IN THE

Supreme Court of the United States

October Term 1963
No. 8 Original

STATE OF ARIZONA,

Complainant,

vs.

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.

PETITION OF DEFENDANT THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA FOR REHEARING AND ARGUMENT IN SUPPORT OF PETITION.

September 12, 1963.

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Defendants,

UNITED STATES OF AMERICA AND STATE OF NEVADA,

Interveners,

STATE OF NEW MEXICO AND STATE OF UTAH,

Impleaded Defendants.

PETITION FOR REHEARING PRESENTED BY THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA.

Comes now the defendant The Metropolitan Water District of Southern California (herein referred to as "Metropolitan") and petitions the Court for an Order granting a rehearing on the issue of the meaning and effect of the Boulder Canyon Project Act (particularly,

Section 4(a) thereof), and the California Limitation Act, as such meaning was announced in the decision herein of June 3, 1963; and in support of such petition respectfully represents that the Court has erred in the following particulars:

I.

In disregarding the plain meaning of said statutes, and in overlooking the fact that for over thirty years, in reliance upon such plain meaning and without any suggestion from any source that the language of the statutes did not carry their literal meaning, Metropolitan constructed costly works and developed an extensive urban economy dependent upon availability of water, which, under the construction of the said statutes announced by the Court on June 3, 1963, will not be available for use in California.

II.

In overlooking the fact that the limitation on use of Colorado River water, evidenced by the offer of the United States to California in the first paragraph of Section 4(a) of the Boulder Canyon Project Act and the acceptance of California evidenced by the California Limitation Act, is contractual, not merely statutory, and that in construing such contract (statutory compact), the intent of the parties manifested by the words used (*i.e.,* waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River Compact) is controlling over any intent on the part of any party not disclosed by the words used.

III.

In construing the said statutes as referring to the mainstream of the Colorado River below Lee Ferry as the basis of computing the limitation on use of "Colorado River System" water in California, instead of construing the plain and unambiguous language of said statutes as referring to "waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact."

Wherefore, as Metropolitan would suffer injury, loss, and damage greater than any other defendant herein, by reason of the decision of June 3, 1963, as related to the meaning of the limitation on use of "Colorado River System" water in California, Metropolitan (in addition to participating in a petition for rehearing filed by the Attorney General on behalf of the State of California), presents this Petition for Rehearing on that issue.

Respectfully submitted,

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ARGUMENT IN SUPPORT OF PETITION FOR REHEARING.

I.

The Decision of June 3, 1963 Herein, Respecting the Limitation on the Use of Colorado River water in California, if Made Final, Will Impose a Great Injustice Upon the Defendants, Particularly Upon the Defendant The Metropolitan Water District of Southern California, and Its 8,000,000 People.

A. Metropolitan Water District as a Public Corporation Has a Grave Responsibility to Its People.

The Metroplitan Water District of Southern California (herein referred to as "Metropolitan") is a public and municipal corporation organized under the laws of the State of California, lying on the coastal plain of Southern California extending from and including part of Ventura County on the north to the Mexican border on the south.[1] Its current population is in excess of 8,000,000 people (about one-half of the population of the State of California).[2] Ninety-six incorporated cities are within its boundaries, including the cities of Los Angeles and San Diego.[3] The District was incorporated in 1928[4] for the specific purpose of supplementing the failing water supply in the coastal area of Southern California, by use of waters from the Colorado River under the then pending Boulder Canyon Project Act (herein sometimes referred to as the "Project

[1]Calif. Ex. 446 (Tr. 9,395).

[2]24 MWD Annual Report (1962) p. xxv.

[3]24 MWD Annual Report (1962) p. 77.

[4]Metropolitan Water District Act, Chap. 429; Calif. Stat. 1927, p. 694; Calif. Ex. 445 (Tr. 9,395).

Act").[5] Having constructed the Colorado River Aqueduct Project by use of the money and credit of its taxpayers, Metropolitan has a serious responsibility to protect the usefulness of the aqueduct and the water supply of the urban communities now dependent thereon.

To call the Court's attention to the peculiar position of defendant Metropolitan, and the special injury to which its people would be exposed as the result of the decision herein of June 3, 1963, Metropolitan, in addition to subscribing to the Petition for Rehearing and brief filed by the State of California, files its separate petition and supporting brief.

B. Because of Its Junior Position in the Schedule of California Priorities, Metropolitan Has a Special Interest in the Pending Litigation.

After the effective date of the Project Act (1929), in response to a request from the Secretary of the Interior[6] that intrastate priorities in use of Colorado River water in California be settled prior to the execution of water storage and delivery contracts under the Act, Metropolitan joined in the Seven-Party Priority Agreement (1931).[7] In the light of Section 4(a) of the Project Act and the California Limitation Act, as read and understood at that time, Metropolitan accepted a priority junior to certain agricultural priorities, aggregating 3,850,000 acre-feet per annum.[8]

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[5]Ariz. Ex. 7 (Tr. 222).

[6]Calif. Ex. 1810 (letter of the Secretary of the Interior requesting a recommendation of the State of California in effecting a water allocation, Nov. 5, 1930, Tr. 12,234, 12,244), text: Sp. M. Ex. 4 for iden. (Hoover Dam Docs. pp. A477-78) Tr. 255.

