moreover, I admit we are somewhat protected so far as California is concerned, although even that is a question in my mind. As the gentleman from Arizona has stated, you have an interstate compact made by seven States, and I do not believe six States may make it binding on the other. I would like to hear the opinion of the gentleman from Virginia [Mr. MONTAGUE] on that. He is a good lawyer. That raises a serious question at least. Let me point

out to the gentleman just what this bill provides. In section 5 it is provided:

> That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe—
>
> "To do what?
>
> to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses.

"The CHAIRMAN. The gentleman has used 30 minutes.

"Mr. COLTON. I thank the Chair. If that does not give him absolute control of this water, or if it does not seek to give the Secretary of the Interior absolute control of this water, I can not understand the English language; and, gentlemen, that is exactly what we are objecting to. We are saying the Federal Government is trespassing upon territory that does not belong to it whenever it attempts to regulate or control the waters of a river when it is not for the express purpose of navigation and commerce. That is the only power the Congress of the United States has over the water in the streams of this country, and the basic principle upon which Utah has rested its opposition to this bill is that the States control the water for all other purposes." (Emphasis added.)

Representative Winter of Wyoming, reiterating the views he had expressed with reference to the third Swing-Johnson bill in the previous Congress (*supra* pp. 47-48) spoke in support of the bill (69 CONG. REC. 9653, 9655):

> "All of the States excepting Arizona have at one time or another ratified, either conditionally

or unconditionally, the seven-State compact and later the six-State compact, which was an agreement among six States to be bound by the terms of the seven-State compact and waiving that portion of that compact which required ratification by seven States. Arizona has seen fit to refuse to enter the compact. I recognize her right to so refuse. I do not recognize and deny her right to prohibit the other six States of the Colorado River Basin or other five States or any number of States to enter into a compact and support in Congress a bill which incorporates, recognizes, and will put into operation such compact. *Arizona will not be bound by any compact to which she is not a party.* That is the limit of her right.

". . . .

"The upper States are protected. This bill gives them substantial, if not complete, protection. If the bill fails, an opportunity to secure the rights of the upper States to that extent will have been lost. If the bill passes, we receive a great measure of protection, even though but six States are bound and one, Arizona, is not.

". . . .

"Regardless of the theories of State rights as to the bed of the stream and control of the use of the water of this stream by the States, it being navigable, with which I agree, the Government controls the public lands above high-water mark, where the dam will be built and the land flooded by a storage of the water, and the public lands over which the canals must run to divert the water

around the dam for power, or to distant areas for reclamation in California and Arizona. Hence the Government can require Arizona, before she perfects any water rights, even though she is out of and not bound by the compact, to conform therewith, which means that the rights of the upper States to their equitable division of the water will be protected. . . ."

On May 24, 1928, Mr. Colton proposed an amendment to the bill requiring that an opinion as to the constitutionality of the measure be received from the Attorney General before the Secretary of the Interior commenced construction of the project. 69 CONG. REC. 9777. He argued that the measure was unconstitutional because it sought to allocate the waters of the river. This proposed amendment was defeated.[7]

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[7]69 CONG. REC. 9777-78:

"Mr. COLTON. Mr. Chairman and members of the committee, this is one of the most important pieces of legislation that has been before this Congress in a generation. The gentleman from Colorado [Mr. TAYLOR] a while ago announced a doctrine, if I understood him correctly, which is absolutely new from a legal standpoint. He said there were three ways that the waters of this river could be allocated. First, by the Supreme Court of the United States; second, by a compact entered into between the States, and, third, under the provisions of this bill. If that means anything at all it means that the Congress of the United States can allocate the waters of that stream. Gentlemen, that is contrary to every principle upon which our whole body of irrigation law rests. If this bill does seek to [9778] divide or allocate the waters of the Colorado River, I maintain it is absolutely unconstitutional; that it is against all of the decisions of the court that have been made with reference to this question, and it declares an absolutely new policy.

"Congress has never heretofore in the history of this country undertaken to allocate the waters of a stream between the States. If this bill is passed and this measure becomes a law, certainly no expense should be incurred or any work commenced until the Secretary of the Interior has submitted it to the legal department of the Government and has found out whether or not it is constitutional.

"I am simply seeking by this amendment that this vital ques-

On May 25, 1928, Mr. Douglas' motion to recommit H.R. 5773 was defeated (69 CONG. REC. 9989), and the bill was passed (*id.* at 9990).

2. *Senate*

Senator Johnson had introduced S. 728 on December 6, 1927.[1] Following hearings in January 1928,[2] the bill was favorably reported from committee on March 20, 1928.[3] Senator Ashurst of Arizona filed minority views.[4] Senator Johnson spoke in support of the meas-

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tion, which embarks the Government and the Congress upon a new policy with reference to the allocation of the waters of a stream, be submitted to the legal department of the Government. In the Western States we have maintained, and have maintained from the beginning, that the right to the ownership of the water is in the States. This undertakes to turn over the right to impound these waters, and section 5 provides that the Secretary of the Interior may arrange to distribute or deliver the water lower down the river and also under the canal that is provided for in this bill. That being true, we declare in effect that the water may be allocated by the Secretary of the Interior, and we declare further that the water may be controlled by him. That means that the Congress and the executive department are now embarking upon the policy of controlling, distributing, and allocating the waters of this river. If that is true, I say that before that new policy is adopted it should be submitted to the legal department of this Government for an opinion as to its constitutionality. In the case of Colorado against Kansas it was plainly held that the right to the water was in the States. The Government has no control except for navigation purposes. The gentleman's argument, pushed to its logical conclusion, is dangerous to the rights of all the States.

"The CHAIRMAN. The question is on the amendment offered by the gentleman from Utah.

"The question was taken; and on a division (demanded by Mr. COLTON) there were—ayes, 28, noes 45.

"So the amendment was rejected."

[1]S. 728, 70th Cong., 1st Sess., is Calif. Ex. 201 (Tr. 7712).

[2]*Hearings on S. 728 and S. 1274 Before the Senate Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. (1928). S. 1274, requiring seven-state ratification of the Compact, had been introduced by Senator Phipps of Colorado.

[3]S. REP. No. 592, 70th Cong., 1st Sess., pt. 1 (1928).

[4]*Id.* pt. 2.

ure on April 26,[5] and Senator Smoot of Utah answered with a two and one half hour speech in opposition,[6] in the course of which he voiced opposition to the purported federal allocation which he argued would be accomplished by the bill's approval of the Compact on a six-state ratification basis (see *infra* pp. 99-101). The proponents of the bill were unable to obtain Senate action on the measure prior to adjournment of the first session on May 29, 1928.

During debate on May 28, just prior to the Arizona filibuster which closed out the session, Senator King of Utah spoke on the proposal to make the Compact effective on six-state ratification. Senator Reed of Missouri[7] was unable to understand how Arizona could be bound by the Compact if she refused to ratify. Senator King explained that in his view Arizona's rights might not be adequately protected under the bill, a contention which Senator Kendrick of Wyoming[8] promptly denied (69 CONG. REC. 10265):

> "Mr. REED of Missouri. Then, as I understand, the Senator claims that the building of these works under the terms of this bill would result in the appropriation of the water by the

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[5]69 CONG. REC. 7245-53.

[6]*Id.* at 7515-44.

[7]Senator Reed voted for the bill. 70 CONG. REC. 603.

[8]Senator Kendrick was a member of the committee which held hearings on the second, third, and fourth Swing-Johnson bills. *Hearings on S. 727 Before the Senate Committee on Irrigation and Reclamation,* 68th Cong., 2d Sess. facing p. 1 (1925); *Hearings Pursuant to S. Res. 320 Before the Senate Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. II (1925); *Hearings on S. 728 and S. 1274 Before the Senate Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. II (1928). He was the author of the committee amendment to the bill requiring a limitation on California uses (70 CONG. REC. 386), and supported the bill and voted for its passage. *Id.* at 603.

construction of the dam which is farther down, and that a State which has not assented to the arrangement would be left without any protection? Suppose the State went on and used the water; suppose this proposed dam should be built and then after a while Arizona should herself build a dam, not having consented to this, could she not protect herself?

"Mr. KING. As I see the situation, there are two propositions involved. As I have stated, there are some who contend that the Government is not bound by any compacts among the States concerning the waters of the river, and that it may make such developments as it desires and such use of the water as it wishes if there is no inference with vested rights. Under this view, if the Government builds a dam and impounds water and utilizes a portion to generate power, neither Arizona nor any other State could prevent such action by the United States unless prior appropriations were interfered with. Arizona might be deprived of any further use of the waters of the river and vast areas of her fertile lands be thus condemned to perpetual sterility.

"If Arizona's rights are not protected by treaties or compacts to which the United States and all the States concerned in the river are parties, then appropriations made either by the Government or the States would jeopardize Arizona's right to use any of the waters of the river not heretofore appropriated by her. She could not even within her own borders divert water from the river for use by the State or the people of Arizona if such

diversion interfered with the appropriations so made by the Government or the States referred to.

"Mr. KENDRICK. Mr. President, will the Senator from Utah yield?

"The PRESIDING OFFICER. Does the Senator yield?

"Mr. KING. Yes.

"Mr. KENDRICK. *Mr. President, in answer to the question asked by the Senator from Missouri [Mr. REED], I desire to say that, as one of those who favor the Swing-Johnson bill, I do not concede that under the provisions of the bill there is any interference at all with the waters of Arizona. In so far as I know, the bill has no such provision and no such intention.*

"As a precautionary measure the committee within less than a month, in passing upon the Senate bill, included an amendment requiring California to agree by legislative act that she would not divert an amount in excess of that provided in the agreement entered into at one time by the States but not ratified by their legislatures. That was done in order to safeguard Arizona's share of the water. That amendment was agreed to by the Senator from California and accepted by the committee without a dissenting vote, as I recall, except that of the Senator from Arizona. It is not intended by this bill to impose any coercion upon the State of Arizona." (Emphasis added.)

Congress reconvened on December 5, 1928. During debate that day Senator Borah of Idaho[9] made it

[9]Senator Borah supported the bill and voted for passage of the measure. 70 CONG. REC. 603 (1928).

clear to Senator Hayden, who had been discussing upper basin hopes for seven-state ratification of the Compact, that the proposed legislation did not prejudice Arizona's interests in any way (70 CONG. REC. 70):

"Mr. BORAH. The Senator has reached a point in which I am very much interested. *Does the State of Arizona contend that any act of Congress can affect its rights in any way in case it does not consent to this compact?*

"Mr. HAYDEN. The State of Arizona positively contends that the Congress of the United States has no jurisdiction over appropriations of waters and that the Congress can not by any enactment in any manner affect the rights of that State or the jurisdiction of that State over the waters of its streams.

"Mr. BORAH. As a proposition of law, let us assume the Senator is correct; but, if that is true, are not the advocates of the bill taking the risk here and not the State of Arizona?

"Mr. HAYDEN. That is a correct assumption; but the last thing that the State of Arizona wants to do, and the last thing that the people of any of the seven States want to do is to throw this controversy into long-drawn-out litigation in the courts. . . .

"Mr. BORAH. I understand the Senator's position now. *I had the impression that the Senators from Arizona felt that legislation here might prejudice their rights, or in some way interfere with their rights; but it did not seem to me that*

that was the correct position. I understand now that it is simply the desire of the Senator to avoid long litigation.

"Mr. HAYDEN. Exactly so. . . ." (Emphasis added.)

On December 11, 1928, Senators Hayden and Borah resumed their discussion of whether the bill's approval of the Compact with only six-state ratification purported to make a "federal allocation" binding on Arizona. Senator Hayden attacked the bill as an attempted assertion of unwarranted federal power; Senator Borah totally rejected Arizona's characterization of the bill (70 CONG. REC. 390, 390-91, 391-92):

"Mr. HAYDEN. Mr. President, the State of Arizona feels that a gross injustice would be done to that State by the passage of an act of Congress which would provide that six States may divide the waters of a stream which belong to seven States without the consent of the seventh. No such bill should be introduced in Congress unless it were upon the assumption that Congress had the right and the power to divide the waters of the stream. . . .

". . . .

"That is what this bill does with respect to the Colorado River compact. It states that, whereas the legislatures of all of the seven States have not approved of the compact, nevertheless the Congress shall approve it and measures shall be taken to put that compact into effect whether the seven States have approved it or not.

". . . .

". . . . Therefore an assertion in this bill that the compact shall be approved, not when ratified by seven States but when ratified by six States, is a wrong and a wholly improper procedure for the Congress of the United States to follow. Therefore I have moved to strike out of the amendment offered by the Senator from Colorado the provision that the Colorado River compact shall be approved by the Congress of the United States to go into effect when ratified by six States and not by seven States.

". . . .

"Mr. BORAH. Mr. President—

"Mr. HAYDEN. I yield to the Senator from Idaho.

"Mr. BORAH. I merely wish to ask a question. Does the Senator from Arizona contend that the passage of this bill will affect any rights which Arizona has as a State or her citizens have by reason of being citizens of the State? Does he contend the passage of the bill could take away those rights, notwithstanding she has not entered into the pact?

"Mr. HAYDEN. We do not know. We look upon the passage of the bill as an assault upon the sovereignty of the State of Arizona. It could be based upon no other theory than that Congress has the right to apportion the waters of the Colorado River and its tributaries in accordance with a certain document, regardless of the wishes of the State of California. It seeks to impose the terms of the Colorado River compact upon the State of Arizona without the consent of that State. There-

fore we resist it. Whether all that we fear could be accomplished or not we do not know. I think the Senator from Idaho would be inclined to take the view that such a thing could not be done; the Supreme Court of the United States would not permit anything of that kind. To pass a bill of this kind, however, places the burden upon the State of Arizona of filing suit and of arguing it before the Supreme Court of the United States. No one can tell in advance what the decision of the Supreme Court will be. Therefore we feel justified in opposing the passage of any proposed legislation that in any manner may seek to divide the waters of the Colorado River, in which the State of Arizona has an interest, without the consent of that State.

