No. 8 Original

In the Supreme Court of the United States

OCTOBER TERM, 1963

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

MEMORANDUM OF THE UNITED STATES RESPECTING CERTAIN PROPOSALS FOR INCLUSION IN DECREE

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The Solicitor General, on behalf of all the parties, has submitted as a separate document for the Court's consideration the portions of a proposed final decree upon which all of the parties have agreed. All the parties, except Imperial Irrigation District, also have agreed to reduce the issues concerning the decree to four points of disagreement noted on pages 5, 6, 7 and 8 of the proposed form of decree.

This memorandum is submitted to express briefly the recommendations and views of the United States upon those four points of disagreement. We assume that if the Court desires full briefs upon any of them, the parties will be notified.

I

PRESENT PERFECTED RIGHTS

At pages 306 to 311 of his report the Special Master discussed the meaning of the term "present perfected rights" as used in the Boulder Canyon Project Act. Consistently with his interpretation of these words, he included in Article I of his recommended decree the following definitions:

> (G) "Perfected right" means a water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works, and in addition shall include water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use;
>
> (H) "Present perfected rights" means perfected rights, as here defined, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act;
>
> * * * * *

In its opinion filed June 3, 1963, the Court did not in so many words say that it accepted the Special Master's interpretation in this regard. However, it made several references thereto which make clear that the Court entertained no doubt respecting that interpretation and that it was, in fact, accepted and affirmed. For example, at 373 U.S. 546, 600, the Court said:

> This means, as the Master held, that these water rights, having vested before the Act became

> effective on June 25, 1929, are "present perfected rights" and as such are entitled to priority under the Act.

At page 584, the following appears:

> One of the most significant limitations in the Act is that the Secretary is required to satisfy present perfected rights, *a matter of intense importance to those who had reduced their water rights to actual beneficial use at the time the* Act became effective. § 6. * * * [Emphasis supplied.]

Notwithstanding the Court's evidently clear acceptance of the Special Master's determination of the sense in which Congress used the phrase "present perfected rights," it is understood that the California defendants will propose for inclusion in the decree a very substantially different definition. It is the position of the United States that the proposal should be rejected and that there should be included in the decree as subdivisions (G) and (H) of Article I the definitions included in the Special Master's recommended decree as hereinabove quoted.

If the Court agrees, the definitions of perfected right and present perfected rights on page 346 of the Special Master's report should be inserted on page 5 of the proposed form of decree.

II

POSSIBLE FUTURE CONTRACT FOR 4 PERCENT OF SURPLUS TO NEVADA

Although the water delivery contract between the United States and the State of Nevada dated March 30, 1942 (Pl. Ex. 43, Report, p. 409), as amended by

supplemental contract dated January 3, 1944 (Pl. Ex. 44, Report, p. 419), makes provision only for the consumptive use of 300,000 acre feet from the mainstream annually, Article 7(f) of the Arizona contract dated February 9, 1944 (Pl. Ex. 32, Report, pp. 399, 402), provides as follows:

> (f) Arizona recognizes the right of the United States and the State of Nevada to contract for the delivery from storage in Lake Mead for annual beneficial consumptive use within Nevada for agricultural and domestic uses of 300,000 acre-feet of the water apportioned to the Lower Basin by the Colorado River Compact, and in addition thereto to make contract for like use of 1/25 (one twenty-fifth) of any excess or surplus waters available in the Lower Basin and unapportioned by the Colorado River Compact, which waters are subject to further equitable apportionment after October 1, 1963 as provided in Article III(f) and Article III(g) of the Colorado River Compact.

Consistently with this provision of the Arizona contract, paragraph (2) of subdivision (B) of Article II of the Special Master's recommended decree (Report, p. 347) reads as follows:

> (2) If sufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumptive use in the aforesaid states in excess of 7,500,000 acre-feet, such excess consumptive use is surplus, and 50% thereof shall be apportioned for use in Arizona and 50% for use in California; provided, however, that if the

> United States so contracts with Nevada, then 46% of such surplus shall be apportioned for use in Arizona and 4% for use in Nevada;

All of the parties except Arizona are of the view that the last-quoted paragraph in the Special Master's recommended decree should be included in the decree to be entered by the Court. Arizona objects to the proviso recognizing that Nevada may use four percent of any surplus waters if the United States so contracts with that State.