[7]Ariz. Ex. 27 (Tr. 242); Calif. Findings MWD: 107, Vol. III, p. MWD-14.

[8]Ariz. Ex. 27 (Tr. 242), Article I, Secs. 1, 2 and 3.

Five hundred and fifty thousand acre-feet of Metropolitan's water right is in the fourth priority, and the balance of 662,000 acre-feet is in the fifth priority.[9] The aggregate of the first four priorities (including Metropolitan's 550,000 acre-feet) equals the 4,400,000 acre-feet of "waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact," to which California is limited, leaving 662,000 acre-feet per annum of Metropolitan's rights dependent on the presence of "excess or surplus waters unapportioned by said compact," to one-half of which California is limited.[10]

The agreed priorities were embodied in the United States' contracts with California users of Colorado River water.[11] Including the contract originally made with the City of San Diego and assigned to Metropolitan when the San Diego County Water Authority was annexed to and became a part of Metropolitan (1946),[12] Metropolitan now holds a contract with the United States for the storage and delivery of Lake Mead water up to 1,212,000 acre-feet per annum, in the fourth and fifth priorities.[13]

Metropolitan has constructed the Colorado River Aqueduct with capacity to transport that amount of wa-

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[9]*Id.*, Secs. 4 and 5.

[10]Ariz. Exs. 1 (Tr. 214), 7 (Tr. 222), Sec. 4(a), 14 (Tr. 232), 38 (Tr. 251) and 39 (Tr. 252); Calif. Op. Br. p. 274, footnote 8.

[11]Ariz. Ex. 33 (Palo Verde Irr. District) (Tr. 249), Article 6; Ariz. Ex. 34 (Imperial Irr. District) (Tr. 249), Article 17; Ariz. Ex. 36 (Coachella Valley County Water District) (Tr. 250), Article 17; Ariz. Ex. 38 (Tr. 251), and 39 (Metropolitan Water District) (Tr. 252), Article 6; Ariz. Ex. 40 (City of San Diego) (Tr. 252), Article 7.

[12]Ariz. Ex. 40 (Tr. 252), Article 7.

[13]Ariz. Exs. 38 (Tr. 251), 39 (Tr. 252), 40 (Tr. 252), 41 (Tr. 253) and 42 (Tr. 253); Calif. Findings MWD: 108, Vol. III, p. MWD-15.

ter 242 miles from the river to the coastal area of Southern California.[14]

Construction of the aqueduct was started in 1932 and completed to the point of delivering Colorado River System water to the coastal plain of southern California in 1941.

As of June 30, 1962, the cost of construction of the Colorado River Aqueduct Project aggregates $477,-973,462.[15] Since the first delivery of water in 1941, use of the aqueduct has gradually increased, in response to the growing demands, and in recent years has been in use substantially to its full capacity. A great urban community has developed in reliance on water so imported.[16]

Being largely dependent upon the presence of "excess or surplus waters"[16a] Metropolitan is concerned more than any other California agency with the continued presence of such "excess or surplus," available to California under the California Limitation Act.

In construing the limitation on the use of Colorado River water in the State of California, the Court apparently ignores the California Limitation Act; looks only to the Project Act, and primarily upon the basis of debate on the floor of the Senate, reads the statutory words appearing in the first paragraph of Section 4(a) of the Act, "waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact," as referring, not to waters so apportioned

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[14]Calif. Exs. 454, 455, p. 2 (Tr. 9,395); Calif. Op. Br. p. A25; Calif. Findings MWD: 112, pp. MWD 23-24.

[15]24 MWD Annual Report (1962), Table 4 at pp. xxxiv-xxxv.

[16]See note 14, *supra;* Calif. Exs. 456 and 457 (Tr. 9,395).

[16a]Ariz. Ex. 14 (Tr. 232), Sec. 1.

by the Compact, but to waters of the mainstream of the Colorado River below Lee Ferry, exclusive of tributaries.[17] That reading of the Limitation Act removes any possibility of the permanent presence of "excess or surplus" water in the river available for use in California.

It is stated in the prevailing opinion that:[18]

> "Assuming 7,500,000 acre-feet or more in the mainstream and 2,000,000 in the tributaries, California would get 1,000,000 acre-feet more if the tributaries are included and Arizona 1,000,000 less."

The lack of water so eliminated from availability for use in California, combined with the low position of the defendant Metropolitan in the schedule of California priorities, exposes Metropolitan to severe curtailment,[19] and (depending on the action taken by the Congress and the Secretary of the Interior)[20] possibly complete loss of use of water, which the United States agreed to deliver to Metropolitan from the Colorado River, and for the use of which vast works have been built and in reliance upon which a great urban economy has developed.[21]

There is no need to emphasize or dramatize the disastrous effect of deprivation of water in an urban community.

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[17]*Arizona v. California,* 373 U.S. 546, 567-568 (1963).

[18]*Ibid.*

[19]Ariz. Ex. 27 (Tr. 242), Article I, Secs. 4 and 5; Calif. Op. Br. pp. 260, 266-277 and Table 6.

[20]*Arizona v. California,* 373 U.S. 546, 593 (1963).

[21]Calif. Exs. 446, 447, 455 and 457 (Tr. 9,395); Calif. Finding MWD: 110, Vol. III, pp. MWD-19-21.