"Mr. BORAH. *Mr. President, I do not desire to argue the question, but lest I may be misunderstood in the future—because this question is likely to come back here in another form with reference to some other bill—when I shall vote for* [391] *this bill I shall vote for it upon the supposition that a mere act of Congress cannot take away any rights of the State of Arizona.*[10]

". . . .

"Mr. BORAH. *I can see how Arizona might lose her rights, not by reason of this legislation, but by reason of acts of appropriation going on in carrying out the terms of this bill in case Arizona did not assert her rights in court. If she stood by and water were appropriated to beneficial*

[10](Footnote ours). Senator Borah voted for the bill. See note 9 *supra*.

use in other States, she might lose her rights. She would not lose them, however, [392] *by reason of this legislation, but by reason of the acts of appropriation.*

". . . .

"Undoubtedly, if Arizona stands idly by and does not protect her rights, either by appropriation or by such action in the courts as will protect them, she will lose her rights ultimately. That is one of the penalties of living under the doctrine of prior appropriation. If an individual has a farm or ranch, and the water is running by it, if he does not use it, his neighbor below him or above him can appropriate it and take it way from him, ultimately. So here, I presume, if Arizona should not act, she perhaps would be prejudiced by this legistion in the sense that the acts carrying it out would result in appropriations by others. *It would not be the act of Congress which took away her rights, however, but the acts of appropriation following as a result of it.*" (Emphasis added.)

The fourth Swing-Johnson bill was passed by the Senate on December 14, 1928, by a vote of 65 to 11, only 9 Senators joining Senators Hayden and Ashurst in opposing passage. 70 CONG. REC. 603.

The foregoing Hayden-Borah colloquy well illustrates the divergence of view between the opponents and proponents of the Swing-Johnson bills. Arizona feared that approval by Congress of the Compact without Arizona's ratification would constitute a "federal allocation" of the waters of the basin in violation of Arizona's sovereign interest. The arguments of the pro-

ponents, exemplified by Senator Borah's remarks, stressed that Congress could not make such a federal allocation and that the bill did not purport to do so. It is in this context that Arizona's assertion in her answering brief that "the bitter cry of the opposition was that, because of this federal allocation, the bills constituted an unconstitutional invasion by Congress of the rights of the States" and that "the defenders of the bills argued vigorously for their constitutionality" (Ariz. Ans. Br. 35) must be viewed.

In the Hayden-Borah debate, Senator Hayden expressed uncertainty as to whether Arizona's fears were well grounded. Asserting that "whether all that we fear could be accomplished or not we do not know," he suggested that Senator Borah was "inclined to take the view that such a thing could not be done; the Supreme Court of the United States would not permit anything of the kind." 70 CONG. REC. 390. Senator Borah agreed that Congress could not do so, and the Swing-Johnson bills did not purport to do so.

Whether or not Congress could have done so, Senator Borah's assertions as to the scope of the Swing-Johnson bills were confirmed by this Court in its decision on Arizona's challenge to the constitutionality of the Project Act. In *Arizona v. California,* 283 U.S. 423 (1931), Mr. Justice Brandeis stated the Arizona argument as follows (p. 458):

> "The further claim is 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 water flowing within or on its borders."

He rejected it with the following explanation (p. 462):

> "The Act does not purport to affect any legal right of the State, 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. On the contrary, section 18 specifically declares that nothing therein 'shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of water within their borders, except as modified' by interstate agreement. As Arizona has made no such agreement, the Act leaves its legal rights unimpaired."[11]

[11]Immediately preceding this statement of its holding, the Court had pointed out (283 U.S. at 464): "Arizona has, of course, no constitutional right to use, in aid of appropriation, any land of the United States, and it cannot complain of the provision conditioning the use of such public land."

APPENDIX C

THE LEGISLATIVE HISTORY ITEMS SELECTED BY ARIZONA DO NOT RELATE TO ANY FEDERAL ALLOCATION WITHIN THE LOWER BASIN, BUT RATHER TO SUBSTANTIAL EFFECTUATION OF THE COLORADO RIVER COMPACT'S APPORTIONMENT TO THE UPPER BASIN WITHOUT ARIZONA'S RATIFICATION

Arizona asserts (Ariz. Ans. Br. 35):

> "The bitter cry of the opposition was that, because of this federal allocation, the bills constituted an unconstitutional invasion by Congress of the rights of the states."

Arizona does not identify "this federal allocation" which she asserts engendered opposition to the Swing-Johnson bills. However, the quoted assertion is made with reference to Arizona's argument that section 5 directed the Secretary of the Interior to make a compact-like allocation among Arizona, California, and Nevada. Arizona then quotes some 14 excerpts from the legislative history (*id.* at 35-43), pointing out that they "are but a few of the many which could be quoted" (*id.* at 43) in support of her argument. Over 60 citations to additional portions of the legislative history of the third and fourth Swing-Johnson bills are provided in a footnote. *Id.* at 43 n.56. Arizona contends that these numerous excerpts "all demonstrate a clear recognition that the Swing-Johnson bills, if enacted, would impose complete federal control over the water of the Colorado River in the Lower Basin and would provide

for a federal allocation of that water among the Lower Basin states."[1]

In fact, none of the extracts relate to the mandatory allocation Arizona finds in sections 5 and 4(a), only a few relate to section 5,[2] and all the rest are grossly misleading. The excerpts quoted by Arizona are primarily concerned with two questions: Does the United States own the unappropriated waters of the Colorado River basin, with the consequence that Congress could allocate those waters by statute, obviating the need for a compact? Would approval of the Colo-

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[1]Ariz. Ans. Br. 43-44. In light of Arizona's alternative positions purportedly in support of the Special Master's Report, we are not certain whether Arizona uses the phrase "water of the Colorado River in the Lower Basin" to refer to the Special Master's "mainstream" (Lake Mead and below) or to the main Colorado River from Lee Ferry to the Mexican border. Under either alternative, we assume Arizona really means that the "federal allocation" was to be only among Arizona, California, and Nevada rather than the "Lower Basin states" (which would also include New Mexico and Utah).

[2]Arizona quotes (Ariz. Ans. Br. 40 & n.49) language from H. R. REP. No. 1657, 69th Cong., 2d Sess., pt. 1, at 11 (1926), that "all rights respecting water or power under the project are, under the terms of the bill, to be disposed of by contract by the government." The report undoubtedly refers to § 5, which provides that *stored water* may not be used without a contract with the Secretary of the Interior. The quoted language from the report must be read in light of the extensive legislative history which we treat in this and accompanying appendixes. See, particularly, the remarks of Rep. Smith of Idaho, chairman of the reporting committee and author of the report quoted by Arizona, made in debate after the bill had been reported (pp. 45-46 *supra*).

Elsewhere in her brief Arizona does quote statements by Delph Carpenter, upper basin spokesman, and Representative Colton of Utah which are directed specifically to § 5. Ariz. Ans. Br. 31-32, 33-34. Mr. Carpenter's remarks, which make clear that the language in § 5 upon which Arizona relies was prompted solely by upper basin considerations, are treated in appendix B *supra* pp. 37-41. Rep. Colton's arguments as to the purported assertion of federal power in § 5 were refuted by the proponents of the bill. Calif. Ans. Br. 51-53; see also app. B *supra* pp. 61-67.

rado River Compact with less than seven-state ratification be an unconstitutional "federal allocation"? It was the latter "federal allocation" which was the basis of the Arizona and Utah opposition to the Swing-Johnson bills, and to which most of the Arizona excerpts refer.[2a]

These two controversies which provide the context for the excerpts quoted by Arizona resulted from Arizona's refusal to ratify the Colorado River Compact, which had been executed at Santa Fe, New Mexico, on November 24, 1922, and unconditionally approved in 1923 by the legislatures of all of the Colorado River basin states except Arizona. Meanwhile, the first and second Swing-Johnson bills had been introduced in Congress in 1922 and 1923 providing for a dam at or near Boulder Canyon and construction of an all-American

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[2a]A substantial majority of the extracts quoted or cited by Arizona to identify "this federal allocation" are statements by opponents of the bills, which, as we have pointed out (Calif. Ans. Br. 51) are entitled to little weight. For example, Arizona quotes in text statements of the major opponents of the bill in the House—Representatives Hayden and Douglas of Arizona and Leatherwood and Colton of Utah. Ariz. Ans. Br. 33-34, 38-39. In addition, the majority of the citations provided by Arizona in note 56 on pages 43-44 of her answering brief are to statements by opponents of the bill. For example, at least five of Arizona's ten citations to *Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. (1926), are to statements by Mr. Hayden. *Id.* at 15, 17, 19, 105, and 188-89. Similarly, at least 11 of Arizona's 21 citations to *Hearings on S. 728 and S. 1274 Before the Senate Committee on Irrigation and Reclamation,* 70th Cong.. 1st Sess. (1928), apparently are to statements by Arizona and Utah opponents of the bill. *Id.* at 39-40, 53, 64-67, 105-07, 120-21, 127, 144, 147-48, 152-54, 159-62, and 222-23. Finally, at least 11 of the 21 Arizona citations to *Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. (1928), are the opponents' views. *Id.* at 45, 56-59, 120, 123, 128, 206-08, 212-13, 215, 228, 415-16, and 418-20.

We detail the refutation of these opponents' arguments by the proponents of the bill in appendix B.

canal. However, the upper basin states, fearing the priorities that would be acquired by the lower basin as a result of the increased uses made possible by the project, opposed the Swing-Johnson proposals in the absence of seven-state approval of the Compact. When it became increasingly apparent that Arizona would not ratify the Compact, the proponents of the Boulder Dam bill turned their efforts to ways and means to afford the upper basin states the protection of the Compact despite Arizona's refusal to ratify.

Three proposals to accomplish this objective resulted. The first proposal, that Congress simply allocate the unappropriated nonnavigable waters of the basin to achieve the interbasin allocation specified in the Compact, was expressly rejected; indeed, it was never seriously considered. The second proposal, that Congress condition the use of federal facilities and lands to the Compact provisions, was ultimately embodied in the Swing-Johnson bills. The third proposal, that the conditioning of federal facilities and lands be accompanied by at least six-state ratification of the Compact (including California), was adopted by Congress, but only after it had been implemented by requiring California to enact a limitation if Arizona should fail to ratify the Compact (Rep. 165).

Alleged Government Ownership of Unappropriated Nonnavigable Waters

The first proposal was advanced by Ottamar Hamele, counsel for the Bureau of Reclamation. He urged that the United States owned all of the *unappropriated nonnavigable* waters in the Colorado River basin and thus might allocate these unappropriated waters as it saw

fit. Consequently, he suggested that Congress simply allocate unappropriated nonnavigable waters in a manner producing an allocation between the basins in conformity with the provisions of the Colorado River Compact.

Arizona accurately quotes (Ariz. Ans. Br. 37) a portion of Mr. Hamele's testimony during hearings on the second Swing-Johnson bill in 1924, but omits that part of his statement explaining the basis of his theory, which we emphasize below:[3]

> "Mr. HAYDEN. Then, if it is possible by the language that you have suggested to effect an apportionment between the upper and lower basins without the approval of the compact, is it also within the power of the Congress to apportion the waters allocated to the lower basin by the compact between the States of Arizona, Colorado, and Nevada by a similar limitation?
>
> "Mr. HAMELE. I think it is. In order to understand that answer it might be well to amplify it with some comment on the different doctrines concerning the use of water in the arid West.
>
> *"There are two theories that are pertinent to this discussion. One is that the right to the use of water from innavigable streams in the arid West arises from the State; that the appropriator gets his right from the State. The other theory is that the right comes from the Federal Government; that the Federal Government still owns all of the unappropriated innavigable water of the arid West and, therefore, has the power to dispose of it.*

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[3] *Hearings on H.R. 2903 Before the House Committee on Irrigation and Reclamation,* 68th Cong., 1st Sess. 882 (1924).

"The latter position is the position that has been taken for a good many years by the Federal Government. It has been under that theory that various developments have been carried on by the Bureau of Reclamation.

"Mr. LEATHERWOOD. You are carrying this only to streams designated innavigable?

"Mr. HAMELE. Yes. I am speaking of innavigable streams; and that is the position taken by the Department of Justice in the Wyoming-Colorado case.

"If that position be good, there certainly can be no question about the power of Congress to direct the use of this water without reference to the Colorado River compact." (Emphasis added.)

Hamele's premise was rejected by opponents and proponents of the Swing-Johnson proposals alike, particularly the representatives of the upper basin, who challenged the validity of the theory of federal ownership of unappropriated western waters. The position of the upper basin states on Hamele's proposal was set forth in a letter of April 7, 1924, from L. Ward Bannister, Denver attorney, to Representative Leatherwood of Utah:[4]

"Proposition 1. The rights of the upper States could be safeguarded by adding to section 8 of the pending bill a provision to the effect that all contracts made under the bill with water users should be subject to the Colorado River compact, whether ratified or not.

"Answer. Underlying this proposition by Mr. Hamele is the assumption that the Federal Gov-

[4] *Id.* at 900, 901, 908.

ernment had riparian rights prior to statehood and therefore still has a right of a property nature to make use of the unappropriated waters and therefore is in a position to say that such part of the unappropriated waters as the upper States would be entitled to under the compact could be allocated to the upper States without the necessity of a compact. Six of the seven States take the view that the Federal Government never had any riparian rights and therefore does not now possess any property right in respect to the use of the unappropriated waters. The Department of Justice at times has claimed, and Mr. Hamele claims, that the Federal Government had and has such rights as a matter of property, but the United States Supreme Court held in Kansas against Colorado[4a] that it is within the power of States to say whether the appropriation system rather than the riparian shall exist and not within the power of the Federal Government to say it shall not exist; and this case comes closer than does any other to a decision of the great question. The upper States can not run the risk of Mr. Hamele's underlying premise being sound.

". . . .

"Proposition 15. The Government probably could fix a division among Arizona, California, and Nevada of the use of the water from the Boulder Canyon project.