It is the United States' position that the Special Master's recommendation should be accepted. The Court's opinion neither requires nor permits such modification to the Master's report. As noted above, the basis for the proviso is Article 7(f) of the 1944 Arizona contract. The basis for Arizona's objection is that State's continued contention that the formula for interstate allocation in the proposed tri-state contract (second paragraph of Section 4(a) of the Project Act; Report, p. 382) is mandatory, and that the Secretary is wholly without any authority to deviate therefrom. In its opinion, the Court rejected this contention and held, to the contrary, that the tri-state compact was appropriately and properly a guide for exercise of the Secretary's discretion in the making of contracts for the delivery of mainstream water. Notwithstanding Arizona's argument before the Court that the Secretary has no discretion (Opening Brief for Arizona, p. 100) permitting him to contract with Nevada for any surplus waters, the Court made no comment which tends to support Arizona's contention now that the surplus-waters provision of Article 7(f) of its con-

tract is not valid. Accordingly, it seems clear that the Master's recommendation in this respect has been affirmed.

Moreover, it is to be remembered that the Arizona contract was approved not only by the State's Colorado River Commission but by its Governor as well. And it was "unconditionally ratified, approved, and confirmed" by the State's legislature (Pl. Ex. 11). Even if the Court had sustained Arizona's contention that the second paragraph of Section 4(a) of the Project Act constitutes an inflexible allocation formula imposed by Congress on the states in the absence of agreement as to a different formula, it seems quite clear that Arizona's legislatively confirmed recognition of the right of the United States to contract with Nevada for the use of four percent of the surplus waters constitutes the kind of agreement which would make the tri-state compact formula inapplicable. See Section 8(b) of the Project Act.

If the Court agrees, the following proviso from page 347 of the Special Master's report should be inserted in place of the asterisks and bracketed sentence on page 6 of the proposed form of decree:

> provided, however, that if the United States so contracts with Nevada, then 46% of such surplus shall be apportioned for use in Arizona and 4% for use in Nevada.

III

CHARGEABILITY OF CONSUMPTIVE USE OF MAINSTREAM WATER TO STATE APPORTIONMENTS

Paragraph (4) of subdivision (B) of Article II of the Special Master's recommended decree (Report, p. 348) reads as follows:

> (4) Any mainstream water consumptively used within a state shall be charged to its apportionment, regardless of the purpose for which it was released;

All parties are agreed that this provision should be included in the decree.

The California defendants apparently will propose an exception for the consumptive use of water released specifically for flood control, river regulation, or generation of power in excess of the quantities specifically released for consumptive use. It has been indicated that California's proposal may be qualified by making applicability of the exception subject to a determination by the Secretary of the Interior that consumptive use of the water released for the specified purposes will not impair the purpose of the release.

The United States objects to any addition to the Master's recommendation upon four grounds. *First,* the Boulder Canyon Project Act (as implemented by the various water delivery contracts and as interpreted by this Court) leaves no room for an exception to the rule that *all consumptive uses* are to be charged to the apportionment. The universe with which Congress plainly intended to deal in enactment of the Boulder Canyon Project Act is all the water in the mainstream of the Colorado River below Lee Ferry available for consumptive use. Allocation of the consumptive use of this water between the several States is in no manner dependent upon the purpose or purposes of its release from storage. Without regard to the purpose or purposes for which water may be released, the provisions of Sections 4(a) and 5 of

the Project Act, California's own Limitation Act (Pl. Ex. 14, Report, p. 397), and all of the water delivery contracts specifically and expressly provide for accounting for all consumptive uses. Article 7(1) of the Arizona contract (Pl. Ex. 32, Report, p. 403) contains this language:

> All consumptive uses of water by users in Arizona, of water diverted from Lake Mead or from the main stream of the Colorado River below Boulder Dam, whether made under this contract or not, shall be deemed, when made, a discharge pro tanto of the obligation of this contract. * * *

The Nevada contract, as amended in 1944 (Pl. Ex. 44, Report, pp. 419, 420), provides for the delivery of "so much water, including all other waters diverted for use within the State of Nevada from the Colorado River system, as may be necessary to supply the State a total quantity not to exceed" 300,000 acre feet per year. The California contracts all contain language like that in Article (6) of the Palo Verde contract, providing for delivery to the district each year of "so much water as may be necessary to supply the District a total quantity, including all other waters diverted for use of the District from the Colorado River" in accordance with the California seven-party agreement. (See Special Master's Report, p. 424.)

Second, the modification proposed by California is not necessary to prevent waste. The decree contemplates an apportionment of all the water which can be put to consumptive use. If one State cannot use the water apportioned to it, then under Paragraph 6 of Subdivision B of Article II of the decree recommended

by the Master and approved by all parties, it may be used in another State. Nothing more is required.

Third, the proposal is illusory. Releases for river regulation oftentimes, as when water is released to flush the channel, require utilization of the releases throughout the river's entire reach above the international boundary. Releases for flood control often serve the purposes of river regulation and if the water were taken out of the channel before those purposes were fully achieved, other waters would have to be released for the same purposes. The same is true with respect to releases for power.