C. In Constructing the Colorado River Aqueduct Project, Metropolitan Met Its Responsibilities to Its People in Reasonable and Justifiable Reliance Upon the Plain Meaning of the Reciprocal Language of Section 4(a) of the Boulder Canyon Project Act and the California Limitation Act, Establishing the Limitation on the Use of Colorado River System Water in California.

The officers of Metropolitan acted reasonably and justifiably in relying upon the plain and unambiguous language of the first paragraph of Section 4(a) of the Project Act and the reciprocal language of the California Limitation Act, as fixing the basis of computation of the limitation on use of water of the Colorado River in California.[22]

Not possessing the gift of prophecy, the officers of the defendant Metropolitan in the early thirties could not foresee that, in 1963, this Court would arrive at the conclusion that the words of the statutes, by which the limitation was established on the use of Colorado River water in California, did not express the intent of the Congress and of the California Legislature, or that, under the guise of statutory construction so radical as to amount to judicial legislation, the basis of computing the limitation on California would be changed to reduce the amount of water available for use in California by as much as 1,000,000 acre-feet per annum.[23]

The two statutes (the Project Act and the California Limitation Act)[24] established a contract between the United States and California, which has been re-

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[22]Ariz. Ex. 7 (Tr. 222) Sec. 4(a); Ariz. Ex. 14 (Tr. 232) Sec. 1.

[23]*Arizona v. California,* 373 U.S. 546, 567-568 (1963).

[24]See note 22, *supra.*

ferred to as a "Statutory Compact".[25] The words used are not ambiguous. There was nothing to put the District on notice that the statutes as written did not accurately express the legislative intent of the two bodies.

Whether the question here be one of contract interpretation or of statutory construction, the result is the same. Looked upon as contractual, the ordinary meaning of the words used is controlling.[26] If statutory construction alone is involved, under the decisions of this Court available in the early thirties, the unambiguous language of the statutes precluded resort to legislative history as an aid to construction.[27] Even if ambiguity existed, the then available decisions of this Court classified legislative debate as inadmissible to modify the meaning of statutory words.[28]

D. The Decision of June 3, 1963, Respecting This Limitation Issue Would Result in a Grave Miscarriage of Justice Unless Corrected Upon Rehearing.

Under either approach, contractual or statutory, the officers of the District had no reason to look beyond the words of the statutes for an undisclosed meaning.

Until the Special Master's Draft Report was unveiled in 1960, and his admittedly "novel" reading of the California limitation disclosed,[29] Metropolitan, with full co-operation of the United States (but at its own expense), proceeded in reliance upon plain statutory language with no suggestion from any source that the

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[25]Calif. Op. Br. pp. 128-137.

[26]See authorities cited, pp. 13-14 and notes 6 and 6a, *infra.*

[27]See cases cited *infra,* Part III-B, pp. 20 to 23.

[28]See cases cited *infra,* Part III-C, pp. 23 to 25.

[29]Tr. 22,762 (Special Master).

statutes involved did not carry their clear and plain meaning, or that the District was proceeding upon a false premise.

To subject Metropolitan and its 8,000,000 people to the loss and damage resulting from an unforeseeable construction of the California limitation would constitute a grave injustice, which in all equity and conscience should be avoided.

II.

The Limitation on the Use of Colorado River System Water in California Results From a Statutory Compact and Its Meaning Should Be Ascertained Under the Rules of Contractual Interpretation and Not of Statutory Construction

The Congress did not attempt to impose a limitation on the use in California of Colorado River System water by legislative fiat (whether or not the Congress had power to do so is a question we do not reach here). Instead, the Congress invited the California Legislature to assume such a limitation as a condition precedent to the effectiveness of the Boulder Canyon Project Act in the event of failure of the Arizona Legislature to ratify the compact.[1]

The Legislature of California responded in the words used by the Congress, and enacted the "California Limitation Act".[2] The result was a compact between the United States and California evidenced by reciprocal legislation. Such compacts have been recognized by

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[1]Ariz. Ex. 7 (Tr. 222), Sec. 4(a).
[2]Ariz. Ex. 14 (Tr. 232).

this Court in the past.[3] In its Bill of Complaint in *Arizona v. California,*[4] Arizona referred to the arrangement between California and the United States as a "statutory contract".

There is nothing in the record to indicate that the California Legislature attached any other than the plain meaning to the words used in the Limitation Act.

If the Congress adopted the Project Act in the belief that the reference in Section 4(a) was to the mainstream only, and the California Legislature used the words as relating to the Colorado River System, a

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[3]The United States and a State may validly enter into agreements by means of reciprocal legislation. *Stearns v. Minnesota,* 179 U.S. 223, 248 (1900); *Searight v. Stokes,* 44 U.S. (3 How.) 150, 167 (1845); *Neil, Moore & Co. v. Ohio,* 44 U.S. (3 How.) 720, 742 (1845).

Virginia v. West Virginia, 220 U.S. 1, 34 (1911); *Kentucky Union Co. v. Kentucky,* 219 U.S. 140, 161 (1911); *Green v. Biddle,* 21 U.S. (8 Wheat.) 1, 92 (1823); see concurring opinion of Jackson, J., West Virginia ex rel. *Dyer v. Sims,* 341 U.S. 22, 36 (1951); see *Zimmerman & Wendell, The Interstate Compact Since 1925,* at 32 (1951).

[4]298 U.S. 558 (1936).