"Answer. Of this proposition Mr. Hamele is not sure. He simply says, 'Well, I rather think so.' 'I think that is rather a big question.' It is indeed a 'big question,' but it is no bigger than his

[4a] (Footnote ours.) Kansas v. Colorado, 206 U.S. 46 (1907).

plan to have the Government, so far as the Boulder Canyon project is concerned, divide the water of the river between the upper and the lower States, and it is attended by the same reasons pro and con as to the authority of the Government to do this and by the same grave doubts. The upper States can not afford to run the risk involved in these doubts, and therefore can not afford to let the pending bill pass in advance of the ratification of the compact."

Two years later, presenting the upper basin amendments to the third Swing-Johnson bill during the House hearings, Delph Carpenter forcefully stated the upper basin's views of Mr. Hamele's suggestion:[5]

"Mr. CARPENTER. In our proposed amendments we are trying to fortify against any claim that may be asserted upon any theory of law. *All the upper States concur in the view that the assertion* [201] *made by the United States attorney to the effect that the United States owns all the unappropriated waters of the West and that they are wholly removed from State control, is absolutely untenable, unconstitutional, and unconscionable,* but nevertheless the assertion is being made—is now being pressed by the attorneys for the Department of Justice before every Federal court in the West wherever a case can be brought before that court that could possibly involve that issue.

"Lest some court might so hold, and in the event the Federal courts decide that such is the rule, then

[5]*Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. 200-01 (1926).

we insist that the provisions of this bill be strong enough and clear enough so that the upper States are protected in this—that these attorneys for the departments of government in their zeal and ambition to override State authority, can not come in later and say, 'Yes, you sought to provide protection in this bill, but it did not bind the interests of the United States—the United States owns all these waters, therefore your efforts to protect your upper basin States are futile.'

"This is one of the paragraphs it is proposed to use to offset any such argument. I recall reading the discussion contained in the previous hearings to which you have referred, and my recollection is that the answers there were addressed to the theory of law advanced by Mr. Hamele to the effect that because the Government in his bureaucratic judgment is the proprietor and sovereign and controller of all the waters of the western streams, therefore a mere assertion of a waiver or provision to the effect that the United States is bound by the provisions of the Colorado compact would be a complete solution of the question and would impress that compact upon the river with full effectiveness, overriding all of the States and making the compact of complete force and effect both as to State and national jurisdiction.

"Upon that theory the Federal Power Commission advanced the idea that by putting provisions in the power licenses the rights of the upper States could be completely protected. It was to the matter of completeness of protection that the remarks of Mr. Bannister were addressed, and of

course we concur in his views in that respect. But, be that as it may, section (c)[6] is for the purpose of controlling the situation if it be held that the views of all the States of the West and all the courts of the States and the views expressed by the Supreme Court of the United States up to the present time are all wrong, and it should later be decided that the United States is the owner of the water.

"Mr. WINTER. And you might add the reclamation law itself.

"Mr. CARPENTER. Yes; section 8."

Then, as now, the federal-state controversy over ownership and control of unappropriated waters in the western states raged heatedly. It is clear, however, that whatever the merits of the Hamele contention, the Swing-Johnson proposals did not proceed on that

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[6](Footnote ours.) Mr. Carpenter was referring to an amendment which the upper basin proposed to add to the bill as § 8-(c). It 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." *Id.* at 117. This paragraph is now § 8(a) of the Project Act, Rep. app. 389.

Its purpose was stated by Mr. Carpenter to be "to make the compact binding upon the property and interests of the United States and those claiming by and under the United States and on all users of water stored, diverted, carried, or distributed by the works authorized by this bill." *Id.* at 197.

theory.[7] This is made abundantly clear in an exchange between Mr. Bannister and Senator McNary,[8] chairman of the Senate Irrigation and Reclamation Committee, during hearings on the Swing-Johnson proposals in 1925. Mr. Bannister had been arguing that Congress did not have the power to divide water among the states,[9] when Senator McNary interrupted and this col-

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[7]The Department of Justice still adheres to the view that the federal government owns all of the unappropriated waters upon the public lands. *Hearings on Federal-State Water Rights Before the Senate Committee on Interior and Insular Affairs,* 87th Cong., 1st Sess. 47-48 (1961). Though this theory apparently is the basis of the argument presented in support of the Master's decision with respect to water rights for federal reservations (U.S. Ans. Br. 61-65), it is not the argument advanced by the United States to support its assertions that Congress authorized the Secretary of the Interior to allocate the stored waters conserved by Hoover Dam. See U.S. Op. Br. 38 n.15; U.S. Ans. Br. 22-26.

[8](Footnote ours.) Arizona quotes (Ariz. Ans. Br. 38) a statement of Senator McNary during hearings on the second Swing-Johnson bill that "under a certain section of this bill, as I recall it, the Secretary of the Interior could allocate these waters among the different States for the purpose of irrigation." *Hearings on S. 727 Before the Senate Committee on Irrigation and Reclamation,* 68th Cong., 2d Sess. 155 (1924). Senator McNary does not specify, nor does Arizona suggest, the section of the bill to which he referred. The language of § 5, upon which Arizona and the Special Master rely as the basis for the Secretary's authority to make a contractual allocation among Arizona, California, and Nevada, did not appear until almost two years later, during hearings on the third Swing-Johnson bill.

[9]Arizona relies upon Mr. Bannister's 1924 statement that if the stream is navigable "then the Federal Government may do anything on that stream necessary to promote navigability; in other words, it may require the release of all waters from the upper States and the lower States both." Ariz. Ans. Br. 36, quoting from *Hearings on H.R. 2903 Before the House Committee on Irrigation and Reclamation,* 68th Cong., 1st Sess. 181 (1924). Arizona's use of this statement, which is irrelevant in this context, is misleading.

There can be no quarrel with Mr. Bannister's statement of the power of Congress to control navigable waters for navigation purposes. *Cf.* United States v. Gerlach Live Stock Co., 339 U.S. 725, 737 (1950), quoted in Calif. Ans. Br. 119-20. Arizona omits, however, Mr. Bannister's pronouncement a few pages

loquy ensued:[1]

"The CHAIRMAN [McNary]. Well, Mr. Bannister, we are not asserting that power anywhere down the line. We are perfectly familiar with the statement you are making. It is not a part of this controversy. We are going upon the theory that your States are going to do that by a compact.

"Mr. BANNISTER. Very well, Mr. Chairman, I will not continue with that part.

"The CHAIRMAN. Yes; certainly; it is purely academic. It is not a part of this controversy.

"Mr. BANNISTER. Yes. Well, I had heard some contention to the contrary by attorneys in the Department of Reclamation.

"The CHAIRMAN. *Oh, well—*

"Mr. BANNISTER. And there will be no such authority to divide predicated upon the theory of

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later on the issue which is central to the Arizona position (*Hearings on H.R. 2903, supra* at 194-95):

"When we fall back upon the fundamental premise that Congress has simply the powers either expressly delegated or delegated by implication by the Constitution, we run up against the question of where is the power mentioned in the Constitution, which either by express language or by implication, gives to Congress the right to effect a division of water between States? . . . [T]here is nothing in the Constitution that says that the Federal Government has jurisdiction over an interstate stream.

". . . .

"So, gentlemen, there is nothing in the Federal Constitution upon which to base the power of the Federal Government to divide this water among the States. . . .

". . . .

"If then, Congress has no authority to effect a division, it follows that nothing can be put in this bill that would confer that authority upon Congress and make the provision thus inserted valid and binding."

Accord, id. at 207, 1962.

[1]*Hearings Pursuant to S. Res. 320, 68th Cong., 2d Sess., Before the Senate Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. 753-54 (1925).

ownership of water, Mr. Chairman. I will not develop that.

"The CHAIRMAN. *No such thought ever entered the imagination of any Member of the Congress.*

"Mr. BANNISTER. I am glad to hear that, for some of the attorneys to whom I have referred have taken the opposite view. . . ."

Conditioning Use of Government Property Upon Compliance With Colorado River Compact

A second proposal was that the federal government employ its power to attach reasonable conditions to the use of federal property, so that all water rights acquired through the federal facilities provided for in the Swing-Johnson bills, as well as all privileges respecting use of the public domain convenient or necessary for the use of waters of the Colorado River, be made expressly subject to the terms of the Colorado River Compact. Consequently, users in Arizona who wished to use the stored water made available by the proposed dam would have to agree to subject such uses to the Compact. Similarly, the Government would condition use of needed rights of way across the public domain in Arizona on an agreement to subject uses of water to the Compact.[1a]

This proposal was advanced during hearings on the second Swing-Johnson bill by William J. Carr, a California attorney, a portion of whose testimony in support of his proposal Arizona quotes in her answering brief. Ariz. Ans. Br. 36-37. However, Arizona omits the vital passages from Mr. Carr's testimony

[1a]See Project Act §§ 8(a), 13(b), (c), and (d) (Rep. app. 389, 393-94). See also Arizona v. California, 283 U.S. 423, 464 (1931), quoted *supra* p. 78 n.11.

which clearly demonstrate that he based his proposal solely on the power of the federal government to impose conditions on the use of federal property, particularly the proposed dam and the public domain. Mr. Carr expressly disavowed any assertion of a general federal power to allocate the waters of the basin:[2]

> "Mr. LEATHERWOOD. And it would be your contention that Congress has power to allocate the waters of this river as between the Colorado River States?
>
> "Mr. CARR. *I do not say that.* I said that the Congress in this legislation, by reason of this being a Government project, by reason of the Government's control of uses of water derived from the project, and by reason of the fact that title to water rights in California is derived from the Government, by reason of Government appropriations and by reason of the fact that appropriations of [571] water will require use of the public domain, can attach conditions binding upon the lower basin that will protect the upper basin to the same extent that the compact would. In brief, the Government will occupy a strategic position by reason of the project and its ownership of the public domain, such that it may and should so limit rights which will grow out of the project that they will not infringe on rights of upper States, just as such limitations are customarily made in the case of permits issued under the Federal water power act.
>
> ". . . .

[2] *Hearings on H.R. 2903 Before the House Committee on Irrigation and Reclamation,* 68th Cong., 1st Sess. 570-71 (1924).

"Mr. HAYDEN. . . . If Congress has the power to make the apportionment, why have the compact?

"Mr. CARR. There might be conditions where they could not do it.

"Mr. HAYDEN. What are those conditions?

"Mr. CARR. In States, for instance, where there was very little public domain it might not be possible; but where there is such a tremendous amount of public domain, which is something Congress has control over, they can reach all water rights that will be touched in the lower States; but I think your question is really directed to a question of the broad, general policy as to whether Congress in exercise of a broad policy should undertake to do anything like that, and I think Congress would not ordinarily undertake to divide water rights; but here is a case where the matter has been very fully considered, where six out of the seven States have ratified, where, as I understand it, in the other State they lacked one vote of ratification, where apparently there is a pretty general consensus of opinion as to what the fair and equitable division is." (Emphasis added.)

Arizona quotes the following portion of the testimony of Charles L. Childers, then the attorney for Imperial Irrigation District, during hearings on the fourth Swing-Johnson bill (Ariz. Ans. Br. 41-42):

"It is somewhat doubtful if a compact respecting these questions, solemnly approved by the legislatures of the several States and by the Congress, would of itself be so effective as a means

> of allocating and administering the allocation of water as an act of the Congress. Compacts for this purpose have not been adjudicated, just how rights will be affected are not known, and the question of State and Federal control has not been settled."

Arizona asserts that by the quoted testimony Mr. Childers conveyed his view "that he believed Congress could and should provide for an allocation of water *in the Lower Basin.*" *Id.* at 41. (Emphasis added.)

Had Arizona provided the context of Mr. Childers' testimony, it would have revealed that he was discussing (1) the Colorado River Compact and (2) the upper basin proposal to have Congress subject lower basin uses to the Compact by conditioning federal rights of way over the public domain.

Mr. Childers' statement immediately following the quotation selected by Arizona reveals that he was discussing the Colorado River Compact:[3]

> "California has been and is willing to be bound by the compact, but if the compact can not be had is there any reason why the Congress, who has the power to do this job in an equitable way, should not proceed to do it? We had hoped, and still hope, to have a seven-State compact. When that seemed impossible we were willing to have a six-State compact and to give protection to upper-basin States, [445] the authors of the bill gladly accepted the amendment to the effect that nothing could be done under the bill until at least six States had approved. When the bill began to make prog-

[3] *Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 444-45 (1928).

ress Utah withdrew her six-State approval, and now her governor comes forward and states that they will not be satisfied with a six-State compact and makes the same demands that are made by Arizona. California is willing to have a seven-State compact, but that apparently can not be had. She is willing to have a six-State compact. That apparently can not be had; she is willing to be bound by a five or four State compact, but gentlemen of the highest integrity state to your committee that they will not be satisfied with less than a compact binding six States.

"With these conditions seeming wholly impossible and with Congress having the power to proceed and do equity to all the States, we feel that Congress should find some way to proceed."

Just before he made the foregoing statement, Mr. Childers expressed his approval of the proposal to have Congress employ its power over the public lands to effectuate the Colorado River Compact:[4]

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[4] *Id.* at 444. Earlier in his testimony, Mr. Childers, in discussing § 12(c) of the bill (now 13(c)) with Mr. Douglas of Arizona, had made the same point (*id.* at 438):

"Mr. DOUGLAS. So that the effect not only of your ratification but of this section (c) or subsection (c) of section 12 is to use the power of Congress to force the terms of the Colorado River compact upon a State that does not or may not choose to enter into that compact?

"Mr. CHILDERS. It is to impress the compact upon the United States and the public lands. Now, if anyone in Arizona or elsewhere wants to use the property of the United States, it should not object to the terms that the United States imposes. If that should be the Colorado River, all well and good.

"Mr. DOUGLAS. In other words, if the State of Arizona should apply additional storage to any of its lands on any of its tributaries, it would have to come into the Colorado River compact.

"Mr. CHILDERS. No, sir; it would not be obliged to come into the compact at all; but if it used the property of the United States, the water user would have to agree that his water, if taken, is taken in accordance with the terms of the compact."