Fourth, the California proposal would simply invite jockeying for position by different users in scheduling their requests for delivery. Each would be under an incentive to insist upon a schedule of deliveries for consumptive use that took no water, or as little water as possible, at a time when the Secretary might have to release water for purposes of flood control. For if the strategy worked, there might be the opportunity to take additional water for consumptive use, at a time when water was released for flood control, without having it charged to the State's apportionment. The proposed provision would thus interject into the scheduling of future releases an unnecessary element calculated, not to achieve the greatest possible number of necessary and authorized uses within the apportionment, but to increase the chance that the users in one State might be able to get water in excess of their apportionment because of the necessities of flood control. It scarcely mitigates the evil to make uncharged use of water dependent upon a determination by the

Secretary. The vice is the invitation to seek a schedule of deliveries that would circumvent the limitations of the overall apportionment. This would make the Secretary's task of working out the most efficient schedule infinitely more difficult even though he retained a power to withhold his approval.

If the Court agrees, the following words from page 348 of the Special Master's recommendation should be inserted on page 7 of the proposed form of decree in place of the asterisks and italicized sentence:

> regardless of the purpose for which it was released;

IV

PROPOSED MANDATE REQUIRING SECRETARY OF THE INTERIOR TO GIVE EFFECT TO CONTRACT PROVISIONS RESPECTING ALLOCATION OF SHORTAGES

It is understood that the California defendants may propose an additional paragraph at the end of subdivision (B) of Article II of the form of decree agreed to by all parties as follows:

> (7) The Secretary of the Interior shall give effect to valid provisions for the allocation of shortages appearing in water delivery contracts heretofore entered into by the United States under the authority of the Boulder Canyon Project Act.

The United States objects to this proposal, and believes that no provision should be added to the agreed form of decree at this point, for the following reasons: *First,* the central issue throughout this case has been the *interstate* apportionment of the

waters of the Colorado River. California's proposed Paragraph (7) is almost exclusively concerned with priorities among California users under the so-called "Seven Party Agreement." The aim of the proposal is to write into the decree language that would enable any of the California users which is party to that contract to litigate in the Supreme Court of the United States, in contempt proceedings in this case, any claim that the Secretary is not conforming to a valid provision in that agreement. Thus, the proposal attempts to set the stage for litigation of wholly extraneous issues that have not been before the Court. No evidence has been offered or admitted, and no arguments have been held, upon the meaning or effect of the California contracts under any of the many contingencies that might someday arise.

Second, the Court has determined that in times of shortage the available water shall be allocated between the States by the Secretary of the Interior exercising the broad power which Congress has delegated. The Court expressly refused to lay down a rule governing the Secretary's action in advance. Presumably, he will give appropriate effect to any valid contracts just as he will to other relevant considerations.

Third, equity will not put the Secretary under an injunction commanding him, under threat of contempt, to conform to contracts that he has never violated or threatened to violate. There is no allegation that the Secretary has infringed upon the rights of any party in this respect.

Fourth, we point out that Paragraph (5) of Subdivision B of Article II contains the only restriction

authorized by the Project Act. That paragraph provides that the Secretary shall release and deliver mainstream water "only pursuant to valid contracts therefor." This provision commands performance with a requirement of the Project Act. California's proposal goes beyond both the Project Act and the opinion of the Court, not for the purpose of adjudicating any issue in this case but in order to lay the groundwork for future litigation between California users under circumstances the full nature of which cannot presently be foreseen.

If the Court agrees, the number "(7)", the asterisks, and the italicized material should be omitted on page 8 of the proposed form of decree.

V

THE CITY OF NEEDLES, CALIFORNIA

As we understand, Needles, a California municipality, takes its municipal water by pumping from the mainstream of the Colorado River. A problem has been raised concerning a continued supply of water to Needles, because California's Seven Party Agreement and the several water delivery contracts between the United States and the California defendants make no provision for furnishing water to Needles out of California's interstate apportionment. Both the decree recommended by the Special Master and the agreed form of decree make no provision for supplying water to Needles. However, the United States recognizes the problem but, like the California defendants, is satisfied that it can be better handled administratively and by reasonable accommodation between the various water users in California whenever the occasion may arise.

CONCLUSION

For the foregoing reasons, it is submitted that the decree to be entered by the Court should include subdivisions (G) and (H) of Article I and paragraph (2) of subdivision (B) of Article II, as contained in the recommended decree submitted by the Special Master. It is also submitted that the California proposals discussed in Parts III, IV, and V above should be rejected.

Respectfully submitted.

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