In Par. XVI of Arizona's Bill of Complaint, Arizona used language of contract:

"Six states, namely, California, Nevada, Utah, New Mexico, Colorado and Wyoming, having ratified said compact and waived those provisions thereof which required its approval by all the signatory states, and California, by her legislature, *having agreed* with the United States to limit her use of the waters of the Colorado River as specified in Section 4 of the Boulder Canyon Project Act, the President of the United States by proclamation dated June 25, 1929, declared said Act to be effective that day." (Emphasis added)

In Par. XIX of Arizona's Bill of Complaint, Arizona used the term "statutory contract":

"Plaintiff alleges that the total of the waters for the storage and delivery of which it was so contracted is substantially the entire amount which may legally be diverted from said river and consumptively used in the State of California under the terms of said *statutory contract* between the State of California and the United States, and is far in excess of California's equitable share of said waters." (emphasis added)

serious question would arise as to whether such mistake would not vitiate the "Statutory Compact".[5]

The compact is a contract and should be interpreted under the law of contract, rather than under the rules of statutory construction. Under the law of contract, the meaning manifested by the words used controls over any unexpressed intent of any party. *Williston* states the rule to be:[6]

> "According to the weight of authority and on principle, where the parties have assented to a writing as an expression of their agreement, or where a writing is required by law, the standard of interpretation is the standard of limited usage, that is, the ordinary meaning of the writing to parties of the kind who contracted at the time and place where the contract was made, and with such circumstances as surrounded its making."

Judge Learned Hand said:[6a]

> "A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by

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[5] *Raffles v. Wichelhaus,* (CT. Exch., 1864), 2 H. & C. 906; Restatement Contracts, Sec. 71(a); *Zlatnick v. Crisp,* 185 F. 2d 502, 503 (D.C. Cir. 1950).

[6] *Williston on Contracts* (Rev. 3d ed. 1936), Sec. 607, p. 1740.

[6a] *Hotchkiss v. National City Bank of New York,* 220 Fed. 287, 293 (SD. NY. 1911) [aff'd 201 Fed. 664 (2d Cir. 1912), 231 U.S. 50 (1913)].

The *Hotchkiss* case has been affirmed on this principle in: *Broderick v. Neale,* 201 F. 2d 621, 623 (10 Cir. 1953); *Provident Trust Co. of Phila. v. Metropolitan Casualty Ins. Co.,* 152 F. 2d 875, 878 (10 Cir. 1945).

See also *Restatement, Contracts,* Secs. 228, 230 and Comment (b) thereto. Sec. 230 has been cited with approval in *Mac-*

the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort. Of course, if it appear by other words, or acts, of the parties, that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail, but only by virtue of the other words, and not because of their unexpressed intent".

It was California's action that gave life to the limitation. The Court here is construing not only the act of the Congress, but the act of the legislature of the State of California resulting in a contract. The ordinary meaning of the words used should be recognized as controlling.

Andrews & Forbes Co. v. Mechanical Mfg. Co., 367 Ill. 288, 300, 11 N.E. 2d 382, 388 (1937), cert. den. 303 U.S. 655; *Pfotzer v. United States,* 77 F. Supp. 390, 393 (Ct. Cl., 1948), cert. den. 335 U.S. 885. See also *Chicago & N.W. Ry. Co. v. Chicago Packaged Fuel Co.,* 195 F. 2d 467, 470 (7 Cir. 1952), cert. den. 344 U.S. 832. See also *Williston on Contracts* (Rev. 3d ed., 1936) Sec. 616, pp. 1772-73.

III.

Even Upon the Assumption That the Meaning of the California Limitation Is to Be Determined Solely by Construction of the Boulder Canyon Project Act, The Decision Is Erroneous in Construing This Act as Imposing the Limitation on the Basis of Water of the Mainstream of the Colorado River Below Lee Ferry Instead of Water of the Colorado River System Apportioned to the Lower Basin States by Paragraph (a) of Article III of the Colorado River Compact.

A. There Is No Ambiguity in the Statute.

Assuming, but not conceding, that in determining the meaning of the limitation on use of Colorado River System water in California, the construction of the Project Act, particularly Section 4(a),[1] is the only question before us, it appears that the prevailing rule in the early thirties was that the Court would look to legislative history only to resolve an ambiguity.[2]

There is no ambiguity or uncertainty in the language of Section 4(a) of the Act,[3] which justifies resort to legislative history. The reference therein to "waters apportioned by paragraph (a) of Article III of the Colorado River compact" is without a shadow of ambiguity. With equal clarity, the Colorado River Compact is by its terms a *system* compact.[4] The ap-

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[1]Ariz. Ex. 7 (Tr. 222), Sec. 4(a).

[2]See cases cited *infra,* Part III-B, pp. 20 to 23.

[3]See note 1, *supra.*

[4]Ariz. Ex. 1 (Colorado River Compact, Tr. 214), Article II(a), which provides:

> "The term 'Colorado River system' means that portion of the Colorado River and its tributaries within the United States of America."

portionments of paragraph (a) of Article III by definition relate to the waters of the Colorado River System, inclusive of all tributaries in the United States.[5]

The Lower Basin is carefully defined in the Compact as the area tributary to the river below Lee Ferry, including parts of five States.[6] If the Compact had been written as a mainstream compact only, there would have been no occasion to describe the "Lower Basin", or to include any part of New Mexico, or Utah, as parts of such basin.[7]

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[5]*Id.* Article III(a), which provides:

"There is hereby apportioned from the Colorado River system in perpetuity to the upper basin and to the lower basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist."