"It is stated that Congress has no authority or power to apportion the use of water between the States. As such, this may or may not be true. Without entering into a legal argument as to the control and disposition of unappropriated waters, there is no doubt that Congress has plenary power and supreme sovereignty and jurisdiction over the public lands. . . . The United States owns substantially all of the lands on either side of the Colorado River from its source to the Mexican line. It is doubtful if any structure of any kind can be placed upon the main stream or upon the main portions of the tributaries of the Colorado River without the consent of the United States, and it is equally doubtful if any water or power can be taken from the main stream of the river or its major tributaries without crossing Government property."

Conditioning Effectiveness of Bill on Six-State Compact Ratification

The third proposal originated with the spokesmen for upper basin states. Considering that neither the Hamele proposal, which they considered unsound and objectionable, nor the Carr proposal could adequately protect their interests, they turned to a third alternative. They proposed that the Project Act be authorized when the Compact had been ratified by six states, without awaiting action by Arizona. In furtherance of this plan, Colorado, New Mexico, Utah, Wyoming, and Nevada in 1925 reratified the Compact and waived the requirement of seven-state ratification. California, however, conditioned its six-state ratification in 1925 on Congress' authorizing the construction of a dam pro-

viding at least 20,000,000 acre-foot storage capacity.

Consequently, the third Swing-Johnson bills introduced in the 69th Congress authorized a reservoir of 26 million acre-foot capacity and approved the Colorado River Compact when it had received six-state ratification.[5] The upper basin representatives then proposed a number of amendments to the bill designed to give them added protection if Arizona refused to ratify. These amendments were based on the federal government's power to condition the use of federal property and privileges, along the lines previously suggested by Mr. Carr in connection with the second Swing-Johnson bill (*supra* pp. 91-93), and were designed to subject to the Compact all future uses in Arizona to the extent possible by this means.

Arizona viewed the proposal to grant federal approval to the Compact when ratified by only six of the seven basin states as an unconstitutional attempt to allocate the waters of the basin, including those from the Gila in Arizona, in accordance with a Compact which Arizona had not ratified.[6]

Utah, having become disenchanted with six-state ratification of the Compact and having repealed her ratification waiving seven-state approval (Rep. 25), also opposed the proposal. Utah spokesmen asserted Congress could not allocate the basin waters by approving the Compact without Arizona's consent. Thus Arizona would be free to make appropriations which, added to California's appropriations, would exceed the lower ba-

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[5]H.R. 9826 (Calif. Ex. 197, Tr. 7709) and S. 3331 (Calif. Ex. 198, Tr. 7760), §§ 1 and 12.

[6]See the statements of Senator Hayden and Rep. Douglas quoted in app. B *supra* pp. 41 n.10, 58, 73-74.

sin's Compact allocations.[7] Most of the extracts cited by Arizona are taken from the discussions in the hearings and debates on the third and fourth Swing-Johnson bills relating to this controversy. The Utah and Arizona opponents of the six-state compact proposal argued that federal consent to the Compact when less than all seven of the states had ratified constituted an attempt to effectuate a "federal allocation" of the waters of the Colorado River system which was beyond the constitutional powers of Congress.

That it was such a "federal allocation" that the opponents of the bill were concerned with is amply illustrated by the statements of Governor Dern and Senator Smoot of Utah made during the hearings and debates on the fourth and final Swing-Johnson bill and which Arizona quotes only in part in her answering brief.

For example, Arizona quotes part of the statement of Governor Dern of Utah during the House hearings on the third Swing-Johnson bill (Ariz. Ans. Br. 40-41). Even the portion cited by Arizona indicates on its face that the Governor was talking about approval of the Colorado River Compact under the six-state ratification alternative provided for in that bill. The part of his statement following the portion quoted by Arizona makes this abundantly clear. We emphasize it in the following quotation:[8]

> "Under the Johnson bill the essence of the compact idea is almost removed, and the Federal Government is given outright authority to divide the water of the river. That the division is to be

[7]See the explanation given by Representative Leatherwood of Utah, *supra* pp. 43-44. See also Rep. 165.

[8]*Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 215 (1928).

made according to the terms of the Colorado River compact is a mere incident. The scheme is Federal division of the water, and the compact is no longer a compact but merely a formula. If Congress at this session can divide the river according to this formula, then a future Congress, again succumbing to the pressure of intensive propaganda, may amend the law and divide the river according to some other formula without consulting the States at all.

"The Swing and Johnson bills pretend to allocate to the upper basin States in perpetuity the amount of water specified in the compact; but what authority has Congress to allocate water? . . ." (Emphasis added.)

Governor Dern later supplied the answer to his rhetorical question "what authority has Congress to allocate water?" He stated that he did not believe that Congress possessed the power to make the federal allocation which he considered inadequate even if valid:[9]

"We agree that there are but two methods to divide the water, either by interstate agreement or by action in the United States Supreme Court. That is the very reason why we hold that Congress is not competent to legislate on this subject, and should not be asked to meddle with strictly state business. We are of the opinion that Congress has no authority whatever to undertake to divide the water of the Colorado River."

Arizona also quotes (Ariz. Ans. Br. 43), without the context, remarks by Senator Smoot of Utah on the

[9] *Id.* at 221.

floor of the Senate in opposition to the Swing-Johnson bill (69 CONG. REC. 7538):

> "The bill is predicated upon the assumption that the Federal Government has very much greater rights in the Colorado River and older streams generally in the country than has ever been recognized by any judicial tribunal. Indeed, the theory upon which this bill must be upheld, if it is upheld at all, is that the Federal Government is sovereign over the Colorado River, and that Congress may determine how the waters of the Colorado should be divided between the States."

Senator Smoot's remarks immediately following those quoted by Arizona also demonstrate that the "federal allocation" which he was discussing was the proposal to approve the Compact with less than full seven-state ratification *(ibid.)*:

> "Now, the bill provides that it shall become effective only upon the ratification by six of the States in the Colorado River Basin of the Colorado River compact. There are, however, seven States in the Colorado River Basin, and it was originally intended that the Colorado River compact should be a compact between these seven States. The fact that one of the States is now left out of the compact, and that the rights of this State are to be determined not by its consent given in a compact or otherwise but by an agreement between six other States and the Federal Government, violates every principle for which the compact idea was originated. In other words, it makes no difference whether one State, two States, three States, or four

States are left out of the compact, the principle that the Federal Government controls the waters of the Colorado River is established just as much by one case as by the other.

". . . .

"Now, however, an entirely different idea is substituted. Because it has been difficult, and thus far impossible, to secure ratification of this seven-State compact by the State of Arizona, it is now proposed to shift to the position that the Federal Government and not the States shall control the waters, and that six of the States and the Federal Government may enter into a compact under which the amount of water which Arizona may take from the stream will be limited and determined."

Most dangerously misleading, however, is Arizona's quotation (Ariz. Ans. Br. 42-43) from Senator Johnson's majority report on the fourth Swing-Johnson bill, in which he asserts that the bill presents a unified plan "for the allocation among the States desiring that allocation of the waters of a great river to which all are entitled."[10] A reading of the report leaves no doubt that Senator Johnson was referring to the "allocation" made by the Colorado River Compact between the upper and lower basins. His description of the "allocation" as "among the States desiring that allocation" is an obvious reference to the controversy over whether any nonratifying state would be bound by the Compact. Later in his report, Senator Johnson devotes three pages to a discussion of the Colorado River basin controversy and the Compact.[11] Here he amplifies the obvious

[10]S. Rep. No. 592, 70th Cong., 1st Sess., pt. 1, at 7 (1928).
[11]*Id.* at 14-16.

frame of reference of the extract quoted by Arizona when he reports that "the passage of the bill, it is thought, will very early make the compact effective and settle an interstate controversy of long standing."[12]

The foregoing illustrations are typical of what Arizona has characterized as the "true" and "actual" legislative history (Ariz. Ans. Br. 13, 17) and presented to this Court in support of her argument that section 5 of the Project Act authorized the Secretary of the Interior to make a compact-like contractual allocation of "mainstream" water among Arizona, California, and Nevada.

We think it may be safely assumed that Arizona chose to place in the text of her answering brief those extracts lending most semblance of support to her argument. The context we have provided for most of those extracts, in this appendix as well as in others, clearly demonstrates that they do not support the Arizona assertion. We have examined the many extracts Arizona says (Ariz. Ans. Br. 43 & n.56) could be quoted in support of her argument (but are not), and think it fair to state that they are even less reliable and persuasive than those which we have treated.

[12] *Id.* at 16.

APPENDIX D

THE LEGISLATIVE HISTORY REFUTES ARIZONA'S CONTENTION THAT THE PROPONENTS AND OPPONENTS OF THE SWING-JOHNSON BILLS BELIEVED THE PROJECT ACT WOULD ABROGATE INTERSTATE PRIORITY PRINCIPLES WITHIN THE LOWER BASIN

Arizona attacks California's argument that "the Project Act preserved priority of appropriation and equitable apportionment in the 'mainstream' and in every other part of the Colorado River system in the lower basin." Calif. Op. Br. 159. California's "historiographers" are chided for relying on "only a few isolated statements culled out of the voluminous historical record" which "can hardly be dignified as 'legislative history.'" Ariz. Ans. Br. 17. The "few isolated statements" which Arizona disparages are the views of both of the authors of the bill (Representative Swing and Senator Johnson) and of the author of section 18 (Senator King of Utah), one of the most important provisions supporting our contention.[1] Calif. Op. Br. 146-47, 148-49.

After chastising California, Arizona presents to the Court what she characterizes as "the true legislative history." Ariz. Ans. Br. 17. Arizona's offer consists in major part of statements of Representative Swing and Senator Johnson (*id.* at 18-20) which, purportedly,

[1]Moreover, we do not rely only upon statements in congressional hearings and debates. The plain language of the statute, the purposes Congress was trying to achieve in the Project Act, the policy underlying the universal adoption of the priority principles in the arid West, and the congressional understanding of its constitutional power also sustain our position. See our reply brief, pt. III *supra.*

"[show] overwhelmingly the full realization by both friend and foe of the Swing-Johnson bills that they would inevitably supersede the interstate operation *in the Lower Basin* of the doctrines of prior appropriation and equitable apportionment." *Id.* at 17-18. (Emphasis added.) In fact, those statements do not relate to the question of *intra*basin priorities at all. The context of those excerpts from "the true legislative history" is provided by the portions of the statements which Arizona does not quote; that context clearly demonstrates that the Swing and Johnson statements relate solely to the question of *inter*basin rights as between the upper and lower basins under the *Colorado River Compact*.[2]

What the legislative history does reveal is that both proponents and opponents of the Swing-Johnson bills were in agreement that priority of appropriation would survive enactment of the Project Act and retain its interstate applicability in the lower basin except as modified by interstate agreement. The pertinent legislative history was engendered by two themes dominating the consideration of the Swing-Johnson bills. First was the upper basin concern with the threat to its future development if Arizona refused to ratify the Colorado River Compact. Second was Arizona's apprehensions with respect to California's priorities in the absence of a tri-state compact. The recognition that principles of priority of appropriation would retain interstate applicability was the reason why the upper basin was reluctant to give its support to the bill in the absence of a seven-state compact and why Arizona refused to ratify the Compact and opposed the Swing-Johnson bills in the absence of a tri-state compact modifying

[2]We provide that context *infra* pp. 121-27.

those priority principles. Both propositions are illustrated by the following statement of Governor Dern of Utah during hearings on the fourth Swing-Johnson bill. Governor Dern stated, in effect, that California would appropriate most of the lower basin main stream supply and that a nonratifying Arizona would not be prevented from asserting her priorities against the upper basins:[3]

> "California is a State of quick development. It is ready to use its water in the near future, and use all the water that is allocated to the lower basin before Arizona begins. When Arizona commences to take water the lower-basin water will all be gone, and the water that Arizona takes will come out of water allocated to the upper basin by the compact, but not as yet used by the upper basin."

Arizona's spokesmen repeatedly asserted that, absent a tri-state compact, California would both expand her existing appropriative rights and also acquire new prior rights. Thus, Arizona feared that California would preempt the lower basin's main stream supply, to Arizona's detriment. The Arizona view was emphatically stressed during the House hearings on the third Swing-Johnson bill,[4] when it had become apparent that the upper basin states, with the possible exception of Utah, were prepared to accept the bill with six-state ratification of the Compact. In Representative Hayden's opening statement in opposition to the bill, he force-

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[3]*Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 244 (1928).

[4]*Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess. (1926).

fully stated the need for a tri-state compact to protect Arizona against California priorities:[5]

> "My position has always been that whenever the Colorado River compact is approved by my State Arizona should insist that there be no development on that river in the lower basin until a supplemental compact had been agreed to by the States of Arizona, California, and Nevada. The compact contemplates and provides a means for the negotiation of just such agreements. Arizona stands in even greater need for protection against prior appropriations in California than do the States of the upper basin and has the same reasons for blocking development until her future is provided for and protected."

During the testimony of Secretary of Commerce Hoover, Mr. Hayden reiterated Arizona's apprehensions:[6]

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[5] *Id.* at 17.

[6] *Id.* at 49. Nevada spokesmen shared Mr. Hayden's view. For example, Arizona cites (Ariz. Ans. Br. 39) an exchange between Representative Leatherwood and Charles P. Squires, a member of the Colorado River Commission of Nevada, during hearings on the third Swing-Johnson bill, to show that both men understood that the bill would vest control of the water in the federal government. A close reading of the colloquy indicates that it does not have the far-reaching implications Arizona suggests. Most important, however, we quote here the immediately preceding portion of that exchange (not quoted by Arizona) which clearly demonstrates that, whatever the views of Messrs. Squires and Leatherwood may have been as to the extent of federal authority provided for by the bill, Mr. Squires assumed that, absent a compact among Arizona, California, and Nevada, priority of appropriation would control rights among those three states. Representative Leatherwood did not disagree (*Hearings on H.R. 6251 and H.R. 9826, supra* note 4, at 43):

> "Mr. LEATHERWOOD. Does your State believe in the doctrine of prior appropriations?
>
> "Mr. SQUIRES. We have such a doctrine in force within the State.