[6]*Id.* Article II(g), which provides:

"The term 'Lower Basin' means those parts of the States of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River system below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River system which are now or shall hereafter be beneficially served by waters diverted from the system below Lee Ferry."

[7]Arizona certainly understood the Colorado River Compact as including tributaries. In 1930, that State filed a Bill of Complaint in *Arizona v. California,* 283 U.S. 423 (1931) in which she alleged that the Compact apportionments included the Gila, and that hence the document was grossly unfair to Arizona. This allegation is included in Par. XIV of said Bill of Complaint which reads in part:

"Said Colorado River Compact is grossly inequitable, unjust and unfair to the State of Arizona, for the reasons and in the respects following, to-wit:

* * *

"(3) Said compact defines the term 'Colorado River System' so as to include therein the Gila River and its tributaries, of which the total flow, aggregating 3,000,000 acre-feet of water annually, was appropriated and put to beneficial use prior to June 25, 1929. The State of New Mexico has but a slight interest, and the States of California,

The Compact was before the Congress in 1928 for approval as required by the Federal Constitution.[8] Its language is uncomplicated; it was, and is, clearly a system Compact, inclusive of all tributaries in the United States.[9] The members of the Congress must be presumed to have understood the document they were called upon to approve. True, the debates on the Boulder Canyon Project Act in the Senate indicate that some members of that body may have had a misapprehension as to the scope of the Compact, but it certainly cannot be assumed that either the Senate or the Congress, as a whole was not aware of the text. If the Congress did not approve the Compact as written and submitted by the *States*, a serious question would arise as to the present existence of such a compact and the resultant protection to the Upper Basin States, which it was intended to provide.

The amendment, now appearing as Section 4(a) of the Project Act, was framed on the floor of the Senate and went over to the House where the Act was approved without debate on the question involved here.[10] Nothing indicates any misapprehension on the House side; nor can the President, in approving the Act, be charged with lack of knowledge or a misunderstanding.

Nevada, Utah, Colorado, and Wyoming have no interest whatever in said water. Since said compact provides that the water apportioned thereby shall include all water necessary to supply existing rights, the effect of including the Gila River and its tributaries as a part of said system would be to reduce by 3,000,000 acre-feet annually the quantity of water now subject to appropriation in Arizona."

[8]U.S. Const. Article I, Sec. 10, cl. 3.

[9]See note 4, *supra.*

[10]70 Cong. Rec. 603 (Dec. 14, 1928); 70 Cong. Rec. 837 (Dec. 18, 1928); Calif. Ex. 2000 (Comment by Counsel, Tr. 11,175), 2001 (Tr. 11,173) to 2017 (Diagram of Legislative History of Sec. 4(a) Project Act, Tr. 11,175), incl.

The second paragraph of Section 4(a) of the Project Act, wherein a Three-State Compact was authorized, casts no doubt on the meaning of the first paragraph or on the fund of water to which the limitation on California suggested in the first paragraph relates.

In the second paragraph, the Congress authorized, but did not insist upon, a Three-State Compact, which was never accepted by any State in the words of the statute. After it was stated on the floor of the Senate that the proposed compact did not express the "will or the demand or the request" of the Congress, no further effort to edit or clarify the text appears.[11]

The proposed Three-State Compact refers to "the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact." Except for the added reference to the quantity (7,500,000 acre-feet) of the water so apportioned, substantially the same phrase is used as is used in the California limitation.

The text of the proposed Three-State Compact confirms, rather than casts doubt upon, the fact that the subject of the said proposed compact was *system* and not

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[11]70 Cong. Rec. 472 (Dec. 12, 1928); Calif. Ex. 2015 (Tr. 11,173), p. 90. Senator Johnson of California commented as follows, concerning the proposed compact as reported in 70 Cong. Rec. at page 472 (Dec. 12, 1928):

"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.)

mainstream water. Had it been understood that only mainstream water was involved, there would have been no occasion for subdivision (3) of the suggested compact granting exclusive beneficial consumptive use of the Gila to Arizona. The Gila would have been automatically excluded if the subject of the proposed compact was mainstream water only.

The effectiveness of the proposed Three-State Compact depended, by its terms, upon prior ratification of the Colorado River Compact. That document is, beyond question, a *system* compact. If read as excluding the Lower Basin tributaries from waters apportioned by paragraph (a) of Article III of the Colorado River Compact, the proposed Three-State Compact becomes inconsistent with the Colorado River Compact. Particularly, the respective obligations of the Upper and Lower Basins in serving water to Mexico are clearly determinable under the Colorado River Compact with reference to the waters of the *system.*

Paragraph (c) of Article III of the Colorado River Compact provides in part that the waters to serve the Mexican Treaty:[11a]

> ". . . shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the upper basin and the lower basin, and whenever necessary the States of the upper division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d)."

[11a]Ariz. Ex. 1 (Tr. 214), Article III(c).

If rights as between the Lower Basin States under the California limitation are to be determined on the basis of *mainstream,* rather than *system,* water, and the rights inter-basin under the Colorado River Compact are to be determined with reference to the *system* (mainstream plus tributaries), a conflict would arise which would undoubtedly require further adjudication in this Court.

The Colorado River Compact and the Project Act are so interwoven that, in administration of the two instruments, consistency is essential.

The omission of New Mexico and Utah from the proposed Three-State Compact and the allocations of water proposed to be made thereby may have been one of the reasons that the proposed compact was never concluded. In any event, the omission of those States, in a proposal never accepted, offers no justification for rewriting the clear language of the limitation set out in the first paragraph of Section 4(a).

We find no ambiguity in Section 4(a) of the Project Act.

B. In the Early Thirties Legislative History Was Resorted to Only to Resolve Ambiguities.

To test the reasonableness of Metropolitan's actions in the thirties, let us assume that counsel for Metropolitan in 1931 or 1932 had been requested to advise as to whether, in contracting with respect to priorities or in proceeding with the construction of the costly Colorado River Aqueduct, reliance could be placed on the plain meaning of the statutory language by which the limitation on the use of Colorado River water in California was established. The answer would have been "yes".

In fact, no such opinion was requested. The idea that the Project Act and California Limitation Act did not carry their literal meaning was not suggested or considered in any way. But assuming such opinions had been requested of competent counsel, two principles would have been encountered, which, at that time, appeared to be firmly established by the decisions of this Court: (1) that in the absence of ambiguity the Court would not resort to legislative history to construe the statutory language; (2) that legislative debate was not admissible to modify statutory language. Both principles were based upon sound reason.

The first principle is well stated in *United States v. Shreveport Grain & Elevator Co.*[12] In discussing extrinsic aids to construction (in this instance, committee reports), the Court, speaking through Mr. Justice Sutherland, said:[13]

> ". . . In proper cases, such reports are given consideration in determining the meaning of a statute, *but only where that meaning is doubtful.* They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms. . . . Like other extrinsic aids to construction their use is 'to solve, but not to create, an ambiguity.' *Hamilton v. Rathbone,* 175 U.S. 414, 421, 44 L. ed. 219, 222, 20 S.Ct. 155. Or, as stated in *United States v. Hartwell,* 6 Wall. 385, 396, 18 L. ed. 830, 832, 'If the language be clear it is conclusive. *There can be no construction where there is nothing to construe*'." (emphasis added)

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[12]287 U.S. 77 (1932).

[13]*Id.* at p. 83.

In an earlier case, cited in *Shreveport (Hamilton v. Rathbone)*, the Court stated:[14]

> ". . . The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it. . . ."

The Court further stated:[15]

> "Indeed, the cases are so numerous in this court to the effect that the *province of construction lies wholly within the domain of ambiguity,* that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to *solve,* but not to *create,* an ambiguity." (emphasis added)

Two instances in which the Court had departed from the "plain meaning" rule, i.e., *Church of the Holy Trinity v. United States,*[16] and *Boston Sand & Gravel*

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[14]175 U.S. 414, 419 (1899).

[15]*Id.* at p. 421.

See also: *Pennsylvania R. Co. v. International Coal Min. Co.,* 230 U.S. 184, 198 (1912); *United States v. Lexington Mill & E. Co.,* 232 U.S. 399, 409 (1914); *Caminetti v. United States,* 242 U.S. 470, 496 (1917); *Railroad Commission v. Chicago B. & O. R. Co.,* 257 U.S. 561, 588 (1921).

[16]143 U.S. 457 (1892).

Co. v. United States,[17] offered nothing to support a similar departure here. In both instances, the question was whether certain general language covered the debated points. In neither case (nor in any case disclosed by our research) had the Court, on the basis of legislative history, stricken specific words having a clear meaning from a statute and substituted other specific words conveying a radically different meaning.

C. In the Early Thirties Legislative Debate Was Not Considered Admissible to Modify the Meaning of Statutory Language.

Even assuming ambiguity to exist, at that time (1931-1935), legislative debate was not considered admissible to modify the meaning of statutory words. The principle and the reasons therefor are stated in *United States v. Trans-Missouri Freight Association*:[18]

> "Looking simply at the history of the bill from the time it was introduced in the Senate until it was finally passed, it would be impossible to say what were the views of a majority of the members of each House in relation to the meaning of the act. It cannot be said that a majority of both Houses did not agree with Senator Hoar in his views as to the construction to be given to the act as it passed the Senate. All that can be determined from the debates and reports is that various members had various views, and we are left to determine the meaning of this act as we determine the meaning of other acts from the language used therein.

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[17]278 U.S. 41 (1926).

[18]166 U.S. 290 at pp. 318-319 (1897).

"There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body . . . .

"The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that *the only proper way to construe a legislative act is from the language used in the act,* and, upon occasion, by a resort to the history of the times when it was passed. . . . If such resort be had, we are still unable to see that the railroads were not intended to be included in this legislation." (emphasis added)

In the thirties, the principles stated in the *Trans-Missouri* case[19] had not been criticized or modified.

In brief, as of the early thirties, there was nothing to suggest to prudent and skilled attorneys that, in the absence of ambiguity and on the basis of legislative debate, this Court would, thirty years later, rewrite the statute with the effect of changing the limitation on the use of Colorado River water in California greatly to the damage of California and particularly to the damage of the Metropolitan Water District.