"There is a strong feeling in Arizona that unless we have a thorough understanding with California and Nevada prior rights will be acquired to the use of the water, particularly in California, which will prevent development within the State of Arizona."

Arizona quotes a statement made during these hearings by S. G. Hopkins, Colorado River Commissioner of Wyoming (Ariz. Ans. Br. 39-40), which concludes that "if the Government constructs this reservoir you have only to go to the Government and obtain your water contracts and irrigate your land" (Ariz. Ans. Br. 40). The Arizona extract is taken from a colloquy between Mr. Hopkins and Representative Hayden who was again explaining how California would acquire water rights through the project which would be prior to Arizona's. Mr. Hopkins did not deny Senator Hayden's assertion that California users would acquire priorities as a result of any uses made possible by the dam. Furthermore, Mr. Hopkins made clear that the contracts were to protect the upper basin's Compact apportionment. Here is Arizona's extract, set in its context:[7]

"Mr. HAYDEN. We believe our rights will be jeopardized for the reason that the land in Cali-

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"Mr. LEATHERWOOD. Does your State undertake to control and dispose of the unappropriated water within the boundary of the State?

"Mr. SQUIRES. We recognize the right of prior appropriation.

"Mr. LEATHERWOOD. Do you believe in that right?

"Mr. SQUIRES. I believe it is a right that can be properly carried out.

"Mr. LEATHERWOOD. Do you think it ought to be preserved to the States?

"Mr. SQUIRES. If there is no compact between the three States, or between the seven States or the six States, the prior appropriation would naturally still remain."

[7] *Hearings on H.R. 6251 and H.R. 9826, supra* note 4, at 108.

fornia is easily susceptible of irrigation and the cost of diversion would not be excessive. There is a large area of land in the Imperial Valley, the Coachella Valley, and the Palo Verde Valley. All of it can be irrigated below the Boulder Canyon dam. In addition to that, filings have been made by the City of Los Angeles for a domestic water supply which will take a large quantity of water from the Colorado River.

"Being neighbor to a rich State and one that is ready to proceed, *we in Arizona believe that the California lands will be put under cultivation first and thereby acquire water rights which would be prior to ours.* Consequently when the time came to reclaim lands in Arizona there may be no water left for them, any more than there would be for the States of the upper basin without the Colorado River compact.

"Mr. HOPKINS. This reservoir will be a great benefit to Arizona in the irrigation of her lands below the reservoir. There is nothing in the bill which would prevent Arizona from taking water from the reservoir and utilizing it on her land. *The only thing is that the water will be subject to the terms of the compact.* The water is appropriated now, and you can not irrigate the Parker project with the present flow of the stream. If the Government constructs this reservoir you have only to go to the Government and obtain your water contracts and irrigate your land." (Emphasis added.)

Senator Hayden made the same point in explaining Arizona's position to Delph E. Carpenter, upper basin

spokesman who presented the upper basin amendments to the bill:[8]

> "Mr. HAYDEN. I am trying to point out the logic of the situation. The four States of the upper basin say that because there is to be immediate development for the benefit of California which will result in the acquisition of water rights prior to any they may acquire, they are compelled to oppose any such legislation unless granted the protection afforded by the Colorado River compact. Is there any inconsistency on the part of the State of Arizona in setting up the same state of facts and asking that nothing be done until her rights are protected?
>
> "Mr. CARPENTER. There may be strong arguments presented, but I would not care to enter into them. I will have to ask to be excused.
>
> "Mr. HAYDEN. I can see no inconsistency in the position of the State of Arizona. *Without some agreement between them California will acquire a prior right to the use of water and power from Colorado River, leaving but little or none for the future needs of Arizona.* You, as an official of the State of Colorado, are trying to protect the interests of your State. In doing that you must remain neutral toward the lower basin States. However, I think you must concede that Arizona has the same right to protect herself as has the State of Colorado." (Emphasis added.)

Mr. Hayden continued to press his argument, finally eliciting the following comment from Mr. Carpenter:[9]

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[8] *Id.* at 158.
[9] *Id.* at 162-63.

"Mr. HAYDEN. Without an understanding with the States of California and Nevada, should this bill pass, the water will be first applied to a beneficial use in California, and when the time comes for development in Arizona, my State may have no water.

"Mr. CARPENTER. What you have said is true in part, but I must respectfully disagree with any thought that, physically, California could legitimately beneficially use all the water of the river. There is too much. It is also true that, under this bill, *the Secretary of the Interior could contract with water users in the State of Ari-* [163] *zona for the use of water or power without let or hindrance,* except that the party contracting with the United States would agree that his particular claim should be subordinate to the Colorado River compact, *not subordinate to the rights of the State of California*—simply subordinate to the rights of the upper States as defined in the compact." (Emphasis added.)

We emphasize that portion of Mr. Carpenter's reply also emphasized by Arizona when she argues that, according to Carpenter, the lower basin states would be "free to contract with the Secretary for stored water on a basis of equality and regardless of prior appropriative rights." Ariz. Ans. Br. 32. In context, however, Mr. Carpenter's reply is clear (1) that he did not deny the premise of Mr. Hayden's assertion that California would acquire priorities against Arizona by reason of prior beneficial use, and (2) that he disagreed only with Mr. Hayden's suggestion that Cali-

fornia could physically appropriate all of the water in the river so as to leave none for Arizona.[10]

Arizona asserts that her interpretation of Mr. Carpenter's answer was shared by Mr. Swing. In support of this contention Arizona relies on the following statement by the author of the bill:[1]

> "The water which is stored by the Government at its own expense would be disposed of by contract as provided in this bill. There should be that privilege given Arizona to secure water on the same terms as is afforded to Nevada and California."

Mr. Swing's reference to the fact that Arizona would be able "to secure water on the same terms" as Nevada and California obviously meant only that Arizona would not be discriminated against in any way. It cannot be distorted to support Arizona's inference that Mr. Swing intended his bill to shear California's existing rights of their priorities and to obliterate the only existing system of law for the determination of interstate water rights as between those states. Mr. Swing repeatedly asserted that the contracts provided for in his bill were not to be a source of title to water rights and that any rights acquired under such contracts would derive from state law.[2] Priority of appropriation was

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[10]Mr. Carpenter subsequently reiterated this point in response to a question from Rep. Hudspeth of Texas (*id.* at 165):

> "Mr. HUDSPETH. Suppose California should appropriate all of the water, would not that all go to her to the detriment of the State of Arizona?
>
> "Mr. CARPENTER. The best answer to that question is that it can not be done. California could not possibly appropriate all of that water if she tried to do so. She would drown herself out. Physical inhibitions would come into play."

[1]Ariz. Ans. Br. 33, quoting *id.* at 163.

[2]See Mr. Swing's explanations of his bill quoted *supra* pp. 36, 42-43, 55-57.

and is the prevailing law in Arizona, California, and Nevada. See Rep. 22.

The Arizona spokesmen voiced the same fears in their subsequent arguments in opposition to the fourth Swing-Johnson bill two years later.

Mr. Mulford Winsor, in presenting the views of the Colorado River Commission of Arizona and the Governor of Arizona during the hearings on the fourth Swing-Johnson bill, viewed the proposed legislation as imposing no restrictions on California's ability to acquire appropriative priorities to Arizona's detriment:[3]

> "Under the terms of the compact the water allotted to the lower basin is allotted not to any State but to the several States of the basin collectively, and in the absence of recognition of what we consider to be the law of the land—that is, the right of the State to control the appropriation of water within their boundaries—and in the absence of an agreement dividing the water between the lower States, there would be nothing to prevent California, if this act should become effective and this storage were created, from taking all of the allocation to the lower basin. There would be nothing to prevent the depletion of the water by Mexico and there would be nothing to keep Arizona from being left holding the bag."

Respresentative Lewis W. Douglas, who had succeeded Mr. Hayden in the House, elicited agreement from Governor Emerson of Wyoming that under the

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[3]*Hearings on H.R. 5773 Before the House Committee on Irrigation and Reclamation,* 70th Cong., 1st Sess. 51 (1928).

proposed legislation California would acquire priorities against Arizona:[4]

> "Mr. DOUGLAS. If this bill should be enacted into law, it would permit the State of California to appropriate to beneficial use in the absence of an agreement between the States of California and Arizona and Nevada the waters of the Colorado River faster than it would permit the State of Arizona to apply to beneficial use water from the Colorado River?
>
> "Governor EMERSON. That is probably true.
>
> ". . . .
>
> "Mr. DOUGLAS. You have heard that this bill, in the absence of a treaty between the lower basin States, permits the State of California to apply to beneficial use the waters of the Colorado faster than it would permit the State of Arizona to apply to beneficial use the water of the Colorado?
>
> "Governor EMERSON. That is undoubtedly true."

Mr. Douglas later asserted that, absent a tri-state agreement, Arizona's only possible protection against California's priorities would be litigation.[5]

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[4] *Id.* at 324.

[5] *Id.* at 429-30: "Mr. DOUGLAS. . . . If California applies to beneficial use in the absence of a compact between Arizona and California, the 7,500,000 acre-feet of water allocated to the lower basin States, there will be no water available in the Colorado River under the terms of California's ratification—and California's ratification does not become effective until those terms have been accepted—there will be no water in the Colorado available in the main stream for use in Arizona.

"Mr. HUDSPETH. Mr. Douglas, if six States ratify and your State does not, how are you going to protect yourself against California? I don't mean to say that California would 'hog' this water, but how is your State going to protect itself if the State of California should take more than she is entitled to?

Senator Hayden restated the Arizona position during final debate on the bill on December 11, 1928:[6]

> "In the lower basin, however, both in Arizona and in California, particularly in the latter State, there is immediate prospect that the water will be placed to beneficial use. So, with an apportionment to the lower basin as a whole, and without any division of water between the States in the lower basin,

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"Mr. DOUGLAS. By the physical conditions there would be no protection.

"Mr. HUDSPETH. Is there a tribunal to go into, any court?

"Mr. CHILDERS. Of course, you could go into the courts, naturally.

"Mr. HUDSPETH. But that would be your only resort?

"Mr. CHILDERS. That would be the only recourse. [430].

"Mr. SWING. And that has been suggested.

"Mr. DOUGLAS. In fact, if this bill is passed by the Congress and signed by the President—that is, this bill in its present form —the State of Arizona will go into court, and that litigation will probably take six or seven years.

"Mr. HUDSPETH. That is what I had in mind when I asked you if there was any possibility of the States getting together.

"Mr. DOUGLAS. I should think the Supreme Court could issue an injunction."

[6]70 CONG. REC. 388. Rep. Douglas had made a similar statement of Arizona's position during the House debates on H.R. 5773 in the previous session (69 CONG. REC. 9782):

"The State of Arizona since then has been attempting to negotiate with California. It wants a compact with California before it signs the seven-State compact for this reason. It is in the same position with respect to California that the upper basin States are with respect to the lower-basin States. California can apply to beneficial use the waters of the Colorado infinitely faster than can Arizona. California's ratification of the compact was conditional upon the construction of a storage dam on the Colorado, the construction of which, by the nature of the topography of the country and of the appropriations in the act and the works to be constructed would give the waters of the Colorado, to California, and Arizona simply said to California, 'You make an equitable agreement with us relative to an allocation of water between us and also give us a right to tax power which is to be developed by the use of the fall within our State, and of our undivided interest in the Colorado, which power you are going to use in your State to increase the industries of your State, to increase the taxable wealth of your State, and then we will sign the Colorado River compact.' "

the State of California could immediately appropriate and put to use the major portion of the water. We were greatly alarmed in the State of Arizona to learn that the State of California had made filings, had given notice to the world that they intended to appropriate out of the Colorado River all of the water apportioned to the lower basin, which would leave absolutely no water from the main stream for the State of Arizona.

"If the filings made by the State of California have the value assigned to them by the senior Senator from California, if they do establish perfected rights as he has asserted, then, without an agreement between the States of Arizona and California, if those filings are valid, there would be absolutely no water left in the Colorado River for the State of Arizona. . . ."

Senator Borah agreed that the interstate applicability of the principles of priority of appropriation might produce that result (70 CONG. REC. 391-92):

"I can see how Arizona might lose her rights, not by reason of this legislation, but by reason of acts of appropriation going on in carrying out the terms of this bill in case Arizona did not assert her rights in court. If she stood by and water were appropriated to beneficial use in other States, she might lose her rights. She would not lose them, however, [392] by reason of this legislation, but by reason of the acts of appropriation."

Senator Hayden rejoined that the Project Act would indirectly aid in producing that result, in that the construction of Hoover Dam pursuant to the act would facilitate the acquisition of priorities by California pur-

suant to contracts that might be executed by the Secretary of the Interior (*id.* at 392):

> "That is exactly what we fear—that if, subsequent to the passage of this legislation, a great dam is erected in the Colorado River without the consent of the State of Arizona, the water impounded behind that dam will be claimed and controlled by the Federal Government, and the State of Arizona will have no jurisdiction over it. The Secretary of the Interior may then enter into contracts to permit the use in California of a much larger quantity of water out of that dam than is fair to the State of Arizona.[6a] The State of Arizona will be helpless unless it does proceed, as the Senator suggests, by

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[6a] (Footnote ours.) In repeatedly asserting Arizona's fears of California's priorities, Senator Hayden made no distinction between the priorities that already attached to California's natural flow rights and those that would attach to rights acquired in stored water as a result of uses made pursuant to contracts. His recognition that priorities attached to prior uses, whether of natural flow or stored water, accords with the view held by other members of Congress.

For example, during hearings on the third Swing-Johnson bill before the House Rules Committee, Rep. Colton of Utah, in reply to a question from Rep. White, asserted that priority of appropriation would control the rights of Arizona's users of Colorado River waters, whether of natural flow or stored water. *Hearings on H.R. 9826 Before the House Committee on Rules,* 69th Cong., 2d Sess. 54-55 (1927):

"Mr. WHITE. Let me ask you a question there. *Does your law in Utah and in your surrounding States make any distinction between the right to use the natural flow of a stream and the right to use the impounded waters?*

"Mr. COLTON. *Well, no, not so far as use is concerned,* if I understand your question correctly, Mr. White. We do not recognize the doctrine of riparian rights at all.

"Mr. WHITE. I will illustrate what I mean in this way. I take it that the citizens of Arizona living up above the site of this proposed dam, under your rules of law, have a right to divert the water of the Colorado River for beneficial uses. Now, they may do that with [55] the waters that naturally flow in the stream, but if there should be a dam built and a lake created of stored water, impounded water, do they have the

filing a suit in the Supreme Court of the United States to determine its rights."

Senator Borah agreed, but asserted that such was the consequence of "living under the doctrine of prior appropriation" *(ibid.)*:

> "Undoubtedly, if Arizona stands idly by and does not protect her rights, either by appropriation or by such action in the courts as will protect them, she will lose her rights ultimately. That is one of the penalties of living under the doctrine of prior appropriation. If an individual has a farm or ranch, and the water is running by it, if he does not use it, his neighbor below him or above him can appropriate it and take it away from him, ultimately. So here, I presume, if Arizona should not act, she perhaps would be prejudiced by this legislation in the sense that the acts carrying it out would result in appropriations by others. It would not be the act of Congress which took away her rights, however, but the acts of appropriation following as a result of it.
>
> "Mr. HAYDEN. Mr. President, that is why we oppose the passage of a bill which authorizes large appropriations of money to construct a dam and other works which will inevitably lead to appropriations of water which are adverse to the State of Arizona, unless and until there is an agree-

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right to use that impounded water, that stored water, in the same way that they would the water naturally flowing in the stream?

"Mr. COLTON. Yes, sir. *It is prior appropriation for the use of the water that counts,* and wherever there is any surplus water that is not being used our citizens may acquire the right to use it, whether it is stored or whether it is flowing."

ment between Arizona and California apportioning those waters. We desire an agreement so that if Arizona is not in position to use her share of the water immediately, it will be reserved for her. In other words, Arizona's position in this matter is exactly and identically on all fours with the position of the States of the upper basin. We ask no more and no less in the way of protection from immediate development in California than do the States of the upper basin."

Both of the foregoing problems—(1) California could appropriate the bulk of the lower basin's Compact allocation and (2) a nonratifying Arizona could assert her future claims against the Compact apportionment of the more slowly developing upper basin—were resolved by requiring, as a condition precedent to effectiveness of the act absent seven-state ratification within six months, that at least six states (including California) ratify the Compact and that California agree to a specified limitation.[7] The Master accurately states this congressional purpose in requiring the limitation of California (Rep. 165-66):

"The reason that Congress imposed this limitation on California's consumptive use of mainstream water in the event that all seven states did not agree to the Colorado River Compact within six months of the date of enactment of the Project Act is apparent from the statutory language itself. It was for the benefit of the other six states.

"Absent seven-state ratification of the Compact, the Upper Basin required protection against appro-

[7]In addition, §§ 8(a) and 13(b), (c), and (d) of the act subject to the Compact all uses of federal facilities and lands under either alternative.

priations in the Lower Basin in excess of the Compact apportionment. The Upper Basin feared that Arizona might not ratify, in which event California, unless limited, would be able to appropriate from the mainstream substantially all of the Lower Basin apportionment, leaving Arizona free to make further appropriations from the mainstream outside the Compact ceilings. The limitation on California left a sufficient margin for exploitation by Arizona so as to secure the Upper Basin against undue encroachment by the nonratifying state.

"Similarly, Arizona and Nevada were concerned that California's rapid development would enable that state to appropriate most of the mainstream water available in the Lower Basin. The California limitation afforded these states protection against this eventuality. Unless California agreed with them to an acceptable division of mainstream water such as that suggested in the second paragraph of Section 4(a), they could, simply by delaying ratification for six months, bring the limitation into effect."[8]

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[8]There was little doubt that, failing an agreement with California, Arizona would delay ratification in order to bring the limitation into effect. During final debates on the fourth Swing-Johnson bill, Senators Phipps and King engaged in a discussion of the pending Pittman-Hayden amendment authorizing a tri-state compact. Senator Phipps had just explained that there would be no limitation on California in the event of seven-state ratification. Senator King prophesied that Arizona would not be inclined to ratify the Compact since, absent a tri-state agreement, she would then have no protection against existing and proposed California appropriations which would be facilitated by the project (70 CONG. REC. 389):

"Mr. KING. But, as I understand the statement just made by the Senator, the limitation of 4,400,000 acre-feet is based solely upon the 6-State compact, and if there is a 7-State compact there is no limitation.

Arizona argues that Congress resolved the controversy by "the imposition of a mandatory formula for allocation created by the interaction of §§ 4(a), 5, and 8(b)" (Ariz. Ans. Br. 43). The Master has rejected the Arizona argument that sections 5 and 4(a) provided a mandatory formula which the Secretary was bound to follow.[9]

If the Arizona argument concerning the effect of sections 5 and 4(a) were accurate, Senator Hayden should have rejoiced after the adoption of the amendments adding the "conform to" language to section 5 and the Pittman-Hayden tri-state compact authorization to section 4(a). If, as Arizona says, the effect of these amendments was to require the Secretary to make contractual compact-like allocations to Arizona, California, and Nevada which would stand on a parity, all Arizona fears of California priorities should have been erased with their adoption. The feebleness of the Arizona argument is amply demonstrated by the fact that both Arizona Senators voted *against* the bill as amended. 70 CONG. REC. 603. Further, Representative Douglas of Arizona never received the good news when the amended bill was sent back to the House. Asserting that he remained "as bitterly opposed to the project authorized in the Senate amendment as I was

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"Mr. PHIPPS. That is correct.

"Mr. KING. Then if there is no limitation what advantage is there to Arizona if she does ratify the compact? California is in a superior position to appropriate the water and Arizona might get no water. California might then appropriate all of the 7,500,000 acre-feet allocated to the lower basin and Arizona, when ready to appropriate water from the river, and finding her share used by California might come to the upper basin States and make demands upon them."

[9]Rep. 162-63, 202. We treat the legislative history refuting Arizona's argument in appendix E.

to the project authorized by the House bill" (*id.* at 836), he voted against the measure. *Id.* at 837.

Statements of Senator Johnson and Representative Swing Quoted by Arizona

Arizona quotes portions of several excerpts from the legislative history, primarily statements by Representative Swing and Senator Johnson, purporting to support her argument that "the true legislative history shows overwhelmingly the full realization by both friend and foe of the Swing-Johnson bills that they would inevitably supersede the interstate operation in the Lower Basin of the doctrines of prior appropriation and equitable apportionment." Ariz. Ans. Br. 17-18.

We here provide the context for the statements by Swing and Johnson quoted by Arizona to demonstrate that they were limited *solely* to the question of California's rights *as against the upper basin* under the Colorado River Compact.[1]

The colloquy between Representatives Raker and Swing quoted by Arizona (Ariz. Ans. Br. 18-19) reveals on its face that the discussion related to interbasin priorities as affected by the Compact, particularly Article VIII.[2] This context is also provided by the full statement of Arthur P. Davis, Director of the Reclamation Service (a portion of which is quoted by

[1]The statement of Governor Dern of Utah quoted by Arizona (Ariz. Ans. Br. 20) should be viewed in the same context. See *supra* pp. 98-99.

[2]The citation provided by Arizona to support her assertion that "Mr. Swing repeated these views in the Senate committee hearings on the pending legislation" (Ariz. Ans. Br. 19 & n.18) does not sustain Arizona's proposition, *i.e.*, that all appropriative

Arizona (Ariz. Ans. Br. 19) as expressing his understanding of Mr. Swing's statement):[3]

> "In case of water shortage in the lower valleys, under the principles of the Supreme Court decision in the Wyoming-Colorado case, the Imperial Valley farmers would have the right to cause to be closed during the period of shortage all the headgates of canals above them which are junior to their appropriations of 1900 and earlier. This would include all three of the Government projects *in the upper basin*—two in Colorado, and one in Utah—and many private enterprises as well, which have hard enough struggle at best without adding water shortage and litigation.
>
> "The irrigators *in the lower basin* do not desire litigation, as is shown by their avoidance of it in the past shortages. If a large reservoir is built and the water regulated, there will be plenty of water for them so there will be no litigation. The representative from Imperial Valley has testified that the district is willing to yield all claim to the low water flow in exchange for a right in the reservoir, and no doubt all irrigators served from the reservoir would do the same." (Emphasis added.)

Arizona then quotes portions of Representative Swing's statements in connection with the third and fourth Swing-Johnson bills (Ariz. Ans. Br. 19-20). Mr. Swing's statement before the House Rules Com-

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rights in the lower basin were allegedly superseded; on the contrary, Mr. Swing's remarks before the Senate Committee are consistent only with our interpretation.

[3]*Hearings on S. 727 Before the Senate Committee on Irrigation and Reclamation,* 68th Cong., 2d Sess. 81 (1925).

mittee during its hearings on the third Swing-Johnson bill expressly related to California's water rights as affected by the Colorado River Compact, as the following context shows:[4]

"Mr. GARRETT. You do not mean to say that California has unconditionally ratified it [the Colorado River Compact]?

"Mr. SWING. California did unconditionally ratify it, and then subsequently made it conditioned.

"Mr. GARRETT. It repealed it?

"Mr. SWING. Yes. It stands now on the conditional ratification that if it has to give up its vested water rights to the upper-basin States, which it is willing to do if it is supplied with storage water, because water is water, whether it comes out of a reservoir or out of the flow of the stream. In the interests of peace on the river, all it asks is that it be afforded storage to take the place of its present rights in and to the natural flow of the river. So, the construction of this dam can not possibly interfere with the rights of Utah under the Colorado River compact, because the terms of the Colorado River compact cover this project by express declaration. And, in addition to that, all contracts to be made by the Secretary of the Interior for the beneficial use of either water or power out of this project, are to be governed by the restrictions and limitations of the compact which are put into the contracts, and those same restrictions and limitations must go into

[4] *Hearings on H.R. 9826 Before the House Committee on Rules*, 69th Cong., 2d Sess. 107 (1927).

every contract, and the beneficiary of the contract must recognize the superior right of the upper-basin States, to that extent."

Mr. Swing's statement before the Rules Committee in the next Congress is equally clear that he was discussing California's rights as affected by the Colorado River Compact. This is amply demonstrated by the part of his statement Arizona quotes:[5]

> "California can not afford to support such a proposal, because *under the Colorado River compact,* California must surrender her present water rights to the natural flow of the river and look to storage instead." (Emphasis added.)

The most misleading extract employed by Arizona is one taken from Senator Johnson's explanation of the fourth Swing-Johnson bill on the floor of the Senate in 1928. Arizona provides the Court with only this much of Senator Johnson's statement:[6]

> "Ah, you see in the days to come what will happen in that river if no protection be accorded *those people* and the appropriation law of the West be permitted to obtain. Then will be demonstrated the utter futility of the position that is now maintained by some." (Emphasis added.)

By "those people," Senator Johnson meant "those upper basin people."

The quoted extract is taken from a long statement by Senator Johnson explaining how his bill provided the maximum possible protection to the upper basin against lower basin appropriations, failing seven-state

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[5]Ariz. Ans. Br. 19-20, quoting *Hearings on H.R. 5773 Before the House Committee on Rules,* 70th Cong., 1st Sess. 80 (1928).
[6]Ariz. Ans. Br. 20, quoting 69 CONG. REC. 7251 (1928).

ratification of the Compact. The Arizona assertion (Ariz. Ans. Br. 20) that Senator Johnson "was explaining the provisions, then in § 5 of the bill" when he made the quoted statement is misleading. Senator Johnson had just finished explaining the protective provisions for the upper basin contained in sections 4 and 5 (section 5 then contained the limitation provision) of the bill. Here is Senator Johnson's statement repeated, with the context immediately preceding the quotation used by Arizona (69 CONG. REC. 7250-51):

> "I repeat and repeat how we have endeavored to protect these upper basin States. We write the bill around the compact, we make every drop of water that comes from the storage and the regulation of the Colorado River under this scheme subject to the compact. We write, then, that California shall use perpetually only a specific amount of water, naming the maximum amount which may be used.
>
> "All these things are done in the good-faith endeavor to protect in every possible way the States of the upper basin and those who claim that they want protection under the Colorado River compact. Yet some of them would prefer to let this water continue to flow down to the sea for an indefinite period, to go to waste in the Gulf of California, the land remain in drought to the detriment of people in southern Arizona and southern California, to permit that to be done indefinitely, rather than to permit the measure of protection—and it is a full measure of protection that is accorded them—under this bill.
>
> ". . . .

"I submit, sir, that under the provisions which have been written in this measure at the instance of the Senator from [7251] Wyoming, under the provisions all through this bill by which we take care of the Colorado River compact, remembering that practically all the land there upon the banks of the Colorado River is land that is owned by the United States of America, from the site of the dam practically down to the international boundary; remembering all that, how can it be said that there is any State in the upper basin or any other place that is not amply protected by the provisions of this bill?

"In addition to that, yielding to the demands that have been made that profit and revenue should come from this measure, the Committee on Irrigation and Reclamation has accorded them the same percentage of profit that is accorded in the existing laws to-day, and they have done it on a project that is paid for by the United States of America in the first instance and that is paid for by the people of California in the second instance. I do not complain of it, but I do complain when any men here say that the upper-basin States are not protected or that we have taken something that does not belong to us. Here we have done everything that can be done by a people in order to have their protection and to give them what they are entitled to.

"Ah, you will see in the days to come what will happen in that river if no protection be accorded those people and the appropriation law of the West be permitted to obtain. Then will be demonstrated

the utter futility of the position that is now maintained by some."