The hazards of using legislative debate as the basis for modifying statutory language is illustrated here by

[19] *Ibid.*

the fact that, the very able Special Master determined from such debate that in Section 4(a) of the Project Act the Congress meant the water of Lake Mead and the Colorado River below Lake Mead in the United States; the mainstream from Lee Ferry to Lake Mead being defined as a tributary.[20] The Court, by use of the same record, concludes that the Congress meant the mainstream below Lee Ferry (quite a different body of water).[21] The Court concedes that the debates ". . . . extending over a long period of years, undoubtedly contain statements which support inferences in conflict with those we have drawn . . .".[22]

Under such circumstances, what the Congress meant should be determined by what the Congress said in the text of the law.

In the light of the decisions of this Court available in the thirties, Metropolitan cannot be fairly criticized or penalized for proceeding in reliance upon the statute as written.

D. Administrative Practice Under the Project Act Gave Rise to No Question but That the Limitation on Use of Colorado River System Water in California Would Be Controlled by the Plain Meaning of the Statutes by Which It Was Created.

In the very active history of thirty odd years of Metropolitan's operation under the Project Act, no suggestion appears that the limitation on use of water in California should be computed on a *mainstream,* rather than a *system* basis. The question never having been raised, we cannot point to any specific administrative

[20]Rep. 183-85, Proposed Decree Art. I(B) (Rep. 345).
[21]*Arizona v. California,* 373 U.S. 546, 591 (1963).
[22]*Id.* at p. 574.

construction of the Project Act or the California Limitation Act in that particular. The fact remains, however, that during over thirty years of dealing with the Federal Government through the Congress, the Secretary of the Interior, the Bureau of Reclamation, and the Reconstruction Finance Corporation, no suggestion appears that the Project Act and the Limitation Act were not to be read literally.

With full awareness of the quantity of water to be transported, the Congress granted Metropolitan a right of way across the desert from the river to the coastal area for the purpose of constructing the Colorado River Aqueduct.[23] Under the Project Act, a contract for storage and delivery of water from Lake Mead,[24] and a contract for project energy to pump such water[25] were made by Metropolitan with the United States through the Secretary. The original power contracts were extensively revised under the Boulder Canyon Project Adjustment Act.[26]

The United States and Metropolitan entered into a "Cooperative Contract for the construction of Parker Dam".[27] The Dam was to be constructed by the United States, but paid for by Metropolitan.[28] Work on the

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[23]47 Stat. 324; Calif. Ex. 450 (Tr. 9,395), Calif. Finding MWD: 115, Vol. III, p. MWD-29.

[24]Ariz. Exs. 38 (Tr. 251) and 39 (Tr. 252); Calif. Finding MWD: 108, Vol. III, p. MWD-15.

[25]Calif. Exs. 415, 416 (Tr. 9,395) Calif. Finding MWD: 109, Vol. III, p. MWD-17.

[26]Act of July 19, 1940, 54 Stat. 774, text Sp. M. Ex. 2 for iden. (Hoover Dam Power and Water Contracts), Item 7, p. 33; Calif. Exs. 417, 418 (Tr. 9,395); Calif. Finding MWD; 109, Vol. III, p. MWD-17.

[27]Calif. Ex. 459 (Tr. 9,395); Calif. Finding MWD: 114, Vol. III, p. MWD-26.

[28]*Ibid.*

project was initiated, but because of the armed resistance of Arizona, work was terminated.[29] The United States sought to enjoin Arizona from interfering.[30] This Court took the view that the Secretary lacked statutory authority to proceed with the construction and denied the relief sought.[31] Thereafter, the Congress, in 1935, specifically authorized the Parker Dam and ratified "all contracts made in connection therewith".[32] Work upon the project then proceeded.

During the depression of the thirties, the Reconstruction Finance Corporation, after extensive consideration of the nature of Metropolitan and the validity and extent of its right to the use of Colorado River water, undertook to and did buy bonds issued by Metropolitan. When the public bond market had recovered, bonds so purchased were resold to private investors.[33]

In the early thirties (1930-1935), four cases involving the Colorado River, the Boulder Canyon Project Act, and the Colorado River Compact, were before this Court.[34]

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[29]Tr. 9,605 (Elder).

[30]Calif. Exs. 464 for iden., 465 for iden., pp. 1-18, *United States v. Arizona* 295 U.S. 174 (1935) (Tr. 9,395); Calif. Finding MWD: 114, Vol. III, p. MWD-27.

[31]Calif. Ex. 470 for iden. (Opinion of the Supreme Court in *United States v. Arizona* 295 U.S. 174 (1935) (Tr. 9,395); Calif. Finding MWD: 114, Vol. III, p. MWD-27.

[32]Calif. Ex. 472 (Tr. 9,395), 49 Stat. 1039 (1935), text Sp. M. Ex. 4 for iden. (Hoover Dam Docs.) App. 1202, p. A701; Calif. Finding MWD: 114, Vol. III, p. MWD-28.

[33]Calif. Exs. 455 at p. 2, and 457 at p. 2 (Tr. 9,395); Tr. 9,658 (McKinlay); Calif. Finding MWD: 111, Vol. III, p. MWD-22.

[34]*Arizona v. California,* 283 U.S. 423 (1931). *Arizona v. California,* 292 U.S. 341 (1934). *United States v. Arizona,* 295 U.S. 174 (1935). *Arizona v. California,* 298 U.S. 558 (1936).