Arizona also relies on a colloquy between Senators Walsh and Johnson to support her contention that Senator Johnson recognized that the Secretary of the Interior, under the bill, "could dispose of the stored water without regard to appropriative rights" (Ariz. Ans. Br. 45). Arizona belabors us for describing that colloquy as confused and then quotes a portion of that colloquy as "a clear and unconfused declaration by one of the bill's sponsors that it would wipe out appropriative rights and that the only way anyone could get any water was under a contract with the Secretary."[7] While Senator Johnson did assert, in accordance with the plain language of the last sentence of the first paragraph of section 5, that a contract would be required for all uses of "stored water," his statements cannot, by any stretch of the imagination, be construed as a declaration that the bill "would wipe out appropriative rights." The full Walsh-Johnson colloquy (70 CONG. REC. 167-68) is set out in Arizona's legislative history volume at 37-38, 40-43. Here is the portion (70 CONG. REC. 168) which Arizona quotes in her answering brief (Ariz. Ans. Br. 45-46):

> "Mr. WALSH of Montana. If the city of Los Angeles has this enormous appropriation of the waters of the Colorado River, a perfected appropriation of an inchoate appropriation, does it follow, if the Government erects this dam across the Colorado River and creates a great storage basin, that

[7]Ariz. Ans. Br. 46. Arizona asserts that Rep. Swing "expressed similar views" and provides a cross reference to the statements of Mr. Swing which we treat *supra* pp. 121-24.

it must yield up that amount of water to the city of Los Angeles?

"Mr. JOHNSON. I rather think so, just exactly as if it were a perfected right for irrigation purposes.

"Mr. WALSH of Montana. Yes; but I always understood that the interest that stores the water has a right superior to prior appropriations that do not store.

"Mr. JOHNSON. Possibly so. What is the point?

"Mr. WALSH of Montana. The point is that apparently, if that is correct, then this expenditure is being made with no right in the Government of the United States to control the water which is stored, but that it must go to those appropriators.

"Mr. JOHNSON. No; the bill provides that a contract in advance must be made for the storage of water by the Secretary of the Interior.

"Mr. WALSH of Montana. A contract with whom?

"Mr. JOHNSON. With those who utilize and take and appropriate the water.

"Mr. WALSH of Montana. That is to say, the Government may dispose of the stored water as it sees fit?

"Mr. JOHNSON. Yes; under the terms of this bill."

Here is the immediately following portion of the colloquy, clearly demonstrating that Senator Johnson was trying to explain that the contract requirement was

merely an added condition to whatever right Los Angeles might possess, and that, whatever the source of the right to use "stored water," appropriation or contract, priority would be a principal incident of that right (70 CONG. REC. 168):

"Mr. WALSH of Montana. Then how can it be said that the city of Los Angeles has a perfected interest?

"Mr. JOHNSON. It has a perfected right there unquestionably, but the bill requires the city of Los Angeles to conform to it, and the city of Los Angeles is perfectly willing to conform to it just exactly as if it had no perfected right.

Mr. WALSH of Montana. *Am I correct in the assumption that the Government of the United States must distribute the water to the various appropriators in accordance with their several appropriations?*

"Mr. JOHNSON. *If they contract.*

"Mr. WALSH of Montana. Yes; but to contract means a liberty of contract. That is what I want to know. Can the Secretary give the water to them or withhold it from them as he sees fit?

"Mr. JOHNSON. Certainly, because before he begins work upon the dam he has to have the contract in his possession for its payment, and he is the one who is to fix the sums that are to be paid.

"Mr. WALSH of Montana. Yes, but that is quite contradictory. It seems to me that the city of Los Angeles has no rights by virtue of this appropriation.

"Mr. JOHNSON. Certainly it has, but those rights unquestionably will be controlled by this bill.

"Mr. WALSH of Montana. I should like to have a very much clearer understanding about that than I have.

"Mr. JOHNSON. I fear I can not make it any clearer to the Senator. I would like to do so if I were able." (Emphasis added.)

Senator Walsh then asked whether the Secretary would be obliged to contract with the city of Los Angeles, to which Senator Johnson's reply may have been somewhat vague and ambiguous *(ibid.)*:

"Mr. JOHNSON. No; he is not obliged to do so, but he is obliged to contract with somebody that makes the same claims to the same waters, and unless the contract is by mutuality agreed upon then he will not build the dam. That is the condition precedent to the construction of the dam.

"Mr. WALSH of Montana. Then he is at liberty to contract with the city of Los Angeles, which has an appropriation, or with some one else that has not an appropriation?

"Mr. JOHNSON. Yes; he is at liberty to contract with the city of Los Angeles, which has an appropriation.

"Mr. WALSH of Montana. *But can he disregard the city of Los Angeles?*

"Mr. JOHNSON. *I doubt very much if he can.*

"Mr. WALSH of Montana. *And contract with some one else who has no appropriation?*

"Mr. JOHNSON. *I doubt very much, first, if he would, and I doubt, secondly, if he could.*

". . . .

"Mr. WALSH of Montana. I directed the inquiry merely for the purpose of trying to find

out, if I can, under what kind of obligation the Government of the United States, should it build this dam, would be to those who have the appropriations.

"Mr. JOHNSON. The Government would be under no obligations until it makes its terms. I seem unable to make that plain. But here is everything in this scheme, plan, or design: Everything is dependent upon the Secretary of the Interior contracting with those who desire to obtain the benefit of the construction, and he is not to undertake any expenditure nor to undertake any construction until that shall have been accomplished.

"Mr. WALSH of Montana. Let us suppose the Arizona people are perfectly willing to meet the requirements and that the Los Angeles people are perfectly willing to meet the requirements, and other people who have not even attempted to make any appropriation are perfectly able and willing to meet the requirements. Who then has the right?

"Mr. JOHNSON. The Secretary of the Interior and the Government have the right.

"Mr. WALSH of Montana. *The Secretary of the Interior may utterly ignore those appropriations?*

"Mr. JOHNSON. *Possibly so.*

"Mr. WALSH of Montana. *That is what I am curious to find out about.*" (Emphasis added.)

Here is how Senator Johnson was understood by Senator Walsh (70 CONG. REC. 169 (1928)):

"Mr. WALSH of Montana. . . . [I]f, as contended apparently by the Senator from California, the city of Los Angeles has a right, inchoate in character, in process of perfection, which

entitles it to a certain amount of water out of the Colorado River, if we allocate so much of the water to the State of Arizona as interferes with its rights, would we not be taking property from the people of Los Angeles without due process of law?

"Mr. HAYDEN. If the right were of a character that must be recognized, I would agree with the Senator.

"Mr. WALSH of Montana. That, I understand, is the contention of the Senator from California, that the hands of the Government are tied; that if we shall erect a dam there at all we shall have to give enough water out of that dam to the city of Los Angeles to satisfy its appropriation.

"Mr. HAYDEN. But I am quite sure, if I understood correctly the Senator from California, that he qualified that statement by saying that, after all, the Secretary of the Interior could allow the city of Los Angeles to have such quantity of water as might be determined by contract."

Immediately thereafter, Senator Phipps added his observation that priority of appropriation principles should control competing claims to the stored water (whether rights were based on appropriation or contract) *(ibid)*:

"Mr. PHIPPS. It seems to me that in resolving such a difficulty, should it arise, there would be taken into consideration the fact that water for domestic use should take priority over water intended for purposes of irrigation. Aside from that, those filings are first in point as compared with those to which the Senator from Arizona referred. They are for a superior use, and, in addition thereto, the applicant who has made the filing [the city

of Los Angeles] has pursued the proper course in developing the manner of appropriation or the manner of diverting the water and putting it to the highest beneficial use. I do not anticipate any difficulty on that score in resolving the question of priority by the Secretary of the Interior."

APPENDIX E

THE LEGISLATIVE HISTORY OF THE SECTION 5 REQUIREMENT THAT WATER DELIVERY CONTRACTS EXECUTED PURSUANT THERETO SHALL "CONFORM TO" SECTION 4(a) REFUTES ARIZONA'S ARGUMENT THAT CONGRESS UNILATERALLY IMPOSED A FEDERAL ALLOCATION OF COLORADO RIVER WATERS UPON ARIZONA, CALIFORNIA, AND NEVADA

This appendix covers the legislative history of the requirement in section 5 of the Project Act that contracts executed pursuant to that section "shall conform to paragraph (a) of section 4 of this Act." Arizona argues that this language states Congress' intention to impose upon Arizona, California, and Nevada a federal allocation precisely as set forth in the second paragraph of section 4(a) (consenting to the terms of a tri-state compact never ratified by any state). *E.g.,* Ariz. Ans. Br. 12-13, 31-32 & n.35, 34 & n.41; Ariz. Op. Br. 84-99.

The legislative history confirms the literal and natural reading of the statute: That "conform to" language in section 5 does not impose any interstate allocation except as agreed upon by the states. The Master has rejected this Arizona contention.[1]

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[1]Rep. 162-63: "Arizona, while agreeing with the United States that the Project Act constitutionally delegates to the Secretary of the Interior the power to allocate mainstream water among the claimant states, argues that the second paragraph of Section 4(a) establishes a formula for the allocation which the Secretary is required precisely to follow, and that those clauses in her water delivery contract which deviate from the formula are void. This argument is premised on the language in Section 5 that 'contracts respecting water for irrigation and domestic uses . . . shall conform to paragraph (a) of section 4 of this act.' The second paragraph, Arizona points out, is included within Section 4(a). But the second paragraph of Section 4(a) is

A. Views of the Upper Basin Authors of the "Conform to" Language

1. *Lack of congressional power to make a federal allocation*

Senator Phipps and Representative Taylor, both from the upper basin State of Colorado and both proponents of the Swing-Johnson bill (69 CONG. REC. 9989-90 (1928), 70 CONG. REC. 603, 837 (1928)) were the authors of the language in section 5 requiring that contracts executed pursuant to that section "shall conform to paragraph (a) of section 4 of this Act." *Infra* pp. 138-39, 140-41. Both legislators held the view that Congress lacks the power to apportion water among the states because such an objective can only be accomplished by interstate agreement or litigation in this Court (*supra* app. A, pp. 18-20, 24-26).

It is unlikely that either man would vote for a bill which imposed any federal allocation; it is inconceivable that either would author language designed to achieve that result.

Mr. Taylor made clear his long-standing views opposing federal control of western waters in an exchange with Senator (then Representative) Hayden during hearings on the third Swing-Johnson bill:[2]

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plain in that it merely *authorizes* a tri-state compact for the division of water; it does not compel it; nor does it condition approval of the Colorado River Compact upon acceptance of the proposed tri-state compact. Indeed, the second paragraph was specifically amended on the floor of the Senate to make the suggested division permissive rather than mandatory. The suggested compact which Congress was willing to approve in advance is of no compelling force or effect since no such compact has ever been agreed to. In so far as Section 5 refers to the second paragraph of Section 4(a) it is for the purpose of requiring the Secretary to respect the compact if ratified by the states. See also Section 8(b). Arizona's contention in this respect must therefore be rejected."

[2] *Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation*, 69th Cong., 1st Sess. 78-79 (1926).

"Mr. HAYDEN. Mr. Taylor was a member of this committee when I first came to Congress. He afterwards became its chairman. During that time many bills of various kinds were reported to the House, but during all the years that he had any connection with this committee, there was never any bill considered relating to the appropriation and use of water when Mr. Taylor did not insist that there be incorporated in it the provision which is a part of the reclamation act, that nothing in such act should affect the law [79] of any State with regard to the appropriation, use, and distribution of water. I would like to ask whether he now feels, as heretofore, that that principle should continue to be recognized?

"Mr. TAYLOR. Yes; I do, and I have put it into many acts. I feel that way now, and I do not think we ought to surrender any rights.

"Mr. HAYDEN. Then, you are opposed to the nationalization of rivers in the Western States?

"Mr. TAYLOR. Yes."

2. Disinterest in intra-lower basin allocation

Senator Phipps and Representative Tayor repeatedly disclaimed any interest in resolving the intra-lower

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Mr. Hayden had just asked Mr. L. Ward Bannister, prominent upper basin water attorney, whether he favored the precedent, purportedly being set by the Swing-Johnson proposals, "which might arise to haunt you on the next stream in Colorado that the Government desired to nationalize," to which Mr. Bannister had replied as follows (*id.* at 78): "I do not believe in the nationalization of the waters of the West, and I think that this bill can be so drawn that it would not mean their nationalization. We can limit the use of the water to the States that do ratify, and preserve all the autonomy of those States. We are not establishing the precedent."

basin dispute. Each sought only protection for the upper basin's apportionment under the Colorado River Compact. For example, on April 24, 1928, Representative Taylor asserted during hearings before the House Rules Committee on H.R. 5773, the fourth Swing-Johnson bill:[3]

> "Personally I am not concerned as to how these gentlemen of the lower three States divide the water between themselves, or what they do with it down in that lower country, or whether Uncle Sam builds the dam or whether private people build the dam. But I am immensely interested in the future development of these four upper States and in preserving their water rights for all time for this and succeeding generations when those States are developed. . . ."

Mr. Taylor reiterated these views during debate on May 24, 1928, the day before he offered the "conform to" language as an amendment to the bill (*infra* pp. 138-39) (69 CONG. REC. 9765):

> "The four upper States should be and three of them are willing to take their joint allotment of that 7,500,000 acre-feet and divide it among them-

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[3] *Hearings on H.R. 5773 Before the House Committee on Rules,* 70th Cong., 1st Sess. 21 (1928). Mr. Taylor had expressed the same views before that committee the year before:

"Thirdly, let the four upper basin States divide between themselves the 7,500,000 acre-feet of water allotted to them by both the seven and six State compacts. . . .

"Also let the three lower basin States similarly divide between themselves the 8,500,00 acre-feet allotted to them by that compact. The three lower States have not yet been able to agree among themselves as to how they would divide that portion of the stream. That is none of the business of the four upper States. Our four upper States will agree among themselves somehow. . . ." *Hearings on H.R. 9826 Before the House Committee on Rules,* 69th Cong., 2d Sess. 20 (1927).

selves afterwards. And the three lower basin States should be willing to do the same. But Arizona has never been willing to do so. In a word, what the upper States want by this legislation is to protect our water rights for future development, and also to prevent the present gigantic waste of flood waters that might be used, and also prevent Mexico from getting all of it. We are not otherwise directly concerned in this long and bitter strife between Arizona and California."

Senator Phipps shared Mr. Taylor's view. During debate on May 2, 1928, a few weeks before he submitted an amendment to section 5 containing the "conform to" language (*infra* p. 139), Senator Phipps asserted (69 CONG. REC. 7625):

> "I do not care to enter into a discussion as to an equitable division of water between California and Arizona, as that is a matter they could settle between themselves, and the more promptly that question can be disposed of I think the better off they will both be."

B. History of "Conform to" Language

1. *House of Representatives*

On May 25, 1928, Representative Taylor of Colorado proposed the addition of the "conform to" language to section 5 of H.R. 5773, the House version of the bill, as a "clarifying amendment." It was adopted after the following brief colloquy (69 CONG. REC. 9988):

> "Mr. TAYLOR of Colorado. Mr. Chairman, I ask unanimous consent to return to section 5 for the purpose of offering a brief amendment.
>
> "The CHAIRMAN. Is there objection?

"Mr. LEATHERWOOD. Mr. Chairman, reserving the right to object, on what subject?

"Mr. TAYLOR of Colorado. It is a clarifying amendment.

"Mr. DOUGLAS of Arizona. Mr. Chairman, I reserve the right to object.

"The CHAIRMAN. The Clerk will report the proposed amendment.

"The Clerk read as follows:

> Amendment offered by Mr. TAYLOR of Colorado: Page 6, line 22, after the word "service" strike out the period and insert: "and shall conform to paragraph (a) of section 4 of this act."

"The CHAIRMAN. Is there objection?

"There was no objection.

"The CHAIRMAN. The question is on agreeing to the amendment.

"The amendment was agreed to."

Section 4(a) of H.R. 5773, to which Representative Taylor's "conform to" language was directed, provided only for a six-state ratification of the Colorado River Compact.[4]

2. *Senate*

In the Senate, the phrase "and shall conform to paragraph (a) of section 4 of this Act," in section 5 first appeared in an amendment to S. 728, the fourth Swing-Johnson bill, printed on May 19, 1928, by Senator Phipps but never offered. That amendment proposed (1) to put a limitation provision on California into section 4(a), and (2) to add the phrase "and shall conform to paragraph (a) of section (4) of this Act," after the word "service" in section 5.[5]

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[4]See Calif. Ex. 2082 for iden. (Tr. 11,177), p. 5.

[5]Calif. Ex. 2004, Tr. 11,173. Calif. Ex. 2001, Tr. 11,173, is a copy of S. 728, to which that amendment was proposed.

On December 5, 1928, Senator Phipps printed another amendment to S. 728, which was identical to his earlier amendment except for the addition of an embargo on Federal Power Commission licenses on the Colorado River system until the act became effective.[6] This amendment was never offered.

That same day H.R. 5773, which had passed the House, was made the pending bill and its text was replaced by that of S. 728. 70 CONG. REC. 67-68.[6a]

Also on December 5, Senator Hayden printed an amendment to H.R. 5773, providing, *inter alia,* two paragraphs for section 4(a); the first paragraph provided for a limitation on California; the second paragraph provided for the ratification of a three-state compact among Arizona, California, and Nevada as a condition precedent to the act's taking effect.[7] On December 6, 1928, Senator Hayden offered his printed amendment. By agreement, this Hayden amendment was made the "pending amendment" to the bill. 70 CONG. REC. 176.

On December 7 (calendar day December 8), 1928, Senator Phipps of Colorado printed an amendment to H.R. 5773, in terms identical to the amendment which he had previously printed on December 5, 1928, to the Senate bill, S. 728.[8] On December 10, 1928, Senator Phipps offered this amendment, which contained the "conform to" language, as an amendment to the pending Hayden amendment, which did not. 70 CONG. REC. 324.

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[6]Calif. Ex. 2009, Tr. 11,173.
[6a]See Calif. Ex. 2010, Tr. 11,173.
[7]Calif. Ex. 2011, Tr. 11,173.
[8]Calif. Ex. 2012, Tr. 11,173.

The Phipps amendment to the Hayden amendment to the bill was not subject to amendment; the Phipps amendment was an amendment in the second degree, and Senate rules forbade amendments in the third degree. On December 11, 1928, Senator Hayden withdrew his "pending amendment" so that Senator Phipps could reoffer his amendment, which he did. The Phipps amendment then became the "pending amendment" in the first degree and thus itself subject to amendment. 70 CONG. REC. 382. The Hayden amendment thereby lost all status. As noted above (*supra* p. 140), Senator Phipps' amendment contained only a limitation provision to be included in section 4(a), the "conform to" phrase for section 5, and the embargo on Federal Power Commission licenses for section 6.

After the Phipps amendment had been amended by changing the limitation from 4,600,000 to 4,400,000, and by eliminating the Gila River system from the Federal Power Commission embargo, Senator Hayden proposed a second paragraph to section 4(a) as an amendment to the Phipps amendment. His amendment would have required, as a condition precedent to the effectiveness of the act, that California ratify the prescribed tri-state compact.[9]

On December 12, 1928, Senator Pittman suggested (1) that the Hayden amendment be changed to make it permissive, authorizing Arizona, California, and Nevada to enter into a tri-state compact, rather than requiring such a compact as a condition precedent to the effectiveness of the Project Act; and (2) that the tri-state compact should not become effective until Ari-

[9]Calif. Ex. 2014, Tr. 11,173.

zona, California, and Nevada had ratified the Colorado River Compact. Senator Pittman stated (70 CONG. REC. 469):

"This is what I propose, to strike out all of the agreement between the three States, and let them enter into it if they want to, but if they do not want to, let them stay out of it. That is not coercing a State.

"This is what I propose, to strike out all of the Hayden amendment down to and including the word 'agree,' on page 1, in line 6, and in lieu thereof insert the following:

> The States of Arizona, California, and Nevada are authorized to enter into an agreement, which shall provide.

"Then go ahead and put down the provisions of the Hayden amendment, and at the end of the Hayden amendment put in a seventh paragraph, which shall read:

> Said agreement to take effect upon the ratification of the Colorado River compact by Arizona, California, and Nevada.

"The Constitution requires that before States may enter into an agreement they shall be authorized by Congress to enter into the agreement. I start out by having Congress, by this act, authorize an agreement. I make the agreement specific by reason of the fact that otherwise it might be held that they would have to come back to Congress for approval of the agreement they entered into. They approve a specific agreement in advance and authorize it. The terms are set out. It does not take effect unless all three States ratify the Colorado River compact.

"Mr. HAYDEN. It should not.

"Mr. PITTMAN. It should not. It does not require California to enter into that agreement. It does not require Arizona to enter into that agreement. It does not require Nevada to enter into that agreement. If they do not enter into that agreement, then we have the bill as it stands. Whatever States do not ratify are not bound by this measure. That, then, becomes an optional matter and not a coercive matter.

"I am confident, however, that if the State of Arizona were willing to enter into such an agreement she would, of course, ratify the Colorado River compact, and if she were not willing to ratify the Colorado River compact she would not want California bound by these conditions, because she would not be in the 7-State compact, and would have nothing to do with it.

"Therefore I say that the fair and practical way is to set out the terms of an agreement which the Congress of the United States would be satisfied for the States to enter into, and say that if they see fit to enter into it they may, but it shall not become effective as a subsidiary agreement to the main 7-State compact until those three States do ratify the 7-State compact.

"I offer that as a suggestion. I do not want to interfere with the vote on this amendment, but I would like very much to have it in a voluntary agreement, rather than impose it upon California as a condition of the ratification.

"Mr. HAYDEN. Mr. President, I am not at all insistent that my amendment be adopted in the

exact language in which it is offered. The suggestion made by the Senator from Nevada is entirely satisfactory to me.

"Mr. PITTMAN. Then I offer it.

"The PRESIDING OFFICER. The amendment would be an amendment in the third degree, and it would not be in order.

"Mr. HAYDEN. Have I the privilege of perfecting my amendment so as to carry out the suggestion of the Senator from Nevada?

"The PRESIDING OFFICER. The Senator can do that.

"Mr. HAYDEN. Then I am pleased to do that."

Senator Pittman then explained to Senators Bratton and Shortridge the effect of his amendment (*id.* at 470):

"I have simply changed the form of the amendment. Instead of making it a condition of ratification on the part of California, I have simply provided that the States of Arizona, California, and Nevada may or may not enter into an agreement 'in the following words, to wit,' and so forth; that if they do enter into that agreement it shall take effect when each of those States has ratified the Colorado River compact. The only legal question involved is whether or not Congress passing a bill and setting out the agreement into which they must enter, they would have to come back and have Congress say it was all right.

". . . .

"What I objected to, as I said once before, was that these conditions or terms of an agreement, involving her ratification of the 6-State compact,

were imposed upon California as a condition of the going into effect of this legislation. I contend that it is not a matter that should be imposed upon any State as a condition of ratification of this legislation. I believe that it is a very proper statement of an agreement between these States when we leave it to the States to adopt or not as they see fit. I think it is entirely proper to provide, as a condition of such an agreement coming into effect, that the three States shall have ratified the 7-State compact before it comes into effect, because the main object of the agreement is to bring about an agreement among the seven States.

"It is supposed to be a subsidiary agreement to the general agreement among the seven States, and no subsidiary agreement, taking the benefits of another agreement, should be permitted until those getting the benefits of the subsidiary agreement have become parties to the main agreement. So that is in the amendment as it is now accepted and modified by the Senator from Arizona himself."

Senator Pittman clearly stated what he conceived to be the Senate's function with respect to the lower basin controversy in this exchange with Senator Waterman of Colorado *(ibid.)*:

"Mr. WATERMAN. Is it not true that the entire controversy now pending in this body arises out of the fact that the three States of the lower basin can not agree as to the subsidiary arrangement under the 7-State compact?

"Mr. PITTMAN. That is entirely correct.

"Mr. WATERMAN. Then, ought we not to use every effort and ever endeavor to so bring about legislation that there is a reasonable probability that Arizona and California may come into accord?

"Mr. PITTMAN. I think it is our duty. I have not anything further to say. I have explained my ideas. The amendment is in its present form because it has been modified by the Senator from Arizona. I can not see why any one of the three lower States should object to such an amendment. It is not imposed as a condition of ratification. It is purely optional with them whether they want to agree to it or not."

Senator Bratton then asserted that he believed the tri-state compact authorization, even in its permissive form, unduly hampered the sovereignty of the states involved (see *supra* pp. 8-10), to which Senator Pittman replied as follows (*id.* at 471):

"Mr. PITTMAN. Mr. President, this question has been here now for seven years. The seven States have been attempting to reach an agreement. Apparently the Senate of the United States is about to reach an agreement as to what ought to be done. The Senate has already stated exactly what it thinks about the water. That might have been an imposition on some States. Why do we not leave it to California to say how much water she shall take out of the river or leave it to Arizona to say how much water she shall take out of the river? It is because it happens to become a duty of the United States Senate to settle this matter, and that is the reason.

". . . .

> "We have already decided as to the division of the water, and we say that if the States wish they can enter into a subsidiary agreement confirming that. We have already agreed that the 7-State pact shall be binding."

Senator Pittman's reply is relied on by Arizona as evidencing his understanding that the Congress was allocating the water in accordance with the terms of the tri-state compact. Ariz. Ans. Br. 47. Although those particular statements of Senator Pittman may, in isolation, carry an inference that he assumed Congress was dividing the waters, his repeated remarks both before and after the quoted statement wholly negative that inference.

Senator Pittman's objective is amply demonstrated by the exchange between Senator Pittman and Senator Johnson immediately following Senator Pittman's remarks relied on by Arizona. During that exchange, Senator Pittman made it clear that he was merely trying to facilitate ratification of the tri-state compact by giving congressional approval in advance to the particular compact terms set out. *Id.* at 471. He stated (*ibid.*):

> "I think that we would save months of time by this amendment. If California and Nevada and Arizona do not like this agreement, they do not have to approve it. If they want to amend it they can do so, and ask approval of the amended agreement."

Senator Johnson and Senator Pittman then engaged in the following colloquy which conclusively establishes that the tri-state compact authorization cannot

have the mandatory effect Arizona argues for (*id.* at 471-72):

> "Mr. JOHNSON. Here is the difficulty which strikes me in the matter: First of all, we are authorizing the doing of something that already the States have the right to do. Secondly, we are stating the things that the three States are to do, and we are making a sort of Procrustean bed upon which they must [472] lie in the determination of matters that are suggested within this amendment, without any elasticity, without any opportunity to alter phraseology or possibly terms. What is done by the amendment is to put the impress of the Federal Government upon the necessity of agreement, and, if one of the States should not agree, leave that State in a position which would not be particularly enviable.
>
> "With the distinct understanding that this authorization is one that is after all an authorization that is wholly unnecessary, because the parties may, in any fashion they desire, meet together and contract and subsequently come to Congress for ratification of that contract; that there is no impress of the Congress upon the terms, which might be considered coercive to any one of those States, I am perfectly willing to accept the amendment.
>
> "Mr. PITTMAN. There is nothing necessary at all, of course, so far as the adoption of this amendment is concerned, unless the element of time is considered valuable. If it should happen, mind you, that two weeks from now the legislatures of the three States, being in session, should

be perfectly satisfied with the terms of this proposed agreement and should ratify it, they could on the next day also ratify the 7-State agreement. On the other hand, if we do not adopt this amendment now, but allow the three States to meet together and agree and they should agree, then it will be necessary for them to come to Congress next fall; and we might find that Congress next fall would not ratify the agreement entered into by the three States, might we not?

"Mr. JOHNSON. That is possible.

"Mr. PITTMAN. Suppose, for instance, a majority of the Senate found there were certain things in the agreement it did not like.

"Mr. JOHNSON. That is all right; *but what I want to make clear is that this amendment shall not be construed hereafter by any of the parties to it or any of the States as being the expression of the will or the demand or the request of the Congress of the United States.*

"Mr. PITTMAN. *Exactly, not.*

"Mr. JOHNSON. *Very well, then.*

"Mr. PITTMAN. *It is not the request of Congress.*

"Mr. JOHNSON. *I accept the amendment, then.*" (Emphasis added.)