The point involved here (*i.e.,* whether the limitation on use of Colorado River water in California related to *mainstream* or to *system* water) was not specifically raised or put in issue in any of the cited cases. However, the pleadings and opinions therein are consistent with the position we take here, that is, that the Colorado River Compact apportionment to which the California limitation refers relates to the Colorado River System and not exclusively to the mainstream.

In *Arizona v. California,* 283 U.S. 423 (1931), the compact was referred to as "an agreement for the apportionment of the water of the river *and its tributaries.*"[34a] (emphasis added).

In 1934, in ruling on a motion for leave to file a bill to perpetuate testimony (*Arizona v. California,* 292 U.S. 341), this Court stated that:[34b] "Colorado River Compact, apportions the water *of the Colorado River System* between the upper and lower basin". (emphasis added) The Court went on to quote the definitions of the "Colorado River Basin", the "Colorado River System" and the "Lower Basin"; the definitions that we rely upon here.

In *United States v. Arizona,* 295 U.S. 174 (1935), the Court had occasion to describe the Colorado River Compact and said:[34c]

> "The Compact was made by California, Colorado, Nevada, New Mexico, Utah and Wyoming. Arizona was not a party. It was made to provide an equitable apportionment of the waters of the *Colorado River system* among the interested States. . . ". (emphasis added).

In the suit for judicial apportionment, *Arizona v. California,* 298 U. S. 558 (1935), Arizona, in her

[34a] *Arizona v. California,* 283 U.S. 423, 449 (1931).
[34b] *Arizona v. California,* 292 U.S. 341, 352 (1934).
[34c] *United States v. Arizona,* 295 U.S. 174, 180-181 (1935).

Bill of Complaint, had occasion to describe the Colorado River Compact and said among other things:[34d]

> ". . . Said compact provides that, as used therein, the term 'Colorado River System' means that portion of the *Colorado River and its tributaries* within the United States; . . .". (emphasis added)

At no time and in no connection (prior to 1960)[35] was it ever stated or suggested that the limitation on California in the use of Colorado River water was to be computed with reference to the *mainstream* and not to the *system.*

Affirmatively, during the period, 1932-1936, documents captioned "Boulder Canyon Project—Questions and Answers, Bureau of Reclamation—"[36] were published and widely distributed by the United States both at the Project and at Washington, D.C. In such documents, the following question and answer appear:

> "Q. How much of the water allocated to the lower basin States does California get?
>
> "A. California has agreed that the aggregate annual consumptive use of the river water shall not exceed 4,400,000 acre-feet of the 7,500,000 allocated to the lower basin by Article III(a) of the compact. In addition California can use one-half of the surplus waters available above the 7,500,000 acre-feet allocated."

Until 1936, the answers are stated to have been supplied by Dr. Elwood Mead, Commissioner of Reclama-

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[34d]Par. XV at p. 19 of Arizona's Bill of Complaint filed in its suit for judicial apportionment, *Arizona v. California,* 298 U.S. 558 (1935).

[35]Sp. M's Draft Report, p. 159.

[36]Calif. Exs. 2034 (1932), 2035 (1933), 2036 (1934) and 2037 (1936).

tion. In 1936, the answer was attributed to John C. Page, Acting Commissioner of Reclamation.[37]

Two things are apparent from the answers so supplied; (1) that, as understood by the Bureau chiefs, the limitation on California was a matter of agreement, not legislative fiat; and (2) that the limitation on California should be computed with reference to the "7,500,000 acre-feet allocated to the lower basin by Article III(a) of the Compact."[37a] If Dr. Mead or Mr. Page had thought that the limitation on California was to be computed on the basis of mainstream water instead of apportioned water, those able and conscientious public servants would have so stated.

The pleadings in the case at bar contained no suggestion that the limitation on California related only to the mainstream. No evidence or argument to that effect was produced by any party.

In fact, at a hearing on Exceptions to his Draft Report (August 17, 1960), the Special Master made this illuminating statement:[38]

> "The Master: What you are saying is that *there has not been a construction of the language* (of the California Limitation Act) *which corresponds to the language which has been suggested in the proposed report, in the Draft Report, and that I will agree with. If we were issuing patents on it, I think we would have to claim novelty.*" (language in parentheses and emphasis added)

The economic welfare of one-half of the people of the State of California should not be imperiled by a

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[37]Calif. Ex. 2037 (Tr. 12,366).

[37a]See note 36, *supra.*

[38]Tr. 22,762 (Special Master).

novel reading of a statute long on the books and long relied upon without question by both the United States, and the State of California, and its water using agencies. This phase of the decision of June 3, 1963, demands reconsideration.

Conclusion.

For the reasons herein set forth, Petitioner respectfully urges that the Petition for Rehearing on the issue of the meaning and effect of the first paragraph of Section 4(a) of the Boulder Canyon Project Act, and the California Limitation Act, be granted, and that said Acts be construed in accordance with the ordinary and plain meaning of the words used in said statutes, and that any decree herein embody such construction.

Respectfully submitted,

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Certificate.

I, James H. Howard, counsel for the defendant, The Metropolitan Water District of Southern California, certify that the annexed Petition for Rehearing is presented in good faith and not for delay.

/s/ JAMES H. HOWARD
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Special Counsel.